NMCS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42/97

BEFORE: THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

BETWEEN JENNIFER WRIGHT 2ND DEFENDANT/APPELLANT

AND JAMAICA CITIZEN'S BANK LIMITED PLAINTIFF/RESPONDENT

R.N.A. Henriques, Q.C. and Ms. Katherine Francis, instructed by Clinton Hart & Co. for the appellant

Mrs. Sandra Minott-Phillips, instructed by Myers, Fletcher & Gordon, for the respondent

January 19, 20, 21, 22; February 8, 9 and April 19, 1999

PATTERSON, J.A.:

On the 18th February, 1994, Jamaica Citizen's Bank Limited ("the respondent") issued a specially indorsed writ of summons against three defendants, of whom Jennifer Wright (the appellant) was the second named, claiming to recover the sum of $6,052,705.60 "being moneys due and owing to the plaintiff by the 1st defendant and for which indebtedness, the 2nd and 3rd defendants are guarantors." The crucial paragraph in the statement of claim reads as follows:

> "The 2nd and 3rd named Defendants were at all material times the Secretary and a Director respectively of the 1st named Defendant and by a contract in writing dated the (sic) November 30, 1988 between the Plaintiff and the 2nd and 3rd Defendants, the 2nd and 3rd Defendants agreed for the consideration therein set out to guarantee to the Plaintiff the payment on demand of all credit facilities and advances made by the Plaintiff to the 1st Defendant at the Defendant's request including all interest, commission and banking charges thereon."

On the 23rd March, 1994, the appellant and the 1st defendant, through their attorneys-at-law, Dunn, Cox & Orrett, entered appearances, but failed to file defences within the prescribed time. The sequence of events relevant to this case which emerged must now be recounted in order to appreciate the real issue on appeal. On the 10th October, 1994, the appellant filed a notice of change of attorneys, and now appeared by Clinton Hart & Company. The 3rd defendant entered appearance. That very day the appellant applied for an ex parte interim injunction in the suit. The summons was supported by an affidavit sworn by Howard Samuel Mitchell, attorney-at-law, a partner in the firm of Clinton Hart & Company. The court made an order granting an interim injunction for 14 days restraining the plaintiff "from enforcing a second mortgage on premises situated at numbers 29-31 Norbrook Drive, Kingston 8, in the Parish of St. Andrew ... by way of sale at public auction or private treaty."

I am not sure of the ground on which the order was made, having regard to the plaintiff's claim to which I have alluded. The affidavit in support of the summons reads in part:

> "**3.** That by a document dated November 30, 1988 executed by the Plaintiff and the Second and Third Defendants the Plaintiff purports that the Second and Third Defendants agreed for the consideration stated therein to guarantee to the Plaintiff the payment on demand of all credit facilities and advances made by the Plaintiff to the First Defendant at the First, Second and Third Defendants' requests including all interest, commission and banking charges related thereto. There is now produced and shown by me marked 'HSM-1' for identification a copy of the said document dated November 30, 1988.
>
> **4.** That, however, the said document dated November 30, 1988 does not constitute an enforceable guarantee for the following reasons:
>
> **(a)** the alleged Guarantee does not satisfy the requirements of the Statute of Frauds of 1677;
>
> **(b)** the name of the principal debtor on the alleged Guarantee is that of a non-existent entity; and
>
> **(c)** the extent of the liability of the Second and Third Defendants under the alleged Guarantee is void for uncertainty."

Thereafter it speaks of a mortgage given by the appellant to the respondent "as collateral security for the aforementioned alleged guarantee." But that order for interim injunction was not the subject of an appeal, and I need not discuss its merit. What is relevant is the fact that the affidavit in support

exhibited a copy of the guarantee mentioned in the statement of claim by the respondent as forming the basis of the claim.

On the 12th October, 1994, the appellant and the 3rd defendant issued a summons, supported by the affidavit of Howard Samuel Mitchell, attorney-at-law, seeking leave to file defence "within fourteen (14) days of the making of the order." A copy of the proposed defence of the 2nd and 3rd defendants was exhibited, and appended thereto was a proposed counterclaim.

On the 14th October, 1994, the respondent filed a notice of change of attorney; Myers, Fletcher & Gordon now appeared. On the 18th October, 1994, the respondent's attorneys filed an affidavit exhibiting a number of documents which the defendants "failed to disclose to the court" in the affidavit "filed in support of the application for an injunction." It is plain that by then the respondent was aware of the order for an interim injunction made on the 10th October and also had knowledge of the affidavit in support of the application. It appears that this affidavit was filed in anticipation of the summons for interlocutory injunction which was certain to follow the grant of the interim injunction. On the 24th October, the appellant and the 3rd defendant applied by summons, supported by a supplemental affidavit of Howard Samuel Mitchell (which referred to, adopted and re-iterated the contents of his affidavit sworn on the 10th October), for an interlocutory

injunction. The court, on that day, extended the interim injunction granted on the 10th October, for a further seven days.

On the 26th October, 1994, the respondent applied by summons, supported by the affidavit of Nigel Logan, an assistant manager employed to the respondent, for summary judgment against all three defendants. The relevant paragraphs of that affidavit are as follows:

> "**1.** That I verify the matter set out in the Statement of Claim.
>
> **2.** That I verily believe that the Defendants have no defence to the claim."

This was followed by a supplemental affidavit (dated 27th October, 1994) in support of the summons for summary judgment, setting out the amounts that the defendants would owe the plaintiff on the 31st October, 1994.

Nigel Logan filed another affidavit (with exhibits) on the 26th October, referring to the affidavits of Howard Samuel Mitchell sworn on the 10th, 12th and 24th October, and opposing the grant of the interlocutory injunction sought by the defendants.

All three summonses were listed for hearing on the 31st October, 1994, but they were adjourned without being heard. The appellant filed affidavits dated 29th November, 1994, 24th March, 1995, and 28th March, 1995, in further support of the application to extend the time for filing defence, and in opposition to the summons for summary judgment. A

number of other limited interlocutory injunctions were granted, pending the hearing of the substantive three summonses that I have already mentioned.

I come now to 30th March, 1995. Reid, J. had for hearing the three summonses; the first, an application by the appellant and the 3rd defendant to extend time for filing defence; the second, an application by the appellant and 3rd defendant for interlocutory injunction; and the third, an application by the respondent for summary judgment. All three summonses were heard together over two days, 30th March, 1995, and 30th May, 1996. On 21st April, 1997, the learned judged ordered that:

> "**1.** There be Summary Judgment for the Plaintiff against the Defendants in the sum of $8,689,229.25 together with interest calculated from May 21, 1996 to April 21, 1997 (336 days)" (The interest amounted to $2,413,595.52).

It was further ordered that:

> "**2.** The summons to extend time for filing the defence of the second and third defendants is dismissed.
>
> **3.** The second defendant's summons for an interlocutory injunction is dismissed."

Consequential order for costs was made and leave to appeal was granted to the 2nd and 3rd defendants.

It is in light of that background that the second and third defendants filed an appeal against the judgment of the learned judge seeking that the "judgment be set aside and that leave be granted to the second and third named defendants/appellants to defend the suit and the injunction pending

the determination of the action." The third defendant has not pursued his appeal before us, and accordingly, his appeal is dismissed.

The appeal

An interesting preliminary point was argued. It arose out of the dicta of Lord Goddard, the Lord Chief Justice in the case of ***M. Pocock v. A.D.A.C. Ltd. and K. B. Pocock v. A.D.A.C. Ltd.*** [1952] The Times L.R. 29 (at p. 34). This is what his Lordship said:

> "I wish it to be known as a practice rule that the proper course for a master to take if he considers that in a summons under order 14 it is clear that the plaintiff knew that there was an arguable defence to the claim, is to dismiss the summons with costs. Masters should use their powers under order 14 much more freely."

Order 14 provides the procedure that obtains in England for signing judgment on a writ specially indorsed without proceeding to trial, notwithstanding appearance. Article 13 of the Judicature (Civil Procedure Code) Law ("the Code") is of the same effect in this jurisdiction. The relevant section is this:

> "**79. (1)** Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant

> satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

There are three conditions that must be fulfilled before a plaintiff can properly invoke the jurisdiction of the court to grant summary judgment on his specially indorsed writ of summons:

> **(1)** the defendant must have entered an appearance,
>
> **(2)** the statement of claim must have been served on the defendant,
>
> **(3)** the affidavit of the plaintiff in support of the application must fulfil the requirements of section 79(1) of the Code.

The affidavit must verify "the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his belief that there is no defence to the action, except as to the amount of any damages claimed, if any." [Section 79(1)].

If the plaintiff knows before applying for summary judgment that the defendant is relying upon a contention which would entitle him to unconditional leave to defend, and if the judge is satisfied on the material presented to the court that the plaintiff had such knowledge, then he ought to dismiss the application. However, once the conditions of verifying the cause of action and the amount claimed have been fulfilled in good faith, the

plaintiff has made out a prima facie case for summary judgment, and the onus is then cast on the defendant who is opposing the application, to satisfy the judge "that he has a good defence to the action on the merits" or to disclose "such facts as may be deemed sufficient to entitle him to defend the action generally." [Section 79(1)].

In the instant case, the respondent fulfilled all the necessary conditions to establish a prima facie case for summary judgment, in my view. In particular, the plaintiff filed two affidavits which together verified the cause of action and the amount claimed, and verified that in the deponent's belief, the respondent had no defence to the action.

It was, therefore, open to the appellant to show cause either by a preliminary objection or by an affidavit of merits. The preliminary objection taken by the appellant was aimed at showing that the respondent's affidavit was false in an essential particular; and that the deponent had knowledge of the appellant's arguable defence to the action, and therefore did not truthfully swear that in his belief there was no defence to the action. Such an objection need not be supported by affidavit, but I was not impressed by the argument presented. The appellant, in my view, failed to show cause against the respondent's application on the preliminary objection; and the court so ruled. The appellant then proceeded to attempt to show that he had "a good defence to the action on the merits", and that the learned judge erred in ordering summary judgment.

We were not supplied with the learned judge's reasons for judgment. We were told that when giving judgment he promised then to put his reasons in writing at a later date, but that promise has not been fulfilled up to the present time. The attorneys present did not make a note of what was said by the learned judge in delivering judgment. Although the reasons for judgment could have been helpful, this court proceeds by way of rehearing on the material affidavit evidence presented in the court below, independent of the reasons for judgment, and must come to its decision as to whether the learned judge was wrong in his decision.

The main ground of appeal on which the appellant relied to show that the learned judge was wrong in his decision, reads as follows:

> "That the learned Judge erred when he entered Summary Judgment for the Plaintiff/Respondent as there was (sic) substantial points of fact and law to be determined as to the validity of the Guarantee, for if the Guarantee was not valid and enforceable, the Firstnamed Defendant and Secondnamed Defendant/Appellant were under no liability to the Plaintiff/Respondent."

Having regard to the judgment of the court below, it is quite clear that the appellant did not satisfy the learned judge that the validity of the guarantee which grounded the respondent's claim could be questioned. Mr. Henriques conceded that if the guarantee was valid, then there would not be a good defence to the action on the merits. He referred to the proposed defence which attacked the validity of the guarantee. It is not in exact terms as what I have already quoted from the affidavit in support of the summons

for interim injunction. This is how the defence is stated in the relevant sections:

> "**2.** The Second and Third Defendants deny that the document dated the 30th day of November, 1988, constitutes an enforceable guarantee to the Plaintiff for the payment on demand of credit facilities and advances made by the Plaintiff to the First Defendant as alleged in paragraph 2 of the Statement of Claim or at all.
>
> ...
>
> **5.** The Second and Third Defendants say that the document dated the 30th day of November, 1988 purporting to be a Guarantee given by the Second and Third Defendants to the Plaintiff guaranteeing the indebtedness of the First Defendant is void and unenforceable for the following, inter-alia:
>
> **(a)** the alleged Guarantee does not satisfy the requirements of the Statute of Frauds of 1677;
>
> **(b)** the name of the principal debtor on the alleged Guarantee is that of a non-existent entity; and
>
> **(c)** the extent of the liability of the Second and Third Defendants under the alleged Guarantee is void for uncertainty.
>
> **6.** By reason of the foregoing, the Second and Third Defendants say that the purported Guarantee of the 30th day of November, 1988 is void and the Second and Third Defendants are not liable to the Plaintiff as a consequence thereof. And the Plaintiff is not entitled to recover the said sum or any part thereof from the Second and Third Defendants or either of them under the alleged Guarantee."

It should be noted that the appellant did not admit in the draft defence, as she did in the affidavit, that she executed the guarantee. However, the grounds on which the guarantee is attacked are the same.

The guarantee which is contained in a printed form was executed on the 30th November, 1988, by the appellant and the other relevant parties. It is headed:

> "GUARANTEE
>
> TO
>
> JAMAICA CITIZENS BANK LIMITED."

and the material parts read as follows:

> "**1.** In consideration of JAMAICA CITIZENS BANK LIMITED (hereinafter called 'the Bank' which expression shall where the context so admits include its successors and assigns) making or continuing advances or otherwise giving credit or affording banking facilities for as long as the Bank may think fit to FLOWERS FOLIAGE & PLANT (hereinafter called 'the Customer') I/WE the Undersigned Jennifer Wright & Douglas Wright HEREBY AGREE to pay and satisfy to the Bank on demand all sums of money which are now or shall at any time be owing to the Bank anywhere on any account whatsoever whether from the Customer solely or from the Customer jointly with any other person or persons or from any firm in which the Customer may be a partner including the amount of notes or bills discounted or paid and other loans credits or advances made to or for the accommodation or at the request either of the Customer solely or jointly or of any such firm as aforesaid or for any money for which the Customer may be liable as surety or in any other way whatsoever together with in all the cases aforesaid all interest discount and other bankers' charges including legal charges

occasioned by or incident to this or any other security held by or offered to the Bank for the same indebtedness or by or to the enforcement of any such security.

PROVIDED ALWAYS that the total liability ultimately enforceable against the Undersigned under this Guarantee shall not exceed the sum of UNLIMITED DOLLARS together with interest thereon calculated with the usual rests at the ruling rate from time to time for bank advances in Jamaica from the date of demand by the Bank upon the Undersigned for payment.

2. This Guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum or sums of money owing as aforesaid but shall be a continuing security and shall extend to cover any sum or sums of money which shall for the time being constitute the balance due from the Customer to the Bank upon any such account as hereinbefore mentioned.

3. This Guarantee shall be binding as a continuing security on the Undersigned until the expiration of three calendar months after the Undersigned shall have given to the Bank notice in writing to discontinue and determine it.

...

5. A certificate by an officer of the Bank as to the money and liabilities for the time being due or incurred to the Bank from or by the Customer shall be conclusive evidence in any legal proceedings against the Undersigned.

6. The Bank shall be at liberty without thereby affecting its rights against the Undersigned hereunder at any time to determine enlarge or vary any credit to the Customer, to vary exchange abstain from perfecting or release any other securities held or to be held by the Bank for or on account of the moneys intended to be hereby

> secured or any part thereof, to renew bills and promissory notes in any manner and to compound with give time for payment to accept compositions from and make any other arrangements with the Customer or any obligants on bills notes or other securities held or to be held by the Bank for and on behalf of the Customer.
>
> **7.** This Guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the money hereby guaranteed nor shall such collateral or other security or any lien to which the Bank may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of the moneys hereby secured be in anywise prejudiced or affected by this present Guarantee. And the Bank shall have full power at its discretion to give time for payment to or make any other arrangement with any such other person or persons without prejudice to this present guarantee or any liability hereunder. And all money received by the Bank from the Undersigned or the Customer or any person or persons liable to pay the same may be applied by the Bank to any account or item of account or to any transaction to which the same may be applicable.
>
> ...
>
> 13. Where this Guarantee is signed by more than one party, the liability of each of them hereunder to the Bank shall be joint and several and every agreement and undertaking on their part shall be construed accordingly."

The underlined words were typed in to complete the printed form.

What then are the "substantial points of fact and law to be determined", which counsel contended were overlooked by the learned

judge? I do not think that any bona fide issue of substance can be raised on the facts. The appellant was the managing director of the first-named defendant company, and as such, she negotiated credit facilities with the respondent bank on behalf of the first-named defendant. The statement of claim refers to the appellant as the secretary of the first-named defendant company and that has not been refuted. However, in my view, whatever position she held, the evidence clearly established that she was a principal moving factor in the affairs of the company, with full knowledge of and participation in the transactions between the 1st defendant company and the respondent bank, going back to 1984. On the 12th October, 1984, the appellant signed a guarantee in respect of banking facilities entered into between the 1st defendant company and the respondent. It was on an identical printed form to that now in issue, but the appellant's total liability was limited to "250,000 Dollars". Then on May 27, 1987, the respondent in a letter of commitment addressed to the company and headed "Attention: Mrs. Jennifer Wright - Managing Director" offered the first named defendant company credit facilities which clearly showed renewal of demand loans and a new demand loan. One of the securities requested by the respondent was "Joint and several guarantee of the Directors" to be supported by mortgages on two properties and hypothecation of certain stocks, totalling $36,924. The letter ended by stating, "If the foregoing terms and conditions are acceptable to you, kindly sign and return the original letter in the manner

stated hereunder, by June 12, 1987." The acceptance (undated) was signed by the appellant and the 3rd defendant as Directors, and the seal of Flowers Foliage & Plants of Jamaica Limited was duly affixed. The offer having been accepted, the next step would be the documentation of the securities.

On the 26th October, 1988, the appellant mortgaged lands registered at Volume 1183 Folio 576 and Volume 1183 Folio 575 to the respondent. A letter from the appellant's attorney-at-law, dated 2nd March, 1994, sets out clearly how the mortgage came into existence. This is what was written:

> "Firstly, our client is certain that this mortgage was not granted in your favour to support a Guarantee given by her in respect of the loans granted to Flowers, Foliage & Plants Limited. She contends that a charge was granted to you secured by Norbrook Drive in order for certain stocks held by you to be released for sale to enable her to complete the purchase price of the premises."

The reference to Norbrook Drive is the description given to the mortgaged lands mentioned above. So it seems obvious that the appellant herself considered the mortgage as a separate pledge to guarantee repayment of money owing by the 1st defendant to the respondent. The appellant's liability to the respondent secured by the mortgage was distinct from the liability created by the instrument of guarantee executed on the 30th November, 1988. Any contention, therefore, that this mortgage limited the appellant's liability under the guarantee of the 30th November, 1988, was bound to fail.

It is important to appreciate that the banking facilities which the respondent extended to the 1st defendant included new advances of money from time to time. It seems plain that any guarantee which the respondent required must be viewed in light of the changing nature of the facilities which it extended to the 1st defendant. The appellant would undoubtedly be a party to the negotiations, and any guarantee given must be construed with that in mind. On the 29th March, 1988, both the appellant and the 3rd defendant executed a joint and several guarantee on an identical printed form to that in issue, with unlimited liability. But the relevant guarantee is that executed on the 30th November, 1988, again on an identical printed form. It is stated to be "binding as a continuing security" on the appellant, determinable by three months' notice. The question of its validity was put forward as being a bona fide triable issue, which would entitle the appellant to leave to defend, and thus defeat the application for summary judgment.

The legal points that the appellant relied on were stated in the proposed defence. If the judge was satisfied that all the points of law were clear and really unarguable, then leave to defend would have been properly refused. The merit of each point must, therefore, be examined.

The first point was that "the alleged Guarantee does not satisfy the requirements of the Statute of Frauds of 1677."

The Statute of Frauds, 1677, prevents the enforcement of a contract of guarantee by action unless a note or memorandum signed by the person

to be charged or his duly authorised agent is in existence at the time of suit. The appellant's contention seems to be that the guarantee does not state the liability of the appellant with clarity, and, therefore, it does not meet the requirements of the statute. However, counsel did not stress this point. The relevant guarantee was signed by the appellant. It does not limit the appellant's liability, but it clearly sets out the way in which the liability can be ascertained at any given time. No difficulty is raised by this point, and, in my view, no triable issue arises on it.

The next point taken touches on the misnomer of the principal debtor as stated in the guarantee. It is stated as "Flowers Foliage & Plant" instead of "Flowers Foliage & Plants of Jamaica Limited". Here again, Mr. Henriques did not press this point. It could not be said that the appellant was misled in any way as to whom the principal borrower was. Any reasonable person reading the document as a whole would have no difficulty in understanding that a mere misnomer had arisen, and that the appellant had tacitly accepted it. This point, in my view, raised no bona fide triable issue worthy of entitling the appellant to leave to defend. (See ***Auburn Court Limited v. Jamaica Citizens Bank Limited*** (unreported) S.C.C.A. 69/90 delivered December 20, 1990).

The third point was advanced with greater fervour. It is worded in this way:

> "... the extent of the liability of the second and third defendants under the alleged guarantee is void for uncertainty."

Mr. Henriques submitted that the insertion of the word "unlimited" in the proviso to the first paragraph of the guarantee rendered the liability of the appellant under the guarantee uncertain, and entitled the appellant to leave to defend. He argued that the guarantee was void because that term is uncertain; the amount of the appellant's liability is not stated.

There can be no doubt that the instrument of guarantee in the instant case is a commercial document. It is a guarantee to answer for "continuing advances or otherwise giving credit or affording banking facilities for as long as the Bank [respondent] may think fit" to the first-named defendant, the primary debtor. It is a guarantee for present and future debt, and is a classic example of a continuing guarantee. It is not restricted to a debt of any particular amount. Rowlatt on the **Law of Principal and Surety** (4th edition) at page 56 sets out clearly the construction to be placed on a continuing guarantee and its effect. This is what is said:

> "A continuing guarantee may either be subject to a limit of time within which the liabilities which are to be covered by it must be contracted, and at the end of which it will expire *ipso facto* without any express revocation, or it may be unlimited in that respect, in which case it will cover all liabilities falling within its scope, until put an end to, where that is possible, by revocation."

A continuing guarantee may be unlimited not only in time, but also in amount. A limit to the amount of the guarantor's liability,

> "...may be effected either by restricting the application of his promise to a certain amount only of the debt or of the ultimate balance, or by

> naming a sum as the maximum which he shall pay, although the whole debt or ultimate balance is guaranteed." (See Rowlatt (supra) at page 67).

I adopt these settled principles of law as set out by the learned author, and I think they are applicable to the present case. Unless a contract of guarantee limits the liability of the guarantor either in time or in amount, the contract remains in full force until the liability of the principal debtor is fully discharged or until it is determined pursuant to its provisions. In the instant case, the only interpretation that can reasonably be placed on the document as a whole is that it does not limit the liability of the appellant in time or in amount, although it may be determined in accordance with the provisions of clause 3 that is referred to above. The proviso to clause 1 contained in the printed form, in my view, was intended for completion only if the liability of the guarantor was limited in amount. The addition of the word "unlimited" in that part of the proviso where the amount of a limitation (if there was one) would be inserted really adds no new condition to the terms of the guarantee, nor does it render the guarantee void for uncertainty. It could be said that it unnecessarily emphasises the unlimited amount of the appellant's liability, but if the entire proviso had been deleted, it would have made no difference. In my view, no bona fide triable issue arises on this point. It is unarguable that the guarantee covers the indebtedness of the principal debtor - the 1st defendant to the respondent bank, and no issue has been made of the amount of the debt of the principal debtor as stated in the

statement of claim. The judgment of the learned judge clearly shows that the appellant did not satisfy him on the proposed defence that there was a bona fide triable issue and consequently that the appellant was entitled to leave to defend. I am of the same view. The affidavits on which the appellant relied to show cause contained material which clearly showed that she could not have been mistaken as to the amount of her liability under the guarantee in question. She admitted that she had signed a previous guarantee in 1984, which, on the face of it, specifically limited the amount of her liability to $250,000. Yet she does not state specifically that she signed the guarantee under review, but states, "that it was always my understanding that the guarantee I gave as a Director was limited to the Two Hundred and Fifty Thousand Dollars". She did not state the grounds that gave rise to such an "understanding". Indeed, it is fair to say that her affidavit did not deal specifically with the respondent's claim which was clearly set out in the statement of claim and the affidavit in support of the summons for summary judgment.

The appellant's affidavits to a large extent dealt with the issue of the enforceability of the mortgage of her premises mentioned earlier on. In my view, that issue had nothing to do with the respondent's application for summary judgment. This is not an action by mortgagee against mortgagor, and the rights of such parties are not here in question. There is no question as to the indebtedness of the 1st defendant to the respondent, nor to the

amount claimed to be owing as at February 8, 1994. There is a counterclaim appended to the proposed defence which may give rise to the issue, but that counterclaim was not filed in the court and consequently did not form part of the pleadings. Clearly, the question of an interlocutory injunction in the instant action is not sustainable.

The grant of the respondent's application to sign judgment rendered the other two applications before the learned judge otiose, and I need say no more.

Before parting with this matter, I must comment on the respondent's delay in applying for summary judgment after appearances had been entered by the appellant and the 1st defendant. There is no express provision in the Code as to the time within which an application for summary judgment should be made. Nevertheless, such an application should be made within a reasonable time after appearance has been entered. The purpose of this summary procedure is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. (See ***Jones v. Stone*** [1894] A.C. 122). Delay may facilitate the filing of a defence, and that defence may in certain cases be sufficient to enable the defendant to obtain leave to defend. But the delivery of a defence does not necessarily mean that the plaintiff can no longer apply successfully for

summary judgment, it may only make his task more difficult; the delay must be explained.

Conclusion

In my judgment, the learned judge was justified in granting leave to the respondent to sign judgment and refusing leave to defend and I find no reason to interfere with his judgment. I would dismiss the appeal with costs to the respondent to be taxed if not agreed.

HARRISON, J.A.:

I agree.

PANTON, J.A. (Ag.):

I agree.