Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NOS. 69 & 70 OF 1984

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

BETWEEN: IVAN ADOLPHUS BURNETT)
) - DEFENDANTS/APPELLANTS
A N D : LIONEL BROWN)

A N D : BANK OF NOVA SCOTIA) - PLAINTIFF/RESPONDENT
JAMAICA LIMITED)

Mr. Raphael Codlin for appellant Burnett

Mr. W. B. Frankson, Q.C., for appellant Brown

Mr. Earle Delisser and Miss Dawn Satterswaite for the respondent

January 22, 23, & 24; February 3, 4, 5, 6, & 7 and July 24, 1986

KERR, J.A.:

These appeals are from the judgment of Theobalds J. whereby judgment was entered for the plaintiff against both defendants for:

"(1) The sum of ONE HUNDRED AND THIRTEEN THOUSAND THREE HUNDRED AND TWENTY TWO DOLLARS TWENTY TWO CENTS ($113,322.22).

(2) Interest of $90,374.12 being interest to 9th January 1984.

(3) Interest at 6% from 9th January 1984 to 18th October 1984 being $5,271.81."

At all material times, the appellant Burnett was the Managing Director and the appellant Brown one of the Directors of the National Lumber and Wood Products Limited (hereinafter referred to as "The Company") and the Company, a customer of the respondent Bank ("The Bank"), in July 1978 opened a current account with the Bank at its 45 King Street Branch.

In that same month at the request of the Company, the Bank issued to the Jamaica Export Credit Insurance Corporation (J.E.C.I.C.) a guarantee to the extent of $150,000.00 for debt to be incurred by the Company and in response to a similar request in September 1978 a further $137,100.00 was similarly guaranteed.

In May 1979 the Bank was called upon by the J.E.C.I.C. to honour its undertaking. The Bank complied. The current account of the Company was debited with the amount, namely, $287,100.00. Now at the time the guarantee was issued there was sufficient funds to the credit of the Company to cover the guarantee but at the time the undertaking was honoured those funds had been withdrawn. The current account of the Company now showed an overdraft of $298,000.00.

William Andrew Lawrence, who became Manager of the Bank on April 30, 1979, was apparently concerned over the resultant unsecured debt of the Company and which debt was attracting interest at the rate of 16%. As a result of his endeavours there were communications and conferences in May to July 1979 with Burnett, resulting in:

(i) an assignment of payments under a contract with the Jamaica Railway Company;

(ii) a guarantee executed on or about 26th May 1979 by appellant Burnett;

(iii) a similar guarantee entered into by Lionel Brown about two months later;

(iv) a demand loan for $298,000.00 to the Company in accordance with the terms of a promissory note dated 24th July, 1979 executed by the appellants as Directors of the Company.

(v) the crediting of the Company's current account with the proceeds from the loan.

(vi) a schedule of payments to commence November 1979.

In his evidence Lawrence said that on the 24th July, 1979, he had explained to both appellants that as they had given personal guarantees the Bank would grant a loan to the Company to liquidate the overdraft and that this loan would bear interest at 14%, which was 2% below the overdraft rate and this was the demand loan evidenced by a promissory note executed by the appellants as Directors and bearing date 24th July, 1979. Since then the debt had been reduced to $113,322.22 with interest to 9th January, 1984 amounting to $90,374.12. The agreed payments not being in accordance with the schedule, on instructions, the Bank's attorneys, Messrs. Orville Cox & Company by a letter dated 6th May, 1980 to the Company's Managing Director and by a similar letter of even date jointly addressed to the appellants personally, demanded payment and warned of the institution of proceedings if they did not hear from the addressees within thirty days as to how they proposed to settle the Company's indebtedness to the Bank.

A letter dated 12th June, 1980 from Attorney-at-Law, Eric Desnoes and Co. to Messrs. Orville Cox & Co., and which seemed on the face of it to have been written on behalf of the Company, as well as the appellants, after indicating that the original debt had been reduced by payments, went on to suggest that a moratorium be allowed on the balance due from the Railway Corporation and a meeting to entertain proposals on behalf of "our clients".

Lawrence admitted in cross-examination the following further payments:

(1)	16th June, 1980	-	$ 39,341.98
(2)	14th September, 1981	-	104,000.00
(3)	1st February, 1982	-	7,000.00

The writ against the Company and the appellants was issued on 28th August, 1980. Judgment was entered against the

Company which was the first defendant. The appellants Burnett and Brown contested the claim. In the amended Statement of Claim the plaintiff after the averments relative to the indebtedness of the Company alleged inter alia, at p. 10:

> "(1) .....
>
> (7) That on or about the 28th day of May, 1979 the second Defendant a director of the First Defendant signed a guarantee for the First Defendant on terms which speak for themselves.
>
> (8) That on or about the 24th day of July, 1979 all three Defendants met with the Plaintiffs and the third Defendant signed a guarantee for the First Defendant on terms which speak for themselves.
>
> (9) It was also agreed that in consideration of the First Defendant signing a promissory note for the debt which now totalled $298,000.00 interest would be lowered to accrue at 14% per annum.
>
> (10) The plaintiffs kept the First Defendant's account open until the 28th September, 1981.
>
> (11) The First Defendant has defaulted in repayments and despite requests has not payed off the debt incurred.
>
> (12) The Second and Third Defendants have also refused to make repayments despite requests."

In their pleaded defence in addition to denials there were the following positive averments, at pp. 12-14:

> "(1) .....
>
> (8) ..... The second Defendant will further say that he was requested by Mr. William Lawrence who had succeeded Mr. Allen, to come into the Bank to sign documents on behalf of the first Defendant, the second Defendant being an agent of the first Defendant.
>
> (9) The second Defendant relying upon that representation went into the first Defendant's bank and signed a document without reading it.
>
> (10) The second Defendant will say that that signing was done pursuant to the representation made to the second Defendant

", by the said Mr. William Lawrence. The second Defendant will further say that the said representation was false, in that the plaintiff, through its agent Mr. Lawrence, was seeking to obtain security from the second Defendant because there was no security given by the first Defendant in relation to the loan and by the time the second Defendant was called in to sign the documents the Plaintiff had learnt that Petro Funds Ltd. had a debenture over the fixed and floating assets of the First Defendant and the Plaintiff's loan was therefore unsecured.

(11) The second Defendant will say that if either Mr. Lawrence or any other officer of the Bank had explained to the second Defendant that he was signing a personal guarantee, the second Defendant would not have done so, because it is the second Defendant's policy not to sign personal guarantees because of the nature of the second Defendant's employment.

(12) The second and third Defendants do not admit paragraph 8 of the Amended Statement of Claim, and the third Defendant will say that the third Defendant was called into the bank by Mr. Lawrence on the 24th July, 1979 and Mr. Lawrence then represented to the third Defendant that he was being requested to sign a guarantee in relation to the First Defendant's business and because the third Defendant was a director of the first Defendant the third Defendant willingly went and signed the documents not realizing that it was misrepresented to the third Defendant that the documents related to the first Defendant's business and the third Defendant was not told that the documents purported to be or was a personal guarantee.

.....

(15) The second and third Defendants will say that by virtue of provisions in section 4 of the Statute of Frauds, the said instrument is unenforceable in that it seeks to make the liability of the guarantors concomitant with that of the principal debtor, in that before there is any default on the part of the principal debtor or indeed before the principal debtor becomes liable to pay, the Plaintiff could have made a demand upon the second and third Defendants and, by virtue of the said paragraph 4 of the Statute of Frauds, would become liable to pay."

The issues raised in the pleadings may be categorised thus:

(1) Non est factum based on alleged misrepresentations of Lawrence.

(2) No valid consideration flowing from the Bank.

(3) The claim against the appellants as guarantors was premature being coincidental with that of the principal debtor.

Lawrence was extensively cross-examined. He said that the Bank sometimes wrote off bad debts and expressed the opinion that anything done between Bank and customer is a dealing up to the time of writing off. He denied that Burnett signed the guarantee without being told he was signing a personal guarantee. He agreed that in a situation as existed in May 1979 the first act would be to try and get alternative security and that was what he did. No demand for payment was made on the Company prior to July, 1979. Brown was not present at the discussions with Burnett on 24th May, 1979. When Brown turned up on 24th July he explained to him that he also requested his personal guarantee. He wanted personal guarantees from both Burnett and Brown.

In support of his pleaded defence the appellant Burnett gave evidence to the effect that at the end of September, 1978, there was a current account operated by the Company at the Bank with over $400,000.00 to its credit and at the end of November over $300,000.00. A Mr. Allen was then the Manager with whom the Company dealt and at the time the request for the Bank's undertaking to J.E.C.I.C. there were sufficient funds in the account to cover the guarantee. He understood that guarantee was for a given period which he could not then remember. In 1978 no security or personal guarantee was sought by the Bank. In 1979 he had discussions with Lawrence. On 24th May, 1979 he was present with a document to sign in respect of a loan. There was no discussion about signing it. Lawrence told him he was being asked to sign

documents in connection with a loan on behalf of the Company. No one requested him to give any personal guarantee on behalf of the Company. That the type-written word "unlimited" was not in the document when he signed it. That he was not told that the demand loan was a new loan given in consideration of his guarantee. Lawrence did say he would allow National Lumber extra time if its Directors would present a proposal for settlement of the debt. He did not read the guarantee when it was handed him for execution because he had confidence in his Banker. He was misled because the document turned out to be a personal guarantee.

In cross-examination he admitted receiving the letter of demand dated 6th May, 1980 from the Bank's Solicitor and taking it to Eric Desnoes. He, however, denied authorising Eric Desnoes to make the admissions contained in the letter in reply dated 12th June, 1980.

The heading and opening paragraphs of that letter read:

> "Re: National Lumber & Wood Products Limited/
> Ivan Burnett et al - The Bank of Nova Scotia
> Jamaica Limited
>
> We act on behalf of the debtors mentioned above, and understand that you represent The Bank of Nova Scotia Jamaica Limited.
>
> Your letter to our clients of the 6th May last has been handed to us for attention, and we write to you to indicate that our clients have never denied their indebtedness to yours."

Notwithstanding, Eric Desnoes gave evidence to the effect that despite the wording of the letter he had no instructions from Burnett to admit he was personally liable under the guarantee.

The attorney for the appellant Brown rested his case on submissions based upon the evidence of the plaintiff and Burnett and the interpretation of the document.

In his judgment, Theobalds J. considered the issues raised on the pleadings, the terms and conditions in the guarantees exhibited and the oral testimony of the witnesses and said at p. 114:

> "..... It therefore becomes necessary to exhibit 1 & 2 to see what they mean. Apart from allegations of representation by Lawrence there is nothing in the pleadings as to the intention of the parties when guarantees were signed. It therefore becomes a matter of interpretation for the Court. Both Defendants contend they did not intend personal guarantee.
>
> Both documents are identical. Court reads documents. It is in effect an unlimited guarantee. I find as a fact on plaintiff's evidence that both before and after execution of documents, the Plaintiff dealt with and continued to deal with National Lumber and Wood Products Limited.
>
> It was argued by Learned Queen's Counsel that the expression 'deal with' ought to be construed not only by operating the account but by dealing or continuing to deal with plaintiff. I have given careful consideration to that submission. The expression 'dealing with' or continuing to 'deal with' means nothing more than the operating of an account on behalf of a customer. I think the bank is dealing with such a customer in the line of its business as a bank. It is my view that this would provide good consideration. In the case of Burnett it is obvious that after the date of his signing a sizeable credit was made to the account by way of overdraft of $285,000.00. The Plaintiff therefore continued to deal with 1st Defendant and Burnett would therefore be liable, assuming that I do not accept his allegation of false representation.
>
> In the case of Mr. Brown, the instrument is dated 26/7/79 and it is my view that the words 'deal with' or 'continue to deal with' mean operating an account on behalf of a customer and he is therefore liable. In the case of Brown there is no evidence of false representation.
>
> His case stands or falls on the words 'deal with' or 'continue to deal with'."

And in respect of the oral testimony at p. 115:

> "..... I reject accusations that he [Lawrence] made any misrepresentation to either Burnett or Brown.
>
> In Brown's case there is no evidence on which I could come to any other conclusion.

> "In Burnett's case I do not accept that he was misled. His demeanour, I was not impressed. He did damage to his credibility when he denied allegations on affidavit. It was inconceivable that Managing Director of a Company with 18 years could be heard to say he signed document without reading it."

And concluded at p. 115:

> "..... Exhibits 1 & 2 speak for themselves. There is no evidence to contradict. Both were admitted and in respect of instruments I find 2nd and 3rd Defendants liable. I find Burnett liable on 'dealing and continuing to deal with' and in respect of Mr. Brown 'continuing to deal with'."

Before us the questions of non est factum and prematurity of the cause of action were quite properly not pursued. The burthen of the challenge to the judgment was the validity or reality of the consideration on the part of the Bank.

Now the guarantees signed by the appellants were on a common printed form and the meaning and effect of the following recitals and clauses are of cardinal importance:

> "IN CONSIDERATION OF THE BANK OF NOVA SCOTIA JAMAICA LIMITED (herein called the 'Bank') agreeing at the request of the undersigned and each of them if more than one to deal with or to continue to deal with NATIONAL LUMBER & WOOD PRODUCTS LTD. (herein called the 'Customer') in the way of its business as a bank the undersigned and each of them, if more than one, hereby jointly and severally guarantee(s) payment to the Bank of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Customer to the Bank or remaining unpaid to the Bank, whether arising from dealings between the Bank and the Customer, or from other dealings or proceedings by which the Bank may be or become in any manner whatever a creditor of the Customer, and wherever incurred, and whether incurred by the Customer alone or with another or others and whether as principal or surety, including all interest, commissions, legal and other costs, charges and expenses (such debts and liabilities being herein called the 'guaranteed liabilities'), the liability of the undersigned hereunder being limited to the sum of Unlimited .... Dollars with interest from the date of demand for payment at the rate or rates mentioned in paragraph 5 hereof.

"AND THE UNDERSIGNED and each of them if more than one, hereby jointly and severally agrees with the Bank as follows:

1. In this guarantee the word 'Guarantor' shall mean the undersigned and, if there is more than one guarantor, it shall mean each of them, and their liability hereunder shall be a joint and several liability.

2. This guarantee shall be a continuing guarantee of all the guaranteed liabilities and shall apply to and secure any ultimate balance due or remaining unpaid to the Bank; and this guarantee shall not be considered as wholly or partially satisfied by the payment or liquidation at any time of any sum of money for the time being due or remaining unpaid to the Bank.

3. The Bank shall not be bound to exhaust its recourse against the Customer or others or any securities or other guarantees it may at any time hold before being entitled to payment from the Guarantor, and the Guarantor renounces all benefits of discussion and division.

4. The Guarantor's liability under this guarantee shall arise forthwith after demand for payment has been made in writing on the undersigned, or if more than one, on any one of them, and such demand shall be deemed to have been effectually made on the day following that on which an envelope containing such demand addressed to the undersigned or such one of them at the address of the undersigned or such one of them last known to the Bank is posted, postage pre-paid, in the post office; and the Guarantor's liability shall bear interest from such date at the rate or rates mentioned in paragraph 5 hereof.

.....

8. This guarantee shall be in addition to and not in substitution for any other guarantees or other securities which the Bank may now or hereafter hold in respect of the guaranteed liabilities and the Bank shall be under no obligation to marshall in favour of the Guarantor any other guarantees or other securities or any moneys or other assets which the Bank may be entitled to receive or may have a claim upon; and no loss or unenforceability of any other guarantees or other security which the Bank

"may now or hereafter hold in respect of the guaranteed liabilities, whether occasioned by the fault of the Bank or otherwise, shall in any way limit or lessen the Guarantor's liability.

.....

16. This guarantee embodies all the agreements between the parties hereto relative to the guarantee and postponement and none of the parties shall be bound by any representation or promise made by any person relative thereto which is not embodied herein; and it is specifically agreed that the Bank shall not be bound by any representations or promises made by the Customer to the Guarantor. Possession of this instrument by the Bank shall be conclusive evidence against the Guarantor that the instrument was not delivered in escrow or pursuant to any agreement that it should not be effective until any condition precedent or subsequent has been complied with and this guarantee shall be operative and binding notwithstanding the non-execution thereof by any proposed signatory."

Understandably there were common grounds of appeal. In summary they were in effect:

(i) that the learned trial judge erred in law in holding that at the time of execution of the instrument by the respective appellants the contract thereby created was supported by valid consideration;

(ii) that the learned trial judge erred in law in holding that the expression 'deal with' or 'continuing to deal with' means nothing more than the operating of an account on behalf of a customer and that this provided good consideration for the contract of guarantee;

(iii) that there was misdirection in law and on the facts as to the genuineness of the consideration in that in reality the signatures of the appellants were procured in relation to the advance made to the J.E.C.I.C. and that the consideration therefore was a past consideration.

In the course of their submissions both Mr. Codlin and Mr. Frankson raised the question as to whether the form in which the consideration was stated in the instrument was clear and

adequate. The consideration in a guarantee, said Mr. Codlin, must be correctly stated. In the instant case "to deal with and continue to deal with" was insufficient. There should have been a clear statement indicating the nature of the dealing since a dealing is capable of including what could not be valuable consideration. He sought support in statements of Paget's Law of Banking - 8th Edition p. 609 and White v. Woodward (1848) 5 C.B. 810 and 136 E.R. 1097 and Johnston v. Nicholls (1845) 1 C.B. 251 and 135 E.R. 535. Mr. Frankson followed up by submitting that there was no basic evidence pointing to the meaning of "to deal or continue to deal" and the phrase is open to contradictory terms and in the absence of evidence as to the "dealing" between the Bank and the Company it was impossible to determine precisely or in any acceptable manner what was in the contemplation of the parties.

In reply to this Mr. Delisser accepted the passages in Paget as a correct statement of the law. He submitted that the statement in the guarantee is clear, unambiguous and comprehensive. He referred to Chitty on Contract - 25th Edition, Vol. II para. 4412 and to Harris v. Venables (post). He adverted to the following from Paget at p. 609:

> "Consideration - existing debt
>
> It must be stated whether the liability is to extend to existing overdraft or debt, if any, as well as to future advances. This is sometimes involved in the statement of the consideration. It is not necessary that the consideration should be set out in the guarantee. But if it is set out, it should be done correctly. ..... The mere antecedent debt of a third person is no consideration for a promise. A usual expression is 'in consideration of your making or continuing advances or otherwise giving credit.....'
>
> It is true that the statement of a consideration is not conclusive, and another consideration may be supplied by external evidence. The real consideration, where further advances are not stipulated for,

> "is the forbearance of the creditor to sue or press the debtor:
>
> '.... where a creditor asks for and obtains a security for an existing debt, the inference is that but for obtaining the security he would have taken action which he forbears to take on the strength of the security.'
>
> The existence of this consideration has also been implied from the nature of the transaction as between businessmen. But, in the absence of statement in writing, it must always remain a matter of deduction whether any claim was contemplated, and if so, whether it was forborne at the request of the guarantor."

On this question I consider the following from Chitty para. 4412 is directly in point:

> "Guarantee of past and future transactions:
>
> If the surety guarantees past transactions in return for an undertaking by the creditor to continue to deal with the debtor, or to grant him further credit, there will be good consideration. In practice the surety frequently guarantees both past and future transactions in return for such an undertaking, and such a guarantee is good as to both sets of transactions, for consideration to be executed on the one side is at all events prima facie consideration for all that is done on the other, and all the promises are to be referred to all the considerations."

For that statement reliance was placed on such cases as Johnston v. Nicholls (1845) 1 C.B. 251 and Harris v. Venables (1872) L.R. 7 Ex. 235.

It is clear from this statement in Chitty which I accept as correct, that the consideration as expressed in the instruments in the instant case is sufficiently clear and comprehensive to embrace in its contemplation future transactions between the Bank and the Company.

Counsel for the appellants in keeping with their grounds of appeal proceeded to attack the reality and validity of the consideration so expressed on the basis of the proper interpretation of the statement and such relevant extrinsic evidence in

the event the statement in the guarantee was not conclusive.

In this regard Mr. Codlin submitted that on the evidence of Lawrence the Bank had been under a duty to deal with and continue to deal with the Company until the debt is written off as a bad debt. Accordingly, such dealing cannot constitute consideration flowing from the Bank to the guarantor. "Dealing with" could only ripen into valuable consideration if it meant making further advances on the express request of the guarantor. There was no evidence that any such advances were asked for by Burnett or promised or contemplated. See Wigan v. English & Scottish Assurance Association (1908-10) All E.R. at 458 and Miles v. New Zealand (1886) 32 Ch.D. 266.

Further, the consideration as stated in the instrument could only amount to valuable consideration if it were shown that there was an agreement between the parties that the Bank intended to close the account but forbore from so doing at the request of the guarantor. The continuing of the account could not amount to valuable consideration and the trial judge erred in so holding.

And further, on the basis of the judgment in Degazon v. Jamaica Civil Service (1968) 10 J.L.R. 497, Burnett's promise was to guarantee the payment of the debt as set out in the instrument and since that debt had been incurred before the promise was given it is past consideration. The promissory note given by the Company did not create any obligation on the guarantors because the obligation of the Company to pay the Bank had been created when it honoured its obligation and created an overdraft on the Company's account.

Mr. Frankson, who expressed himself as adopting such submissions of Mr. Codlin on the general question as to the reality and validity of the consideration as may be relevant to the appellant Brown, was careful to ask that in such areas as there

may be variance between his submissions and Mr. Codlin's that his submissions be considered as alternatives. In my view if submissions are incompatible that is the best that can be done for them.

Mr. Frankson further submitted that as an exception to the general rule, extrinsic evidence was admissible to determine whether there was any consideration or whether the consideration is nominal or insufficient - see R. v. The Inhabitants of Cheadle (1832) B & Ad. 833. In the instant case, while the exhibited instrument in itself did not furnish any evidence as to the history of dealing between the Bank and the Company, extrinsic evidence had been tendered as to what that dealing was and it was limited to one single promise to pay a debt when it became due to the J.E.C.I.C. The evidence disclosed the Bank made no advances or loaned any money to the Company nor furnished any further guarantees for any debt by the Company in consideration of the obligations assumed by the guarantors. If Court held words "deal with etc." constituted good consideration then up to the time action brought the contract subsisting between guarantors and Bank was no more than executory which never "fructified" by performance. There was no subsequent service as in Bell v. Welch (post).

In reply, Mr. Delisser submitted that from time to time a Court has been asked to interpret an instrument in writing. In each case the document in question had to be examined on its merits and interpreted accordingly and therefore the cases cited indicate no more than the Court's interpretation in the particular cases. In the instant case the learned trial judge was asked to consider whether the granting of the loan to the Company and whether allowing the Company to continue to operate its current account, constituted a "dealing". The loan he pointed out was

put to the credit of the Company's current account and this removed the overdraft and enabled the Company to continue operating the current account. The demand loan also reduced the interest which was 16% (and liable to fluctuate) on the overdraft to a fixed 14% on the loan. It was only when the Company defaulted in payments under the arrangements under the demand loan that the Bank closed the account.

Now the circumstances when such external evidence is admissible are as stated in Chitty in para 4412 thus:

> "Difficult questions of construction may arise in these cases, since guarantees are often expressed in terms which leave it doubtful whether the surety is guaranteeing past and future transactions, or past ones only. In these circumstances extrinsic evidence is admissible to show that the parties contemplated future transactions as falling within the guarantee, and that the whole guarantee is therefore valid."
>
> [Foot-note references indicate that those statements were founded on the following amongst other cases - Chapman v. Sutton (1846) 2 C.B. 634, Morrell v. Cowan (1877) 7 Ch.D. 151 and Butcher v. Steuart (1843) 11 M. & W. 857].

Now Mr. Codlin's argument that the Bank was obliged to deal and continue to deal with the Company rested upon a false premise namely, that because there pre-existed the execution of the guarantee a debtor-creditor relationship between the Bank and the Company, and the debt has not been written off as a bad debt, the Bank was obliged to continue the relationship of Bank and customer. Neither in authority nor good sense is there any basis for this proposition. A Bank in the absence of agreement is not bound to continue the Banker-customer relationship with a debtor. The debtor-creditor relationship is neither simultaneous nor necessarily concomitant with that of Banker and customer. The former will continue as long as the debt remains unpaid while the latter may be terminated by the Bank in the absence of specific agreement when the customer is in debt or default. In any event,

the facts of the instant case do not support Mr. Codlin's conclusion. There had been no firm arrangements concerning the overdraft. Indeed it was the absence of such arrangements and the lack of any security that caused Lawrence, the Manager of the Bank, such anxious concern and the urgent desire to have security and firm arrangements so that the relationship of Banker and customer may continue. In addition to the Bank continuing to carry the current account of the Company Burnett did admit in cross-examination that "Mr. Lawrence did say he would allow National Lumber extra time if its Director would present a proposal for settlement of the debt". Codlin's hypothesis is therefore contrary to the facts. Indeed the concession by him that it was open to the Bank to close the Company's account and his acceptance that "dealing" may be interpreted to include such activities as accepting deposits, honouring cheques and collecting Bank charges, would render untenable his contention that there was an obligation on the Bank to continue the Banker-customer relationship in the circumstances then existing.

Now the contention on behalf of the appellants that "deal with" and "continue to deal with" could only ripen into valuable consideration if it involved making advances to the Company at the request of the guarantors is to place an unwarranted limitation upon the consideration as expressed in the instrument and to ignore the transactions subsequent to the execution of the guarantees and in particular the grant of the demand loan to clear the overdraft, the arrangements for the re-payment of this loan, the operation of the current account as evidenced by the monthly statements for the period July 1979 to September 1981. These are matters incidental to the continued dealing with the Company in the relationship of Banker and customer. To these circumstances I find appropriate and applicable the following dicta of Lord Parker in Clegg v. Bromley (1912) 3 K.B. at p. 491 (and quoted in Paget's ante):

> "..... where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security."

Perhaps it may be now convenient to look at a number of cases in which the Court with the aid of extrinsic evidence had to determine whether or not the consideration as expressed in the instrument was real or adequately expressed.

In Johnston v. Nicholls (1845) 135 E.R. as at p. 535, the guarantee was in the following form:

> "As you are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for and guarantee to you, the payment of any sums of money which C. now is, or may at any time be, indebted to you, so that I am not called upon to pay more than the sum of 2000L. There had been considerable dealings between A. and C. prior to the date of the guarantee, consisting of loans of money, payments made for, and goods supplied to C. by A., the credit upon which had not then expired, and those dealings had been to a small extent since continued: Held, that the guarantee disclosed a sufficient consideration, for the payment as well of the past as of the future debt."

Maule J. in his judgment had this to say at p. 542:

> "This is a rule calling upon the plaintiffs to shew cause why the judgment should not be arrested, or why the verdict found for them at the trial should not be set aside, and a non-suit entered.
>
> The judgment is sought to be arrested on the ground that the declaration discloses no sufficient consideration for the defendant's promise. Now, the consideration and the promise are thus stated - after an allegation of certain dealings which the plaintiffs had had with the firm of Claridge, Brothers, & Nicholls - 'in consideration that the plaintiffs would continue such dealings as aforesaid with the said firm of Claridge, Brothers, & Nicholls, he, the defendant, promised the plaintiffs to be responsible to the plaintiffs for, and to guarantee to the plaintiffs the payment of, any sums of money which the said firm of Claridge, Brothers, & Nicholls, then were or at any time thereafter might be indebted to the plaintiffs in the course of such dealings as aforesaid.' That amounts in substance to this, - that,

> "in consideration that the plaintiffs would do something in futuro, the defendant promised in like manner to do something in futuro. I think the declaration discloses a sufficient consideration for the promise, and that the case stands clear of the objection that has been urged in arrest of judgment."

While Cresswell J. to his rhetorical question, "Is this a binding guarantee?" answered thus at p. 543:

> "It [the declaration] refers to prior dealings which had taken place between the plaintiffs and Claridge, Brothers, & Nicholls, and speaks of their being about to enter upon future transactions with the latter. It is fair to assume, therefore, that this means transactions of the same character as those already had. The guarantee then goes on to suggest, that, in the course of such dealings, the firm alluded to may become largely indebted to the plaintiffs: and, in consideration of the plaintiffs entering upon transactions in business with Claridge, Brothers, & Nicholls, that is, continuing to have dealings with them as they had theretofore had, the defendant agrees to be responsible to the plaintiffs for the payment of any sums of money in which the firm then was or at any time thereafter might become, indebted to them not exceeding 2000L. That discloses a sufficient consideration for the defendant's promise; it is not necessary that the consideration should correspond in value with the undertaking of the defendant."

And concluded:

> "I therefore think that there was a legal and binding promise, and one that supported the declaration."

The decision in White v. Woodward (1848) 136 E.R. at p. 704 cited by Mr. Codlin is inconclusive and unhelpful. In that case the plaintiffs were warehousemen and wholesale drapers. In July 1845, the defendant gave to the plaintiffs a written guarantee - a promise in writing signed by the defendant commencing thus:

> "Gentlemen, - In consideration of your agreeing to supply Mr. Henry Slater, of, &c, draper and upholder, with goods, upon credit, in the way of your trade (the amount to be in your own discretion), I hereby guarantee you the due and regular payment of such sum or sums as he may now, or at any time, and from time to time hereafter, owe to you or to the persons who for the time being may compose your firm, and against any loss you may sustain by his dealings with you: ...."

and containing other terms and conditions extending liability in certain eventualities and limiting liability "to principal sum in running account of 100L."

A judge in chambers having set aside the demurrer as frivolous, the defendant upon application obtained from the Court a rule nisi to rescind the order of the judge. At the hearing to show cause counsel for the plaintiff asked that the rule be discharged on the basis that the demurrer was frivolous as the declaration upon the authority of Johnston v. Nicholls (ante) disclosed "ample consideration" for the defendant's promise. Counsel for the defendant countered by referring to a number of cases in which the Court had ruled the consideration as stated in the instrument was insufficient. The end result reads at p. 706:

> "Per curiam. Without pronouncing any opinion as to the sufficiency of the declaration, it is enough to say that this demurrer is not so clearly frivolous as to warrant its being set aside."

Mr. Frankson in support of his contention that there was not sufficient evidence to resolve the uncertainty in the consideration as set out in the instruments submitted that Johnston v. Nicholls was clearly distinguishable as there was clear evidence of the transactions between the plaintiff and the party for whose benefit the guarantee was given prior to the execution of the guarantee and it was from this evidence that the Court was able to infer that the future dealings contemplated were of the same character whereas in the instant case there was only the honouring of the undertaking by the Bank to the J.E.C.I.C. and no further transactions of the like nature.

Now Johnston v. Nicholls illustrates the type of extrinsic evidence that would be admissible for and useful in determining the exact nature of the transactions in contemplation of the parties when the consideration in a guarantee is expressed in

comprehensive terms as in the instant case; more specifically that the type of transactions antecedent to the execution of the guarantee is indicative of the transactions contemplated in the word "deal". To maintain his stand Mr. Frankson astutely limited the evidence of previous transactions to the payment by the Bank of the debt due by the Company to J.E.C.I.C. Thus he ignored the fact that the relationship of Banker and customer pre-existed this particular transaction. There was the evidence of Burnett to the effect that at the end of September 1978 in the current account operated by the Company there was over $400,000.00 to its credit and Mr. Codlin's recognition of the activities of the Bank in keeping a customer's current account. It was this type of dealing which continued subsequent to the execution of the guarantee signed by the appellant Brown.

As to the reality of the consideration Mr. Frankson relied on Bell, Public Officer of the National Provincial Bank of England, v. Welch and Adams (1850) 137 E.R. 851. In that case:

> "The defendants gave the plaintiff the following guarantee: - 'We, the undersigned, hereby indemnify the National Provincial Banking Company, to the extent of 1000L., advanced or to be advanced to R.P., by the said company.' It appeared, that, at the time the guarantee was given, R.P. was indebted to the bank in a sum exceeding 1000L.: Held, that the guarantee did not, upon the face of it, or construed with reference to the extrinsic circumstances, disclose a sufficient consideration. A declaration upon the above guarantee, stated, that, at the time of making the agreement, &c., R.P. kept an account with the company, and was indebted to them in 800L. for money advanced; that it was proposed between R.P. and the company, that the company should advance him divers other moneys not then agreed upon; and that thereupon the agreement (setting it out) was entered into: the declaration then proceeded to allege, that, 'in consideration of the premises,' the parties mutually promised, &c., that the company did advance to R.P. divers large sums amounting to 1000L., and forbore and gave day of payment to R.P., &c.: - Held, that

> "the whole of the allegations preceding the mutual promises, formed part of the consideration for the defendants' promise, and were all put in issue by non assumpsit."

The distinction between that case and the instant case is evident from the reasoning in the judgments. Wilde, C.J. after referring to the terms of the guarantee said at p. 857:

> "The words 'advanced or to be advanced' might fairly admit of the construction that future as well as past advances were meant: but the facts shew, that, at the time this guarantee was given, there was a debt of 1400L. due to the bank from Richard Pinney; and there is nothing upon the face of the instrument, and certainly nothing when the state of the account between Pinney and the bank is looked at, to shew that the parties contemplated a security for future advances to the extent of 1000L. There was at that time a sum exceeding 1000L. already advanced; and the guarantee in terms binds the defendants to pay 1000L. of it."

While Maule, J., who was of the same opinion expressed himself thus at p. 857:

> "In order to make this declaration good, reading it according to the natural sense of its words, it imports that the defendants promised to guarantee the National Provincial Bank of England to the extent of 1000L., in consideration of their making future advances to Pinney, that is, provided future advances were made."

He then referred to the facts and continued:

> "If the sum already advanced had been less than 1000L., the guarantee might have admitted of the construction suggested, viz. that it impliedly contemplated future advances, inasmuch as it could not otherwise operate to the full extent intended. But, when it appears that the 1000L. has already been advanced, and consequently that there is an existing debt to which the guarantee can be at once applied, the meaning of the guarantee is, - We guarantee the existing debt of Pinney, to the extent of 1000L., whether future advances are made or not. If the parties had in terms said so, there cannot be a doubt that the instrument would not have imported any future advances: and I think they do in effect say that. The evidence shews that more than 1000L. had already been advanced by the bank to Pinney. It is, therefore, the same as if the defendants had said - Pinney owes you 1000L.: we will pay you, if he does not."

Mr. Frankson endeavoured to bring Brown within the ambit of this case. He submitted that in so far as the appellant Brown is concerned the demand note was executed on the 24th of July, 1979 and the date of execution of Brown's instrument was the 26th of July, 1979 and therefore it cannot be said that that was a service rendered to the 1st defendant subsequent to the execution of the instrument and could not constitute consideration for future services. Now the evidence of Lawrence was to the effect that the demand loan was made on the same day that Brown executed his guarantee. There was no evidence from Brown contradicting this and the date 26th July in all probability was entered in error.

Be that as it may, the learned trial judge impliedly excluded the evidence of the demand loan in his finding against Brown by limiting the consideration in respect to Brown thus, at p. 114:

> "In the case of Mr. Brown, the instrument is dated 26/7/79 and it is my view that the words 'deal with' or 'continue to deal with' mean operating an account on behalf of a customer and he is therefore liable."

In any event, argued Mr. Frankson the learned trial judge erred in holding that "deal with or continue to deal with" mean operating a current account on behalf of a customer inasmuch as it appears from the decided cases that dealings have a restricted meaning and therefore in relation to the Bank and the Company, the transaction in contemplation must be similar to that which had taken place between them before the executing of the instrument by Brown - [F.E. Degazon and Others v. The Jamaica Civil Service Mutual Thrift Society Ltd. (1968) 10 J.L.R. 497].

In Degazon & Others v. The Jamaica Civil Service Association (supra) the guarantee of £750 17s. 10d. covered a past debt of £250 17s. 10d. and a future loan of £500 and it was

held that since the consideration which moved the appellant to sign the guarantee was the "making of a loan of £750 17s. 10d. to the borrower" and it was clear that in reality only £500 was loaned under the agreement, the appellants were not liable in respect of the sum of £250 17s. 10d. which presented a past consideration.

This case is unhelpful. It deals specifically with debts past and present. It is an example of the situation where the guarantee in the aggregate covered both past debt and future loans. It was such a situation Maule J. visualised in his obiter observation in Bell v. Welch (supra).

In my view in the cases cited, the advance of moneys, the further extension of credit, or the grant of a loan are illustrative of some of the activities that may come within the ambit of 'dealing' between a Bank and its customer. However, it is for the Court in every case where the nature of consideration is to be ascertained with the aid of extrinsic evidence to determine the consideration in contemplation. In the instant case, the Banker-customer relationship in contemplation was the continued operation of the current account with all the incidentals, including the acceptance of lodgments and the honouring of cheques drawn upon the account and the forbearance not to close the current account.

Further, Mr. Frankson submitted that at the time Brown executed his instrument the Bank was under an obligation to Burnett "to deal with and continue to deal with" the Company and that would include operating the account. There was no request from Brown that the Bank should confer any additional benefit on the Company.

Accordingly, when Brown signed his document it imposed no new obligations on the Bank or exposed the Bank to any detriment nor conferred on the Company anything to which it had

not already been entitled.

It was an astute argument and Mr. Delisser was specifically asked to reply. He endeavoured to do so by the following analogy: A may promise to build a bridge for B for a certain sum and may also make a similar promise to build the same bridge for C and there would be a binding contract with both B and C and upon building the bridge A could recover the costs from either B or C. The analogy was too remote to be helpful. In it there was no third party beneficiary who was not a party to the contract. It was therefore an ineffective answer to Mr. Frankson's attractive proposition. In the time taken out for reflection, it seems to me quite clear that the answer lies in the very nature of consideration. It is not essential to a valid consideration that there should be some benefit conferred by the promisee on the promisor; it is enough if the consideration which flows from the promisee is some "forbearance, detriment, loss or responsibility, given, suffered, or undertaken" [Currie v. Misa (1875) L.R. 10 Ex. 162] or some benefit conferred upon a third party as required by the promisor.

In each case the consideration involved the rendering of a service to the Company and the Company enjoyed the benefit of having in operation a current account which it was open to the Bank to unilaterally close because of the Company's indebtedness and default. The undertaking by the Bank to each guarantor though in similar terms was an independent obligation and Clause 16 rendered each guarantor personally bound immediately upon the signing of the instrument by him. Accordingly there was as between the Bank and each guarantor independent agreements.

On the question as to whether or not there was a request from Brown as stated in the document, Lawrence did admit that there was no express request from him. However, he was advised of Burnett's guarantee and the purpose for which it was given

and his plea of non est factum having failed, the inference is inescapbale that when he signed the document he appreciated, assented to and agreed with the recitals and the terms therein. Brown must be held to have given the guarantee against the background of the antecedent discussions of the import of which he had been made aware.

No doubt anticipating such a finding, both counsel for the appellants in reply submitted that from the evidence of Lawrence it was his clear intention to obtain from the appellants a joint guarantee. Accordingly, unless the same instrument is signed by both, neither appellant can be liable. It was the intention of the parties that a joint guarantee should be given. Lawrence did not regard the transaction of the guarantee as completed until he obtained Brown's signature. Mr. Frankson adverted attention to the fact that there is no provision in either instrument indicating that they should be read and construed as one. It was manifestly clear, submitted Mr. Frankson that the intention was for the Directors Burnett and Brown to give joint personal guarantees. In support of these arguments reference was made to: Evans v. Brembridge and Others (1843 60) All E.R. Rep. 170; Hansard v. Lethbridge and Others (1892) The Times Law Reports 346 and The National Provincial Bank of England v. Brackenbury (1905-6) The Times Law Reports 797.

This question was not raised in the Court below; nor, as Mr. Codlin conceded, could it be brought within the ambit of any of the grounds of appeal. Notwithstanding, an indulgent Court gave a listening ear to these unheralded submissions. The cited cases are clearly distinguishable in that, (i) in the instruments the required sureties were stated and therefore the omission of the signature of any one of them would be patent and (ii) none of the instruments in those cases apparently contained provisions similar to Clause 16 which was intended, as Mr. Frankson

graphically put it, "to bind and truss the guarantor so that he has no means of escaping." By its terms Clause 16 has rendered immaterial the promises of others by expressly stating that "none of the parties shall be bound by any representation or promise made by any person relative thereto which is not embodied herein." Therefore this final surprise assault upon the judgment also failed.

For these reasons I would dismiss the appeal. There was some mild questioning as to the award of interest. However, having regard to the evidence of Lawrence as to the current rate of interest on overdrafts and Clause 5 of the guarantee which reads:

> "The rate of interest payable by the Guarantor from the date of a demand for payment under this guarantee shall be at the rate or rates payable by the Customer at the date of such demand and on the several items of indebtedness constituting the guaranteed liabilities."

the amount of interest awarded by the learned trial judge was not by any means unwarranted or unreasonable. Accordingly, I would affirm the judgment with costs here and in the Court below to be the respondent's - such costs to be taxed if not agreed.

CAMPBELL J.A.

On an unspecified date in July, 1978, National Lumber and Wood Products Limited (hereafter called the company) opened a current account with the respondent at their branch at 35 King Street, Kingston, Jamaica. The appellants are the directors of the company. The first appellant is in addition the chairman thereof.

In July, 1978 and September, 1978 respectively the respondent on the written request of the company, guaranteed payments by the latter to Jamaica Export Credit Insurance Corporation Limited. By the express terms of the written request the company inter alia, authorised the respondent without prior notice, to debit its account with all payments made under the guarantee and undertook to repay on demand all sums so paid and or debited by the respondent.

On the respective dates when the respondent guaranteed payments and down to about the beginning of December, 1978 the company's account was in credit. It had an amount of $400.000.00 initially later reduced to $300,000.00. Each of these sums far exceeded the total contingent liability of the respondent under the guarantee. However by May 16, 1979 barely five and a half months later when the respondent was called upon to honour its guarantee, the account of the company had been completely depleted.

The respondent duly honoured its guarantee by paying to Jamaica Export Credit Insurance Corporation Limited on account of the company the sum of $287,100.00 and debited the company's account with this payment. The effect of this debit was that the company's account became overdrawn by substantially the amount of the debit.

As there was apparently no prior arrangement for the company to operate an overdrawn account, the first appellant was called in by the respondent on May 16, 1979 with regard to

this overdrawn account. Discussions took place. An agreement was reached but this was disputed before the learned judge. However, as a sequel to the discussions, the first and second appellants each signed a personal guarantee in favour of the respondent on May 28, 1979 and July 26, 1979 respectively guaranteeing the indebtedness of the company both present and future. On July 24, 1979 a Promissory Note in the sum of $298,000.00 was executed by the first and second appellants on behalf of the company in favour of the respondent. On the same date an amount of $298,000.00 was credited to the company's account thereby reducing its overdraft to approximately $384.00. The company made instalment payments in liquidation of this loan evidenced by the promissory note but thereafter defaulted. The respondent after due demand sued the company on the promissory note and in the same action sought to recover from the first and second appellants on their personal guarantees.

Judgment by default was obtained against the company and the action proceeded to trial against the first and second appellants.

The appellants by their joint pleading, denied liability under their respective guarantees. The first appellant averred that he did not sign any guarantee on May 28, 1979. He further averred that, if he did sign the guarantee it had been falsely represented to him. The second appellant averred that the guarantee, which he admittedly signed, was misrepresented to him. Consequently in each case the plea of 'non est factum' was in effect raised.

Both appellants further averred that the guarantees were in any case void and of no effect because no consideration was given therefor inasmuch as the purported consideration was the antecedent debt of the company incurred on or about July 27, 1978 in the incurring of which neither appellant had requested the

respondent to give credit to the company nor had they at any time subsequently, requested the respondent to forbear from recovering the debt from the company.

At trial it was strenuously asserted that in view of clause 16 of each guarantee, the existence of a consideration to support the guarantee must be sought, if such existed, exclusively from the document. The relevant provisions of the guarantees which are in identical terms are as hereunder:

> "In consideration of the Bank of Nova Scotia Jamaica Limited (herein called the 'Bank') agreeing at the request of the undersigned ..... to deal with or continue to deal with National Lumber & Wood Products Ltd (herein called the 'Customer') in the way of its business as a Bank, the undersigned ..... hereby guarantees payment to the Bank of all debts and liabilities, present and future ..... owing by the customer to the Bank or remaining unpaid to the Bank whether arising from dealings between the Bank and the customer or from other dealings or proceedings by which the Bank may be or become in any manner whatever a creditor of the customer. ..... (emphasis mine)
>
> "Paragraph 16 This guarantee embodies all the agreements between the parties hereto relative to the guarantee and postponement and none of the parties shall be bound by any representation or promise made by any person relative thereto which is not embodied herein; and it is specifically agreed that the Bank shall not be bound by any representations or promises made by the customer to the guarantor. Possession of this instrument by the Bank shall be conclusive evidence against the guarantor that the instrument was not delivered in escrow or pursuant to any agreement that it should not be effective until any condition precedent or subsequent has been complied with and this guarantee shall be operative and binding notwithstanding the non-execution thereof by any proposed signatory."

Consistently with their view of the exclusionary effect of paragraph 16 of the guarantee, the appellants objected albeit unsuccessfully to the oral evidence given on behalf of the respondent by Mr. Lawrence on the ground that it was being adduced to add to vary or contradict the contents of the guarantees. The learned judge correctly admitted extrinsic evidence both oral and documentary as providing the back ground or circumstances in which the guarantees were executed as also as relevant to the issue of non est factum. He however based his judgment on the issue of consideration on the recited consideration in the guarantee after interpreting the words therein expressed. Thus the outcome of this appeal on the issue of consideration rests inevitably on whether the construction by the learned judge of the words "deal with" and "continue to deal with" is correct, and if correct, whether on such construction, they import consideration.

The learned judge gave judgment for the respondent. He found as a fact that there had been no misrepresentation by the respondent of the guarantees which the appellants signed. They were thus bound by the guarantees unless by their terms, considered in the context of the admissible extrinsic evidence, no consideration could be said to have been given therefor. As stated earlier the learned judge found that the consideration for each of the guarantees was that which was expressly stated therein namely the respondent's undertaking "to deal with" or "to continue to deal with" the company in the way of its business as a bank. These words he noted had to be construed to determine whether they afforded consideration to support the guarantees. He construed the expressions as meaning "nothing more than the operating of an account on behalf of a customer" and that "the bank is dealing with such a customer in the line of its business as a bank." He concluded that the expressions

so interpreted constituted consideration for the guarantees.

Against this judgment, an appeal has been brought by both appellants on grounds which are substantially the same. The first appellant's three grounds are in substance two, because grounds 2 and 3 have to be taken together to provide a complete ground of appeal. His grounds of appeal summarized are as hereunder:

1. No valid contract supported by consideration was created by the execution of Exhibit I because the loan for which Exhibit I was executed had been given to the company many months before Exhibit I was executed.

2. The expressions "deal with" or "continue to deal with" as meaning nothing more than the operating of an account on behalf of a customer could not amount to consideration since the respondent as shown by the evidence of Mr. Lawrence was already under an obligation to operate the account.

The second appellant's grounds of appeal paraphrased are as follows:

1. The learned judge erred in holding:

   (a) that at the time of execution of Exhibit 2 the latter was supported by consideration;

   (b) that the expressions "deal with" or "continue to deal with" mean nothing more than the operating of an account on behalf of a customer and that this provided consideration for Exhibit 2.

2. The learned judge misdirected himself in law and on the facts in failing to hold that the reality of the transaction was that a guarantee was procured for a past consideration.

Mr. Codlin's submissions on the construction of the words "deal with" or "continue to deal with" can be summarised thus:

1. Since on the extrinsic evidence, the company was already indebted to the respondent, the latter would be bound to "deal with" or "continue to deal with" the company until the overdraft was cleared either through payment or by being written off. Such a dealing with the company could not therefore provide consideration to support the first appellant's guarantee.

2. The expression "deal with" could only amount to consideration if it meant making further advances to the company at the request of the first appellant, and even in such a case the consideration being executory, the first appellant could not be rendered liable until the consideration was executed by the respondent actually making the further advances to the company. There was no evidence whatsoever of any further advances having been asked for, promised, or contemplated, and none was given.

3. In so far as "deal with" meant accepting deposits and honouring cheques, for which services, bank charges are made, these were services which the respondent was already under a duty to perform by virtue of having allowed the company to open the current account with it.

4. The learned judge's interpretation of the words "deal with" or "continue to deal with" was not supported by, and in fact was contrary to all authorities dealing with banker and customer relation and also the consideration for guarantee when given to a bank. In this regard Mr. Codlin relied on the exposition of "consideration" for a guarantee by the learned authors of Paget's Law of Banking (8th Ed.) at p. 609 in addition he relied on certain judicial decisions as supporting his submission.

The first limb of Mr. Codlin's submission is without substance. He ignores the fact that the words "deal with" or "continue to deal with" are limited by the words "in the way of its business as a bank" which connote a banker and customer relation. This relation primarily exists where the

bank is the debtor and the customer the creditor and not the reverse. The fact that the company is owing the bank and th· the bank in consequence would necessarily have to deal with the company until the debt is liquidated by payment or by being written off would exemplify only a dealing between a creditor and a debtor and does not exemplify a dealing with the company as a customer by the bank in the way of its business as a bank. To the contrary, unless the overdraft indebtedness was prearranged, or had subsequently been approved on terms at least satisfactory to the bank, the relation of banker and customer would have ceased to exist or be at risk of being unilaterally determined by the bank. The learned judge properly did not construe the words in the manner of Mr. Codlin's submission.

The second limb of Mr. Codlin's submission which also embraces his other substantive ground of appeal is based on an erroneous view of the facts. This error was early revealed in the pleadings of the appellants in answer to paragraphs 4 and 5 of the respondent's amended statement of claim. These paragraphs are as hereunder:

> "4. On or about the 27th day of July, 1978 the first defendant (the company) requested the plaintiff (respondent) to guarantee certain payments to the Bank of Jamaica for the Jamaica Export Credit Insurance Corporation.
>
> 5. The plaintiff in keeping with the request made payments to the Bank of Jamaica totalling approximately $287,000.00."

To these paragraphs the appellants made answer as hereunder:

"2. "As regards paragraph 4, the second and third defendants (1st & 2nd appellants) will say that at the time when the said loan was made the second and third defendants were not requested to guarantee the said loan neither did they request the plaintiff to advance the said loan to the first defendant (company).

15. Further, or in the alternative, the second and third defendants will say if, which is not admitted, the second and third defendants did sign a guarantee, that guarantee is unsupported by consideration because it relates to an antecedent debt which was made to the first defendant on or about 27th July, 1978 and the second and third defendants did not sign the guarantee until May and July respectively 1979, neither did they request the plaintiff to make the loan to the first defendant or to forbear from proceeding in any way against the first defendant or to do any act for the benefit of the second and third defendants." (Emphasis mine)

From these answers it is clear that the first appellant is contending that his guarantee was given in respect of the transaction dated 27th July, 1978. There is a fallacy in this, because on that date no loan was given to the company nor did the respondent make any payment on behalf of the company. The respondent merely gave its own guarantee in favour of the company at the latter's request. It is true that the respondent did not then seek the personal security of the company's directors on giving its guarantee. This was because the respondent's liability was contingent, and also because at that date and down to December 1978 the company's account was in credit to an amount which far exceeded any contingent liability under the guarantee. It was only in May 1979 that the respondent was called upon to honour its guarantee. Having done so, it called upon the first appellant, on the latter's own admission, to submit proposals for liquidating the company's indebtedness. The first appellant requested time on behalf of the company. Proposals were discussed. It is within the context of these proposals for liquidating this indebtedness that Mr. Lawrence, whose evidence was accepted as credible by the learned judge,

stated that a loan would be made to the company to clear this overdraft indebtedness if the directors would guarantee the new indebtedness to be created by the loan and future indebtedness. A loan was in fact made as evidenced by the Promissory Note given by the company on July 24, 1979. This was after the first appellant had executed his guarantee (Exhibit 1) on 28th May, 1979. Thus the substratum of Mr. Codlin's submission has fallen out and on the facts as they are, he would, by inference from his own submission be conceding that there was not only consideration, but executed consideration manifested by the new loan given by the respondent in return for Exhibit 1. It matters not that the new loan was used wholly to liquidate the overdraft. The new loan as already stated, was evidenced by the Promissory Note executed by the company on July 24, 1979 and on that date an amount equal to that stated in the Promissory Note was credited by the respondent to the company's overdrawn account. The company secured the benefit of substituting a loan at 14% for the overdraft which was attracting interest at 16% as disclosed from a copy of the company's account with the respondent as at 31st July, 1979, admitted as Exhibit 7. This exhibit shows an amount of $3,868.60 debited as interest which worked out at approximately 16% on the amount then overdrawn. This limb of Mr. Codlin's submission as well as his other substantive ground of appeal are therefore not well founded, being based, as earlier stated, on a view of the facts which is in violent conflict with the actual evidence.

The third limb of Mr. Codlin's submission like the first limb is without substance. It is predicated on a view of the law governing banker/customer relation which as earlier adverted

to in considering the first limb of his submission, is prima facie true only in a situation where the customer's account is in credit. As Mr. Codlin himself rightly conceded, if the company's account was overdrawn without prior overdraft facility having been agreed with the respondent, the latter could unilaterally determine the bank/customer relation. He further conceded that if in such circumstances the first appellant had requested the respondent to continue its banker/customer relation with the [redacted] in consideration for the first appellant guaranteeing the existing and future liabilities of the company, the accession by the respondent to such a request would provide consideration for the guarantee. But the request would in effect be for the respondent to give time to the company to liquidate its indebtedness while continuing to keep it as a customer. This situation is exactly what is disclosed from the admissible extrinsic evidence. This evidence establishes that the respondent's conduct was in conformity with the recited consideration in the guarantee.

The first appellant himself disclosed that on the very day, namely May 16, 1979, when the company's account with the respondent became overdrawn, consequent on the debit therein of the sum paid by the respondent under the guarantee, he, the first appellant, was summoned by the respondent for discussion about the indebtedness of the company and the formulation of a payment schedule. He further admitted that the respondent through Mr. Lawrence made known to him what the respondent was prepared to offer. He admitted that at a subsequent meeting on May 24, 1979 the question of repayment of the amount paid by the respondent under the guarantee was again raised. Though the first appellant insists that no security was sought by the respondent he did at least admit to being asked to assign to the respondent a life policy which he had, as part of the

provision of security for the company's indebtedness.

The respondent's version of what transpired at its meeting with the first appellant, is given by Mr. Lawrence. This version is that following on the payment by the respondent of the amount guaranteed to Jamaica Export Credit Insurance Corporation and the debiting of this amount to the company's account, it thereby became overdrawn. The company had a direct obligation to the respondent to satisfy this indebtedness. As no formal arrangements existed to liquidate this debt, he requested a meeting with the directors of the company. The first appellant attended meetings with him and requested that the respondent allow the company reasonable time to discharge the debt. The first appellant offered on behalf of the company an assignment of certain payments due to the company from the Jamaica Railway Corporation but as this was insufficient, he, Mr. Lawrence indicated his preparedness to allow the company a reasonable time to liquidate its indebtedness provided the directors presented a proposal for such liquidation and agreed to give their personal guarantees. At a meeting on May 24, 1979 the first appellant agreed to execute a personal guarantee and he, Mr. Lawrence, further requested an assignment by the first appellant of a Life Policy held by him as a personal collateral. On July 4, 1979 the first appellant assigned this Life Insurance Policy in support of his guarantee.

Under cross-examination by Mr. Codlin for the first appellant, Mr. Lawrence reiterated that at the first meeting on May 16, 1979, the need to establish a repayment programme and collateral security for the debt were discussed. At a subsequent meeting on May 28, 1979, the first appellant again requested time, and a proposal was made for a loan to the company to liquidate its overdraft in return for the personal guarantee of the directors to secure this new indebtedness.

The evidence thus discloses a situation in which the respondent, contrary to being willing to allow the company to continue to operate its overdrawn current account, was insisting on proposals for liquidation of the indebtedness. It may fairly be inferred that the respondent was in no mood to keep the company as a customer. The request by the first appellant for time to settle this indebtedness could fairly be construed as a request made to the respondent for the latter to continue for at least a reasonable time its banker/customer relation with the company and as conceded by Mr. Codlin, in such a situation if the respondent acceded to this request, by not determining its banker customer relation with the company, there would be valuable consideration for the first appellant's guarantee. The company derived a benefit, albeit no direct benefit accrued to the first appellant himself.

Since the duty to continue a banker/customer relation does not extend, in the absence of prior arrangement, to an overdrawn account, an essential of the dealings between a customer and a bank namely the operation by the bank of the current account of the customer by honouring cheques drawn thereon would have ceased unless the respondent had acceded to the first appellant's request.

In Brooks & Co. v. Blackburn Benefit Society (1884) 9 A.C. 857 Lord Balckburn at p. 864 said:

> "In all banking accounts, the banker, so long as the balance of the account is in favour of the customer, are bound to pay cheques properly drawn, and are justified, without inquiry, as to the purpose for which those cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance, or, in other words to allow the customer to overdraw."

In the light of the above principle and based on the uncontroverted evidence that the company continued to operate its account until 1981 when it was closed by the respondent as inactive, there was ample evidence of consideration flowing from the respondent to support Exhibit I. There is accordingly no merit in the submission of Mr. Codlin on this aspect of the matter.

With regard to the final limb of Mr. Codlin's submission, he was unable to direct our attention to any learned treatise or relevant decided case which faintly established or supported his submission that the words "deal with" or "continue to deal with" in the recital in Exhibit I could not properly be interpreted in in the way the learned judge interpreted the words, or that when so interpreted, the words could not import good consideration in a situation where the company had without prior authority, overdrawn its account.

Mr. Frankson on behalf of the second appellant, developed more fully and from a different perspective Mr. Codlin's submission on the inadequacy and/or inappropriateness of the words "deal with" or "continue to deal with" to provide a consideration for the guarantee executed by the second appellant in Exhibit 2. He further submitted, albeit, there was no specific ground of appeal on this particular issue, that as the evidence of Mr. Lawrence for the respondent was that the second appellant made no request to the respondent, there could be, in any case, no consideration, because the undertaking by the respondent "to deal with" or "continue to deal with" the company must, to amount to consideration binding the second appellant to his guarantee, be at the latter's request. On this latter submission, the evidence elicited under cross-examination of Mr. Lawrence on which Mr. Frankson relies is as hereunder:

> "When Lionel Brown met in July, guarantee already prepared for his signature. That was my first meeting with Lionel Brown. I explained at least two things to Lionel Brown. I do not recall stating specifically that 'you are here as a director.' I told him that 'I required the Directors to give their personal guarantee.' I did tell him he was there in two capacities one as a Director and two as Mr. Brown a private citizen. I stated that as an individual the signing of the guarantee involved his personal liability - it was on the document - to the best of my recollection he was told it was an unlimited guarantee. I also advised Lionel Brown that on his executing the guarantee I was prepared to discount a loan to first defendant with interest at 14%. Mr. Lionel Brown never ask me for any facility for himself or for the company. I told him there was an issue between Mr. Burnett and myself and this had been agreed (not settled) and I was requesting that he join in."

In my view the above evidence, contrary to Mr. Frankson's submission, discloses a situation from which it certainly could be inferred that, even though the second appellant did not on the evidence expressly request of Mr. Lawrence "any facility for himself or for the company" he impliedly requested the identical facility which Mr. Burnett had expressly requested of the respondent from as early as May 16, 1979 namely, inter alia to forbear from pressing for immediate liquidation of the overdraft. He was told of the issue between Mr. Burnett and the respondent which had its origin in the request of Mr. Burnett. On this request the whole arrangement to ease the company out of its predicament was structured. He was asked to join in that issue so that the issue could be resolved in the manner provisionally agreed between Mr. Burnett and Mr. Lawrence. He joined in by executing Exhibit 2 which had already been prepared prior to his meeting with Mr. Lawrence. In Exhibit 2 there is recited a "request" by him. The irresistible inference from his conduct

in signing Exhibit 2 after being told of the circumstances why his signature was required, is that he was making himself a party to the issue then subsisting between Mr. Burnett and the respondent. He thus impliedly made a request to the respondent by adopting and participating in the aforesaid issue. The request need not be express. It is sufficient if the circumstances warrant an inference that it was implied.

In Crears v. Hunter (1887) 19 Q.B.D. 341 the facts disclosed that the defendant's father since deceased, had before the defendant came of age, borrowed a sum of £200 from the plaintiff, promising that his son, the defendant when of age would become surety for the debt. In 1877 the defendant being then of age, the plaintiff brought a promissory note stamp to the defendant's father's house where the defendant then was, and the promissory note now sued upon was then drawn up and signed by the defendant's father and the defendant. By such note they jointly and severally promised to pay to the plaintiff or order "the sum of £200 being money lent, with interest on the same ..... half yearly at the rate of 5 per cent per annum." There was no evidence as to anything being said by the parties in relation to the signing of the note. Interest had been paid upon the note..... the principal being still due, the plaintiff brought his action on the note against the defendant Hunter and his father's executor.

The defence inter alia was that even on the assumption that the transaction manifested a forbearance to sue the father on the original loan, the defendant was not liable as he had not expressly requested such forbearance. This defence did not succeed. Lord Esher M.R. in dealing with the issue of "request" said at p. 343:

> "But it seems to me that the question whether the request is express or to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there was an express request."

Lindley L.J. at p. 346 said:

> "It may be that there is no evidence that the defendant actually said that he would be liable, if the plaintiff would give his father time. But, except on the theory that such was the understanding between the parties, the defendant's conduct is inexplicable. I cannot think that there was no evidence for the jury that there was no forbearance by the plaintiff at the request of the defendant. On the contrary the evidence to the effect that there was, seems to be overwhelming."

Lopes L.J. at 346 said:

> "There is no evidence here of any express request. It seems, however, clear that there is evidence of an implied request and I think the jury were justified in finding that there was such a request. Unless it were to procure forbearance, it is inconceivable why the defendant should have signed the note at all."

Thus, even if Mr. Frankson's submission on this issue had been based on a specific ground of appeal its fate would be the same, namely that on the credible extrinsic evidence in the case, the submission is not well founded. With regard to the submission that the expressions "deal with" or "continue to deal with" are inadequate and inappropriate to amount to consideration for the guarantees, Mr. Frankson submitted that the expressions as they stand are imprecise and uncertain. Further, he submits, there is no extrinsic evidence of previous dealings between the parties which, if such existed, could properly have been used by the learned judge to aid in the interpretation of the said expressions. He relied on Johnston and Others v. Frank Nicholls (1845) E.R. Vol. 135 p. 535 to show how the word "dealing" may be construed by reference to previous transactions. The guarantee was worded thus:

> "As you are about to enter upon transactions in business with C, with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you, in consideration of your doing so, I hereby agree to be responsible to you for and guarantee to you the payment of any sums of money which C. now is or may at any time be, indebted to you, so that I am not called upon to pay more than the sum of £2000."

The above case undoubtedly confirms the principle that an expression which is not defined or otherwise limited by the context in which it is used, and is prima facie wide and general in its meaning, may properly and legitimately be given a meaning which is considered to be within the contemplation of the parties, by reference to what they by their previous conduct have understood the expression to mean, provided this meaning albeit narrower than it otherwise would have had is not fundamentally inconsistent with the literal meaning of the aforesaid expression. Thus, in the cited case, where the plaintiff's business was that of merchants with no legal limitations as to its nature and extent, the scope of the transactions which were within the contemplation of the parties was properly limited to previous dealings involving cash advances, payments made on account of C. for duties, and sales of goods on credit to C. As Maule J. said at p. 542:

> "This action is founded upon a mercantile contract which refers to a state of circumstances existing at the time between the plaintiffs and Claridge, Brothers, and Nicholls and must therefore be construed with reference to the existing circumstances of the parties between whom and on whose account it is made. Mercantile contracts like these are more peculiarly susceptible of explanation by such reference."

The above cited case contrary to supporting the submission of Mr. Frankson in my view is more cogently relevant as being the judicial base for the principle relied on by Mr. Delisser on behalf of the respondent which is stated in Chitty (25 Ed.) Vol. 2 page 1199 paragraph 4412 as follows:

> "If the surety guarantees past transactions in return for an undertaking by the creditor to continue to deal with the debtor, or to grant him further credit there will be good consideration. In practice the surety frequently guarantees both past and future transactions in return for such an undertaking and such a guarantee is good as to both sets of transaction."

The learned judge construed the expressions "deal with" or "continue to deal with" as limited by the expression "in the way of its business as a bank." When so limited they meant, he said, "nothing more than the operating of an account on behalf of a customer." In so construing the expressions the learned judge was undoubtedly relying on the established concept of a bank/customer relation recognized judicially, within which concept the expressions cannot be said to be uncertain, nor are they capable of different and contradictory interpretations. As I have earlier stated, had the expressions "deal with" or "continue to deal with" been used in an unqualified, unrestricted way, there would prima facie have been some uncertainty as to what was meant and to ascertain their meaning, evidence of previous course of dealings between the parties would have had to be resorted to in the absence of which the expressions would be struck down for uncertainty. In this case, however, the expressions are qualified and limited by the words "in the way of its business as a bank" and thus are confined to "dealings" within a bank/customer relation. Such dealings have been the subject of judicial pronouncements. They have also been considered in recognized treatises on banking such as Pagets Law

of banking under the multi-faceted banker/customer relations. The dealings are thus inextricably linked with the nature of banking business. On the nature of this business and the dealings envisaged, the views expressed by the Lord Chancellor (Lord Hatherley) in Copland v. Davies (1872) (English & Irish Appeals) Vol. 5 p. 358 is relevant. He says this at p. 375:

> "With regard to Mr. Kennedy, it is not disputed that he was a banker in the ordinary sense of the word, as receiving people's money and giving them receipts ..... acknowledging the receipt of money, and issuing pass books and cheque books, and dealing with them in the ordinary way of a banker."

In more recent times the bank/customer dealings in the ordinary sense have been considered by Lord Denning M.R. and Diplock L.J. in United Dominion Trust Ltd v. Kirkwood (1966) 2 K.B. 431 in words which are most apposite. At. p. 447 Lord Denning said thus:

> "There are, therefore two characteristics usually found in bankers today (i) they accept money from, and collect cheques for their customer and place them to their credit (ii) they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them also a third namely (iii) they keep current accounts or something of that nature, in their books in which the credits and debits are entered."

Diplock L.J. at p. 465 said:

> "Accordingly it is in my view essential to the business of banking that a banker should accept money from his customers upon a running account into which sums of money are from time to time paid by the customer and from time to time withdrawn by him by cheque, draft or order. I am inclined to agree with the Master of the Rolls and the author of the current edition of Paget on Banking 6th Ed. (1961) p. 8 that to constitute the business of banking today the banker must also undertake to pay cheques drawn upon himself (the banker) by his customer in favour of third parties up to the amount standing to their credit in their 'current accounts" and to collect cheques for his customers and credit the proceeds to their current accounts."

The expressions "deal with" or "continue to deal with" thus have, within the context in which they have been used, a clearly recognized meaning coincident with the interpretation given by the learned judge. This interpretation was not dependent on nor did it require evidence of particular transactions constituting previous dealings between the respondent and the company in order to determine what was their intention in using the aforesaid expressions. They must be assumed to know what has been judicially determined as the dealings between a bank and its customer in the way of a bank's business as a bank. I have already determined that in the context of the state of the current account of the company, a request by the appellants express or implied that the respondent continue its bank/customer relation with the company which is acquiesced in by the respondent and implemented by the company being permitted to continue operating its account until 1981, constituted good consideration as found by the learned judge.

The submission of learned counsel based on the uncertainty of the meaning of the expressions, thereby rendering them incapable of amounting to consideration, accordingly fails.

Mr. Frankson submitted that even if the learned judge did correctly interpret the words "deal with" or "continue to deal with" and was also correct in his conclusion that they constituted good consideration for the first appellant's guarantee and even if in addition to continuing the bank/customer relation the respondent had made a loan to the company as evidenced by the promissory note, the learned judge would still have been in error in holding that there had been good consideration to support the second appellant's guarantee. The learned judge was in error, he says, on two bases namely:

(1) In so far as the purported consideration for the second appellant's guarantee was a "dealing with" manifested by the giving of the loan evidenced by the promissory note dated July 24, 1979 this was no consideration in law being past consideration because it preceded the execution by the second appellant of his guarantee on July 26, 1979 and no further loan was made subsequent to his execution of the guarantee.

(2) In so far as the purported consideration is constituted by the continuing of the bank/customer relation with the company after July 26, 1979, this equally was in law no consideration because the respondent at the time when the second appellant executed his guarantee was doing no more than performing its contractual duty to the first appellant on the hypothesis that his guarantee was valid and was subsisting from May 2, 1979.

On the issue of past consideration based on the second appellant's guarantee having been dated July 26, 1979 which is subsequent to the date of the loan to the company, it is not open to us to consider this submission because the learned judge did not make any adverse findings against the second appellant on this basis. To the contrary, to the extent that the learned judge impliedly found that the granting of the loan constituted a "dealing with" the company he impliedly concluded that this would afford consideration only for the first appellant's guarantee. This seems clear from the following excerpt from his judgment which reads thus:

> "The expression 'dealing with' or 'continuing to deal with' means nothing more than the operating of an account on behalf of a customer. I think the bank is dealing with such a customer in the line of its business as a bank. It is in my view that this would provide good consideration. In the case of Burnett (first appellant) it is obvious that after the date of his signing a sizeable credit was made to the account. ..... The plaintiff therefore continued to deal with 1st defendant (the company) and Burnett (first appellant) would therefore be liable ..... In the case of Mr. Brown, the instrument is dated 26/7/79 and it is my view that the words "deal with"

> "or 'continue to deal with' mean operating an account on behalf of a customer and he is therefore liable. ..... His case stands or falls on the words 'deal with' or 'continue to deal with' (emphasis mine)

Later in his judgment he concluded thus:

> "I find Burnett liable on 'dealing and continuing to deal with' and in respect of Mr. Brown 'continuing to deal with' these findings are based on the facts."

The second basis on which it is submitted that the learned judge was in error, involves an erroneous extension by learned counsel of the principle, correct in itself, that a promise by a plaintiff to perform a contractual duty already owed to the defendant provides no consideration for the latter's further promise or vice versa.

To the contrary however, where the promises are exchanged between two persons, only one of whom is already under an existing contractual obligation to a third person and the promises relate to the performance of that obligation, it has always been held that such promise of performance, or the actual performance of the contractual obligation to the third person by the one who was then under that obligation, is sufficient consideration to support the promise made to him by the other.

This principle has in recent times been re-affirmed and is now firmly established by the Privy Council in New Zealand Shipping Co. vs. A.M. Satterthwaite & Co., (The Eurymedon) (1975) A.C. 154 and subsequently applied in Pao On v. Lau Yiu Long (1979) 3 W.L.R. 435.

The former case involved the interpretation of a formidable exemption clause described as the "Himalayan Clause" contained in a Bill of Lading which constituted the carrier's contract with the consignor of goods. The clause excluded

liability for the neglect, default and delay by the carrier, its servants or agents (including independent contractors when engaged by the carrier) in the course of performing the contract of carriage. Stevedores engaged by the carriers, negligently damaged the goods when unloading them. In an action brought by the holder of the Bill of Lading against the Stevedores, the latter successfully pleaded the exemption clause. By a majority, the Privy Council held that on a proper construction, the exemption clause amounted to an offer or promise by the consignor to persons including the Stevedores that in consideration for their performing their respective contractual duties to the carrier, thereby enabling the latter to perform the main contract in the bill of lading, he the consignor would exempt the Stevedores from liability for damage to the goods.

In Pao On v. Lau Yiu Long (supra) Pao and his family who owned the entire shares in a private company sold all the shares to a public company in which Lau was a majority shareholder. The entire purchase consideration of ten million dollars was to be by allotment and issue to Pao of shares in the public company. To safeguard against a fall in price of the shares by Pao off-loading his shares in the public company on the market, thereby adversely affecting Lau, the latter obtained from Pao an undertaking contained in Pao's contract of sale with the public company that Pao would not within a specified period sell 60% of his shareholding. At the same time, Pao by a collateral agreement with Lau secured from the latter an undertaking to purchase before the expiration of the aforesaid period 60% of his aforesaid shareholding at the same price as the public company had agreed to pay. Before the date fixed for completion of the contract between Pao and the public company, Pao having second thoughts on whether his collateral agreement with Lau did achieve what he really desired namely

a guarantee against the shares nose-diving in price, insisted on the cancellation of the collateral agreement and the substitution therefor of a proper guarantee. This guarantee was given. It stated that in consideration of Pao having agreed to sell the shareholding to the public company at the request of Lau which agreement had not yet been completed, the latter agreed and guaranteed the market value of 60% of the shareholding at a price not less than the contract price with the public company at the expiration of the time within which Pao had undertaken not to sell. It further agreed to indemnify him against any fall in price of the shares within the specified time. Before the expiration of the time in question, the price of the shares in the public company fell drastically. In a claim by Pao for indemnity under this guarantee, Lau contended, inter alia, that the consideration for the guarantee was Pao's promise to perform his contractual obligation to the public company under the earlier contract of sale of his shares. Dealing with this contention Lord Scarman for the Board said at p. 447:

> "The extrinsic evidence in this case shows that the consideration for the promise of indemnity, while it included the cancellation of the subsidiary agreement, was primarily the promise given by the plaintiffs to the defendants to perform their contract with Fu Chip, which included the undertaking not to sell 60 per cent of the shares allotted to them before April 30, 1974. Thus the real consideration for the indemnity was the promise to perform, or the performance of, the plaintiff's pre-existing contractual obligations to Fu Chip. This promise was perfectly consistent with the consideration stated in the guarantee. Indeed, it reinforces it by imposing upon the plaintiffs an obligation now owed to the defendants to do what, at the first defendant's request, they had agreed with Fu Chip to do. Their Lordships do not doubt that a promise to perform,

> "or the performance of pre-existing contractual obligation to a third party can be valid consideration. In New Zealand Shipping Co. Ltd., v. A.M. Satterthwaite & Co. Ltd., the rule and the reason for the rule were stated:
>
> 'An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration ..... the promisee obtains the benefit of a direct obligation. .... This proposition is illustrated and supported by Scotson v. Pegg which their Lordships consider to be good law.'
>
> Unless, therefore the guarantee was void as having been made for an illegal consideration or voidable on the ground of economic duress, the extrinsic evidence establishes that it was supported by valid consideration."

Thus the fact that the respondent may have been under a contractual obligation to the company by virtue of the first appellant's guarantee, does not prevent an obligation being incurred by the second appellant in giving his guarantee to the respondent in consideration of the latter undertaking with him as it did with the first appellant, to "continue to deal" with the company which involved the continuing obligation, by the respondent, to keep the company's current account, with the further obligation of permitting the company to operate and to continue to operate the same.

For the reasons given herein, the appeals of both appellants fail and ought to be dismissed. I would accordingly dismiss the appeals.

WRIGHT J.A.

I have had the benefit of reading the judgment in draft of Kerr, J.A. and agree with his reasoning and conclusion. Accordingly, there is nothing further that I need to add.