

MISC. APP. 77/15

2015

R.

NO. 13

IN THE HIGH COURT OF SIERRA LEONE  
(COMMERCIAL AND ADMIRALTY DIVISION)  
IN THE MATTER OF THE CONVEYANCING ACT 1881

AND

IN THE MATTER OF A LEGAL MORTGAGE BETWEEN ROKEL COMMERCIAL  
BANK (SL) LTD AND HUSSEIN IBRAHIM BAZZY AND MODCON  
CONSTRUCTION COMPANY

AND

IN THE MATTER OF AN APPLICATION TO SECURE THE REPAYMENT OF  
MONIES DUE AND OWING TO ROKEL COMMERCIAL BANK (SL) LIMITED

**BETWEEN:**

**ROKEL COMMERCIAL (SL) LTD. - PLAINTIFF/APPLICANT**

**AND**

**HOUSSEIN IBRAHIM BAZZY & OTHERS - DEFENDANTS/RESPONDENTS**

**COUNSEL:**

**O. JALLOH ESQ - PLAINTIFF/APPLICANT**  
**B. E. JONES ESQ**

**R. S. V. WRIGHT ESQ - 1<sup>ST</sup> DEFENDANT/RESPONDENT**  
**V. NABIE ESQ - 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS**

**BEFORE THE HON. MS. JUSTICE F. BINTU ALHADI J.**

**JUDGMENT DELIVERED ON THE DAY OF JANUARY 2019**

On the 1<sup>st</sup> of October 2015 an application by way of Originating Summons dated the 25<sup>th</sup> day of February 2015, as amended pursuant the Court's Order of 1<sup>st</sup> day of October 2015, on behalf of the Plaintiff/Applicant was made for the following Orders to wit:-

1. that the mortgagors/surety/guarantors/defendants/borrowers/customers do immediately pay all monies due and owing the mortgagee/plaintiff under mortgage deed dated the 23<sup>rd</sup> day of July 2013 and duly registered as No. 174/2013 in volume 88 at page 139 of the record book of mortgages kept in the office of the Registrar-General in Freetown, undertakings, debenture deeds respectively dated 2<sup>nd</sup> April 2002 and duly registered as no. 17/2002 in volume 73 at page 138 of the Record Book of mortgages aforesaid, 13<sup>th</sup> October 2005 and duly registered as No. 106/2005 in volume 76 at page 121 of the Record Book of mortgages aforesaid; 17<sup>th</sup> May 2007 and duly registered as No. 59/2007 in volume 78 at page 53 of the Record Book of Mortgages aforesaid; 2<sup>nd</sup> November 2010 and duly registered as No. 236/2010 in volume 83 at page 84 of the Record Book of Mortgages aforesaid; and Guarantees for the payment of the sum of Le 10,443,837,654.6 (Ten Billion Four Hundred and Forty Three Million Eight Hundred and Thirty Seven Thousand Six Hundred and Fifty Four Leones and Six Cents) the same comprising the principal debt and the interest accrued thereon;
2. that further and in the alternative an Order be granted for the mortgage to be enforced by the sale of the mortgaged property situate at No. 15 Charlotte Street Freetown as shown on survey plan L.S. 2252/09 and the assets covered by the aforesaid debenture deeds and if the same be insufficient to liquidate the sum due and owing the Plaintiff that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants pay the outstanding sum to the Plaintiff;
3. that in the event Order 2 be granted delivery up of possession to the Plaintiff of the mortgaged property and the assets covered by the aforesaid debenture deeds;
4. any further Order(s)/relief(s) that this Honourable Court may deem fit and just;
5. that the costs of and incidental to the application herein be provided for the same to be borne by the Defendants jointly and severally.

The application was supported by the affidavit of Lemuel B. Cole sworn to on the 25<sup>th</sup> day of February 2015 together with exhibits attached thereto.

The 1<sup>st</sup> Defendant/Respondent filed an affidavit in opposition and the Plaintiff/Applicant in turn filed an affidavit in reply.

In his submissions to the court on the 19<sup>th</sup> day of January 2016, Mr. Jalloh exhibited Board Resolutions approving the renewal of overdraft facilities, bid bonds, performance bonds offered by the Plaintiff bank to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and letter from the said Plaintiff bank demanding debts owed on the banking facilities offered to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the tune of which stood at Le 10,443,837,654.06 (Ten Billion Four Hundred and Forty Three Million Eight Hundred and Thirty Seven Thousand Six Hundred and Fifty Four Leones and Six Cents) as at the time proceedings commenced in court.

He maintained that, inter alia, the 1<sup>st</sup> Defendant stood as surety/guarantor in regard the facilities provided to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Mr Jalloh asked that the court grant the Orders prayed for; either for the immediate payment of the sum claimed; or failing, for the immediate sale of the mortgaged property and possession thereof.

In his closing submissions, Mr. Jalloh he highlighted the point that the mortgage deed which the 1<sup>st</sup> defendant executed specifically asked for Le 3,000,000,000 (Three Billion Leones).

**Cross-Examination of Mr. Bassam Ghossoub On Behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant Companies.**

Under cross-examination on the 21<sup>st</sup> of January 2016, Mr. Ghossoub confirmed that the closing indebtedness of Modcon Construction Company Limited as at 9<sup>th</sup> December 2014 stood at Le 7,127,070,764. 74 (Seven Billion One Hundred and Twenty Seven Million and Seventy Thousand Seven Hundred and Sixty Four Leones and Seventy Four Cents).

He said that as at the same date, the total indebtedness of Centrum Company, the 3<sup>rd</sup> Defendant, stood at Le 2,374,745,889.84 (Two Billion Three Hundred and Seventy Four Million Seven Hundred and Forty Five Thousand Eight Hundred and Eighty Nine Leones and Eighty Four Cents); and that as at that date no repayment had been made to the Plaintiff bank.

He confirmed that the total debt for the two companies stood at Le 9,501,816,654.58 (Nine Billion Five Hundred and One Million Eight Hundred and Sixteen Thousand Six Hundred and Fifty Four Leones and Fifty Eight Cents.

Mr. Ghossoub admitted that he diverted some money he received from customers of the companies to other banks and not to the Plaintiff bank, Rokel Commercial Bank that had lent monies to the companies.

He recalled executing a vesting deed for No. 15 Charlotte Street, Freetown in favour of Mr. Houssein Ibrahim Bazy; and he admitted to signing for the banking facilities on behalf of Modcon Construction Company Limited and Centrum Company Limited, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants; and that he was the focal point that the bank dealt with.

He told the Court that he discussed the reasons for Mr. Bazy, the 1<sup>st</sup> defendant, putting up the property at Charlotte Street as security prior to Mr. Bazy signing it up. He also said that he explained to him that the mortgage was to cover a specified amount of “our” indebtedness towards the plaintiff bank; and that the specified amount was Le 3,000,000,000 (Three Billion Leones).

Furthermore, he explained that the indebtedness was as a result of having to pay the Anti-Corruption Commission (ACC) monies guaranteed on performance bonds and advance payment guarantees.

Under re-examination by Mr. Vandie Nabie, Mr. Ghossoub admitted that the mortgage deed was not signed by the 3<sup>rd</sup> Defendant, Centrum Company Limited; and that the indebtedness of over Le 9,000,000,000 includes interest.

### **Cross-Examination of Mr. Houssein Ibrahim Bazy**

During cross-examination Mr. Bazy informed the court that the property at 15 Charlotte Street, Freetown was vested in him by Mr. Bassam Ghossoub. He denied mortgaging the said property to the plaintiff bank neither in 2010 nor in 2013. However, in the same vein, he admitted to signing a mortgage deed for No. 15 Charlotte Street to Rokel Commercial Bank in favour of Modcon Construction Company Limited.

### **Submissions by Mr. R.S.V. Wright**

Mr. Wright argued, inter alia, that Counsel for the Plaintiff failed to show whether the Defendants were jointly and/or severally liable, since the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were companies with separate and distinct entities. He pointed out that the 1<sup>st</sup> Defendant is sued as a surety, guarantor and mortgagor and not as a principal debtor; and as such, unless it is established what the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants owe as individual companies, the liability of the 1<sup>st</sup> Defendant does not come into play, if at all.

## **FINDINGS OF THE COURT**

Firstly, I note that no evidence of an initial application to the Plaintiff bank for a loan or overdraft facility was submitted to the Court. However, on the 19<sup>th</sup> of July 2010, the plaintiff bank offered banking facilities to the tune of Le 10, 443,837,654.06 to Modcon Construction Company Limited. In other words, these two companies were given the facilities jointly, with Mr. Bassam Ghoussoub signing for both companies.

From exhibit "A" attached to the affidavit of Lemuel B. Cole sworn to on the 25<sup>th</sup> of February 2015, I note that only Mr. Bassam Ghoussoub signed the Memorandum of Acceptance attached to the offer letter from the bank dated 19<sup>th</sup> July 2010 and captioned "Banking Facilities". I also note that Mr. Ghoussoub signed for the 2<sup>nd</sup> Defendant, Modcon Construction Company Limited and the 3<sup>rd</sup> Defendant, Centrum International Company Limited.

The offer of banking facilities stated that the bank had agreed to make available the following facilities to "your group of companies"; and these facilities were:

- Modcon Construction Company Limited:
  - Overdraft Le2,000,000,000
  - Bonds & Guarantees Le7,000,000,000
  - Le 9,000,000,000 (Nine Billion Leones)
- Centrum International Limited
  - Overdraft Le1,000,000,000 (One Billion Leones)

Then, on the 8<sup>th</sup> of November 2011, Exhibit HH1-13 attached to the affidavit of Henrietta Kargbo sworn to on the 4<sup>th</sup> day of March 2016, shows that the bank agreed to make available to MODCON an overdraft of Le 2,000,000,000; Centrum International Le 1,000,000,000; and bonds and guarantees of Le 7,000,000,000; making it a total of Le 10,000,000,000 to meet operational expenses in normal course of business. The bonds and guarantees were to enable the group of companies meet prerequisites and performance requirements of contract awarding bodies.

The terms entered into were for 12 months and to expire on the 3<sup>rd</sup> of November 2012. They included: debenture over fixed and floating assets registered and stamped to cover borrowings of Le 3,000,000,000; insurance, unlimited guarantee by Bassam Ghoussoub for Modcon and Centrum; title deeds to property at 15 Charlotte Street held on simple deposit. It was signed and accepted by the Acting Managing Director, Mr. Collier and Mr. Ghoussoub for Modcon and someone else for Centrum both dated on the 8<sup>th</sup> of November 2011.

I also note that part of the terms of the banking facilities availed to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the overdraft and bonds and guarantees shall remain repayable upon demand by the bank. Also, as security for the facilities the Plaintiff bank relied on: debenture over the fixed and floating assets of the company, registered and stamped to cover borrowings of Le1,000,000,000 (One Billion Leones); charge over stock-in-trade with insurance over them to the tune of Le598,000,000 with the bank's interest noted; unlimited guarantee signed by Mr. Bassam Ghassoub for Modcon Construction Ltd and Centrum International Ltd; and title deeds to property at 15 Charlotte Street held on simple deposit, with a valued open market value of Le1.9 Billion and forced sale value of Le1.8 billion.

Furthermore, I note the other terms and conditions of the banking facilities availed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. They include: board resolutions from both companies/defendants authorizing the facilities offered; debenture over fixed and floating assets to be up-stamped to cover borrowings of Le3 Billion; letter of consent from Mr. Houssein Bazy for property at 15B Charlotte Street to be used as security for borrowings granted to Modcon Construction Company Ltd; Board Resolution authorizing the increase in debenture and for the Charlotte Street property to be used as security; and COT to continue to be charged at Le1.5 per mil.

Exhibit HH2 of the said affidavit is a Board resolution of directors the 2<sup>nd</sup> Defendant/Respondent, passed on the 11<sup>th</sup> of November 2011 approving the above limits for overdraft and bid bonds and guarantees. However, there was no signature of any director; only the company secretary and there was no company seal. Exhibit HH3 attached to the said affidavit is a Board resolution for Centrum on the 9<sup>th</sup> of November 2011 approving Le 1,000,000,000 (One Billion Leones) but there was also no signature of any director or chairman; only the company secretary and no company seal.

Exhibit HH4 attached to the said affidavit is a letter from the Plaintiff to the Anti-Corruption Commission (ACC) regarding a claim of performance bond No. 20/12; attaching a credit advice for a sum of Le 475,477,393.33 representing the balance outstanding on performance bond No 20/12 and claims from the ACC.

Exhibit HH5 attached to the same affidavit aforesaid is a Debenture list and performance bonds; Exhibit HH 10 is a letter from the Plaintiff bank to the Defendants demanding payment of Le 10,493,150,716.61 owing. It stated that the Management of the bank had been directed by the Board and the Special Debt Recovery Committee to demand payment to be made by the 7<sup>th</sup> of May 2014. Exhibit HH 11 claims on performance bond no 20/12; and letter dated 11<sup>th</sup> July 2014 to Modcon pointing out that the ACC had demanded full payment of

Le 713,216,090 and hence called up for the full sum owed, based on Mr. Ghoussoub's general indemnity dated 14<sup>th</sup> December 2012.

On the 17<sup>th</sup> of June 2016 an ex-parte notice of motion was filed by the Plaintiff for a restraining Order and injunction from disposing or removing from Sierra Leone vehicles, equipment, machinery and so on. The Order was granted by this Court.

Furthermore, the said agreement signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the 26<sup>th</sup> of July 2010, whilst the offer was made on the 19<sup>th</sup> of July 2010, expressly stated the terms including the right to repayment upon demand, the expiry date of 5<sup>th</sup> July 2011 and the cost of borrowing described as 'pricing'. The 'pricing' spelt out that the interest on overdraft borrowings will be charged to the respective accounts at 4% below the bank's prime lending rate, which was 22% per annum (i.e. effective 18% per annum).

There were other terms and conditions attached to the said agreement; and these were:

- Board Resolutions from both companies authorising request for the overdraft and bonds and guarantee limits.
- Debenture over fixed and floating assets to be up-stamped to cover borrowings of Le3,000,000,000 (Three Billion Leones).
- Letter of Consent from Mr. Houssein Ibrahim Bazy for property at 15B Charlotte Street to be used as security for borrowings granted to Modcon Construction Company Limited.
- Board Resolution authorising the increase in debenture and for the Charlotte Street property to be used as security.
- COT continues to be charged at Le1.50 per mille.

From the above stated, I deduce that the 1<sup>st</sup> Defendant/Respondent was not a party to the original offer and acceptance of the banking facilities. Also, no documentary evidence was submitted to show that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents made a request for the facilities offered. However, they entered into a written agreement with the Plaintiff bank to borrow a total sum of Le10,000,000,000 (Ten Billion Leones).

Did the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents comply with the aforementioned agreement? From the facts of the case, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants utilized the facilities that were granted to them; and the bank fulfilled its own obligations by availing the facilities as per agreement. As a result of the default in repayments, the Plaintiff suffered loss and damage.

However, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents defaulted in their repayments of the debt and interest due and owing the Plaintiff. Furthermore, a

perusal of the bank statements starting from Exhibit "B1" to "D" attached to the affidavit of Lemuel Cole sworn to on the 25<sup>th</sup> day of February 2015 and the demand letters sent to the Defendants/Respondents by the Plaintiff/Applicant bank supports this view.

### The Right to Repayment on Demand

Where an account is overdrawn, or where the bank lends money to a customer, the relationship is that of debtor and creditor and the bank is entitled to be repaid the debt in full on demand (subject to contrary provision); Williams and Glyn's Bank v Barnes [1981] Com LR 205. A particular problem may arise in relation to overdrafts and loans which are expressed to be payable on a fixed future date but in respect of which the bank reserves the right to demand repayment in full before that date.

In: Lloyds Bank plc v Lampert [1999] 1 All ER (Comm) 161 and in: Bank of Ireland v AMCD (Property Holdings) Limited [2001] 2 All ER (Comm) 894, were it was held that the agreements in question meant what they said: that the debt should be repayable on a certain future date subject to a right in the bank to demand repayment prior to that date. Thus, while there may be circumstances in which a bank may be precluded from relying upon an express right to call for immediate repayment of a fixed-term overdraft or loan, in the absence of such exceptional circumstances the bank will be entitled to rely upon the express provision of the agreement to call for immediate repayment.

In order to be entitled to repayment, the bank must make a valid demand; Joachimson v Swiss Bank Corp [1921] 3 KB 110; Thomas Cook (New Zealand) Limited v Commissioner of Inland Revenue [2005] STC 297.

### The Right to Charge Interest

Where the overdraft facility document stipulates for interest to be payable, this is usually based upon variable market rates. The validity of banks rights to charge variable interest rates was affirmed in Yourell v Hibernian Bank Limited [1918] AC 372 (HL) where the House of Lords recognized that this method of charging interest was legitimate as between banker and customer despite the compounding involved. The House regarded the debt accrued on the basis of the interest charge as accrued on the day it was debited to the account.

In National Bank of Greece S-A v. Pinios Shipping Co. (No. 1) [1990] 1 AC 637 (HL) Lord Goff of Chieveley held that the usage in question prevailed generally as 'between bankers and customers who borrow from them and do not pay the



interest as it accrues.' He said that a bank could continue to compound interest, even after a bank had demanded repayment. His Lordship also pronounced that '..... if it is equitable that a banker should be entitled to capitalize interest at, for example, yearly or half yearly because its customer has failed to pay interest on the due date, there appears to be no basis in justice or logic for terminating that right simply because the bank has demanded payment of the sum outstanding in the customer's account.'

### The Board Resolutions

The affidavit of Henrietta Kargbo, Acting Credit Analyst of the Plaintiff bank sworn to on the 26<sup>th</sup> day of November 2015 attached were resolutions submitted to the bank by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Exhibits "DD" is a letter exhibiting the board resolution of the 2<sup>nd</sup> Defendant, Modcon Construction Company Limited.

The resolution stated that, " at a meeting of the Directors held on the 22<sup>nd</sup> of June 2010 it was resolved :

- To accept offer of Rokel to increase the debenture charge over the company's fixed and floating assets from Le1,000,000,000 (One Billion Leones) and Le3,000,000,000 (Three Billion Leones) in order to secure borrowings granted to the company.
- Further to authorise Rokel Commercial Bank Limited to create a legal mortgage of Le1.89 Billion over property at 15B Charlotte Street, Freetown to secure borrowings granted to the company.

I note that they are simply letters written on behalf of the companies by a firm of corporate secretaries, with the signature of Mr. Ghoussoub appended as Chairman. I am surprised that the Plaintiff raised no questions as to the validity of these resolutions. They did not comply with Section 201(1) of the Companies Act No 5 of 2009 which states that: "all resolutions shall be passed at general meetings and shall not be effective unless so passed; but in the case of a private company a written resolution signed by all the members to attend and vote shall be as valid and effective as if passed in a general meeting.

The question that arises is: where is the guarantee from Mr. Bazy? Why did the Board resolution not state that it has authorized a Mr. Bazy to create a mortgage over his property on behalf of MODCON to the Plaintiff bank?

Also, I note that the above resolution was only signed by the Chairman and Rickdales Consultancy Limited as secretaries. Are there no other board directors and their signatures and a seal of the company? Was the Chairman the sole shareholder?

In fact, the covering letter, Exhibit DD1, prepared by the company secretary dated 28<sup>th</sup> July 2010 said that, “ it was further resolved to authorise the bank to create a legal mortgage over the company’s property at 15B Charlotte Street for the same purpose.” Which again brings into question the vesting deed executed by Mr. Ghoussoub to Mr. Bazy and the veracity of Mr. Bazy’s guarantee being supported by the mortgage of the same property to the bank. This particular transaction described here introduces some amount of conflict and ambiguity around the said property. It casts doubt on the veracity of the evidence of Mr. Ghoussoub and Mr. Bazy. There appears to be a conflict and ambiguity around this said property. I will only partially accept the proposition that the said property belongs to Mr. Bazy just from the basis of having respect for legal documents; such as the vesting deed that was executed; Otherwise I have my doubts.

Exhibit “EE” which is a letter exhibiting a Board Resolution passed on Friday the 11<sup>th</sup> of November 2011 stating that the directors have resolved to approve Rokol Commercial Bank’s renewal of MODCON’s overdraft and bid bonds and guarantees for an additional period of one year, ending on the 3<sup>rd</sup> day of November 2012. It also stated that it has resolved to approve the new limits of Le 2,000,000,000 (Two Billion Leones) for the overdraft facility and and Le 7,000,000,000 (Seven Billion Leones) for bids, bonds and guarantees. There was no signature of the Chairman nor of the board directors; except of the company secretaries.

Exhibit “FF” which is the letter exhibiting the resolution of the directors of a meeting held on the 9<sup>th</sup> of November 2011; on renewal of overdraft offered to Centrum International Group for an additional period of one year ending 3<sup>rd</sup> of November 2012 and approved amount of Le 1,000,000,000 (One Billion Leones). There was no signature of the Chairman and the directors of the board except for the company secretaries.

The debenture over the fixed and floating assets dated 2<sup>nd</sup> April 2002, which is Exhibit “E” attached to the affidavit of Lemuel Cole sworn to on the 25<sup>th</sup> of February 2015, has a schedule showing a list of vehicles and list of equipment to cover borrowing of Le 100,000,000 (One Hundred Million Leones); and Exhibit “F” a supplemental debenture dated 15<sup>th</sup> October 2005 to cover borrowing of Le 400,000,000 (Four Hundred Million Leones); and Exhibit “G” a 2<sup>nd</sup> supplemental debenture dated the 17<sup>th</sup> of May 2007 to cover Le 500,000,000 (Five Hundred Million Leones); and Exhibit “H” dated 2<sup>nd</sup> November 2010 to cover borrowing of Le 2,000,000,000 (Two Billion Leones).

## Security for the Borrowings

The security for the borrowings was a tripartite mortgage of property situated at 15B Charlotte Street, Freetown. From the Offer Letter of banking facilities dated 19<sup>th</sup> July 2010 it is evident that the bank was informed about the property at 15B Charlotte Street to be used as security for the borrowings. It is also clear that the 1<sup>st</sup> Defendant's consent was expected by the bank. So is the 1<sup>st</sup> Defendant saying that he was not aware of these discussions in 2010? ..... I also observed that the property was vested in the 1<sup>st</sup> Defendant by Mr. Bassam Ghossoub but the root or basis of the vesting was not made clear to the Court. In other words, where did the property originate from for it to be vested by Mr. Ghossoub to Mr. Bazzy?

## The Right to Repayment on Demand

There is no doubt about the fact that, where an account is overdrawn or where a bank lends money to a customer, the relationship is that of debtor and creditor and the bank is entitled to be repaid the debt in full on demand (subject to contrary provision); Williams and Glyn's Bank v Barnes [1981] Com LR 205.

What is the position of the 1<sup>st</sup> Defendant, Mr. Houssein Bazzy? Did his letter of consent amount to a guarantee? What are the essential features of a guarantee? It is a contract whereby one person (the guarantor or surety) promises to be answerable for a liability of another (the principal debtor) to a third person (the creditor or lender). The guarantor therefore assumes a secondary liability; E.P. Ellinger et al, 'Ellinger's Modern Banking Law' (2006) 5<sup>th</sup> edition, Oxford University Press; at 903.

A guarantee may simply be a personal undertaking by the guarantor, but such promise is often secured by a further charge on property owned by the guarantor; E.P. Ellinger et al (supra).

In the banking context a guarantee is usually constituted by all three parties (the creditor, guarantor and principal debtor) all agreeing that the guarantor's liability is secondary; E.P. Ellinger et al (supra) .

Unless the contract of guarantee is under seal, the guarantor's promise must be supported by consideration, which is often constituted by the creditor's action in entering into the principal transaction (e.g. by supplying goods to the principal or by the provision of financial accommodation); Ellinger et al (supra) at 905.

The guarantee will not be properly constituted, if it is stated to be given for a past consideration (such as 'an advance having been made') or if the

expressed consideration has occurred prior to the execution of the guarantee; Astley Industrial Trust Ltd v Grimston Electric Tools (1965) 109 SJ 149. The language of the undertaking must also be sufficiently promissory.

Guarantees are required to be in writing or evidenced in writing, pursuant to section 4 of the Statute of Frauds 1677, which imposes this requirement in respect of 'any special promise to answer for the debt default or miscarriage of another person'; Ellinger et al (supra) at p 905.

From the facts of the case, it appears that the creditor, that is, the plaintiff bank had entered into a principal and prior transaction with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants before the guarantor/surety, 1<sup>st</sup> Defendant came into the picture. This would amount to past consideration and which would therefore nullify the surety. I think that the 1<sup>st</sup> defendant went into the transaction without seeking independent legal advice. He spoke with the representative of the defendant companies without understanding the extent of the financial difficulties of the said defendant companies.

It is my view that he did not equate giving his consent with standing as a surety or guarantor. It was actually incumbent on the plaintiff bank to ensure that he executes a separate contract of guarantee under seal showing the terms and conditions of the promises made between the parties; and to be backed up by the consideration, which in this case, is the property at Charlotte Street.

However, from the evidence submitted to the Court, no separate contract of guarantee was shown or presented. I say this as compared to a mortgage deed which was signed by the parties; and which does not constitute a contract of guarantee. A contract of guarantee will state its own terms, whilst a mortgage, which is different from a contract of guarantee, will state its own terms. I therefore note that Mr. Bazy did not sign a separate contract of guarantee.

Assuming the 1<sup>st</sup> Defendant, Mr. Bazy, is of the view that he made a promise to the Plaintiff for the debt of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, he stated in the mortgage deed that he would be liable for up to Le 3 BN. I think that, out of an abundance of caution, the Plaintiff should have been requesting the consent of Mr. Bazy whenever they were approving additional credit facilities to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Furthermore, from the terms of the mortgage deed it is clear that Mr. Bazy signed for previous and future credit facilities availed and to be availed to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Now, it could be argued that since Mr. Bazy signed the mortgage deed he should be held liable, not just as a secondary debtor but as a principal debtor; but did he get independent legal advice before signing the

mortgage deed? Not only did he not, but he signed when most of the facilities had already been availed to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He was not a party to overdraft facilities.

I am of the view that, even if Mr. Bazy knew that he was making a promise as a surety/guarantor, he believed that he was only liable for up to Le 3 Billion and not more. I think that allowing him to sign the mortgage deed without ensuring that he receives independent legal advice was unfair; because the terms of the mortgage deed itself would have been confusing to a layman. I think he should have signed a separate contract of guarantee which would have stipulated and defined what it is and its terms and conditions. Then he could have then signed the separate mortgage deed; having had independent legal advice on both documents.

It is instructive to note that Exhibit "DD" which is attached to the affidavit of Henrietta Kargbo sworn to on the 26<sup>th</sup> of November 2015, is a letter from the Company Secretaries of Modcon Construction Company Limited stating that inter alia, the Board " further resolved to authorise the bank to create a legal mortgage over the company's property at 15B Charlotte Street for the purpose." So, the question that arises is: when did it become a property of the 1<sup>st</sup> Defendant? Why was it vested in the 1<sup>st</sup> Defendant? Was it to hide the assets of Mr. Ghoussoub or the 2<sup>nd</sup> Defendant company? Because according to the Company Secretary, the property belonged to the company.

There was no mention in the Resolutions of Mr. Bazy becoming a guarantor to the bank and the said property being put up as security by him. How is it that the same property is being used to create a legal mortgage for Le 3,000,000,000 (Three Billion Leones). Was Modcon honest with the bank in disclosing all of its assets?

Whilst Exhibit "EE" attached to the said affidavit of Henrietta Kargbo sworn to aforesaid, states that a meeting of the Board of Directors was held on the 11<sup>th</sup> of November 2011, there was no evidence of a Board approval of the Plaintiff bank's renewal of Modcon's overdraft, bid bonds and guarantees for an additional period of one year and new limits of Le 2,000,000,000 (Two Billion Leones) for overdraft and Le 7,000,000,000 (Seven Billion Leones) for bids, bonds and guarantees.

Exhibit "FF" attached to the said affidavit of Henrietta Kargbo above, is a Board Resolution of Centrum Company Limited, the 3<sup>rd</sup> Defendant, approving the offer made by the Plaintiff bank to renew an overdraft for an additional one year ending 3<sup>rd</sup> November 2012 for an amount of Le 1,000,000,000 (One Billion Leones).

Counsel for the 1<sup>st</sup> Defendant, Mr. Wright had grave doubts as to whether the Managing Director had the authorized approval level to lend Ten Billion Leones. However, Henrietta Kargbo was able to satisfy the court under oath and with documentary proof as exhibited in Exhibit "BEJ 2" that the Managing Director made a proposal on behalf of the defendants to the Board of the bank. In the proposal the names of the directors of the defendants were named as: Mustapha Zayat, Ramadan Zayat, Ziad Adel Massin, Bassam Ghoussoub, Mohamed Bazy and Hisham Mackie. The managing director of the plaintiff bank proposed that " he believed that the facilities requested will be used judiciously for the furtherance of the business and did not envisage that the bank would be exposed to any undue risk." He therefore requested the Board of the bank to consider for approval for one year, an amount of Le10,000,000,000 (Ten Billion Leones).

## **CONCLUSION**

In conclusion, this matter has more questions than answers. It has shown that the Plaintiff bank lacked a robust corporate governance system and it did not carry out its due diligence tasks as expected. The relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the bank was a cosy one; in which Mr. Ghoussoub representing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants became very complacent in his dealings with the bank and the bank vice versa.

I do not think that the 1<sup>st</sup> defendant should be held accountable. He was not part of the companies, he signed the mortgage deed after most of the debt had accumulated. The mortgage deed does not give the 1<sup>st</sup> defendant liability and it does not incriminate him. I have my doubts about why Mr. Ghoussoub at some point vested the property at 15 Charlotte Street, Freetown in him; but as a Judge, I will respect the legal document for what it is worth.

In view of the above mentioned, I make the following Orders:

1. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are jointly and severally liable for the debt owed to the Plaintiff bank to the tune of Le 10,000,000,000 (Ten Billion Leones).
2. That the Plaintiff bank is to forfeit the sum of Le 443,837,654 (Four Hundred and Forty Three Million Eight Hundred and Thirty Seven Thousand Six Hundred and Fifty Four Leones) for its negligence and lack of robust corporate governance.

3. That the 2<sup>nd</sup> Defendant, Modcon Construction Company Limited and the 3<sup>rd</sup> Defendant, Centrum International Limited do pay the sum of Le 10,000,000,000 (Ten Billion Leones) to the Plaintiff bank, Rokel Commercial Bank (SL) Limited within one month from today's judgment.
4. That in the event Order 3 is not complied with the assets covered by the aforesaid debentures, bonds and other securities are to be sold and the proceeds should be paid to the plaintiff bank.
5. The 1<sup>st</sup> Defendant, Mr Houssein Ibrahim Bazy is not liable to the bank and hence the mortgage deed is not enforceable.
6. Costs to be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant companies and to be taxed if not agreed upon.
7. Liberty to apply.

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Hon. Ms. Justice F. Bintu Alhadi J.