

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 257 of 2002

BETWEEN

**The Royal Bank of Trinidad
Tobago**

Plaintiff

And

**DEF SEC Technologies Limited,
James Andrews, Charles Andrews,
Colin Lindsay Mitchell, Peter Penny,
Gerald Major, Louis Driscoll, Oscar Waldron,
Albert Sydney and Edison Isaac**

Defendants

Before The Honourable Mr. Justice Devindra Rampersad

Appearances:

Mr. Ian Benjamin for the Plaintiff

Mr. Robin Montano for the First to Ninth Defendants

Mr. Russell Huggins for the Tenth Named Defendant

Delivered this 30th day of June 2009

JUDGMENT

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1. **BACKGROUND**

- 1.1. The Plaintiff is a limited liability company duly incorporated and authorised to conduct the business of banking under the laws of Trinidad and Tobago, with its registered office situated at No. 19-21 Park Street, Port of Spain.
- 1.2. The first named Defendant company, Def Sec Technologies Limited, was formed in or about September 1997 to provide equipment to the security industry both locally and regionally. The second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth named Defendants were all directors of the first named Defendant company. At all material times, the said Defendants were customers of the Plaintiff's Starlite Shopping Plaza, Diego Martin branch.
- 1.3. A guarantee in writing dated 8 January 1998 was executed by the tenth named Defendant in favour of the Plaintiff in consideration of the latter's dealings with the first named Defendant. The basic term of the said guarantee was that the tenth named Defendant guaranteed payment to the Plaintiff of all present and future debts and liabilities of the first named Defendant to the extent of \$50,000.00 together with interest.
- 1.4. On the 14th December 1999, a promissory note was signed by the first named Defendant along with the second, third, fourth, fifth, sixth, seventh, eighth and ninth named Defendants to purportedly secure the repayment by the first named Defendant to the Plaintiff of the sum of four hundred and ninety three thousand, six hundred and twelve dollars (\$493,612.00). The said amount secured by the promissory note was allegedly extended to liquidate the balance then outstanding in respect of a previous demand loan, current account and overdraft facilities.
- 1.5. As part of the alleged agreement in respect of the promissory note, the Defendants were to make monthly payments towards the interest on the loan and were expected to make intermittent lump sum payments towards the principal to the Plaintiff. They defaulted on such payments (the circumstances of which I shall deal with in detail later on), and by specially indorsed writ of summons, the Plaintiff claimed against the Defendants for sums

of money and interest due and payable under the said promissory note and the said guarantee.

- 1.6. The Writ and Statement of Claim were filed on 7 February 2002. On 22 February 2002, a defence was filed on behalf of the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth Defendants. On 6 March 2002, a separate defence was filed for the tenth Defendant. By court Order dated 24 November 2003, leave was granted to the Plaintiff to amend its Statement of Claim so that paragraph 5 of the same read: “ ... *the said note was endorsed by the second, third, fourth, fifth, sixth, seventh, eighth and ninth named Defendants to the Royal Bank of Trinidad and Tobago Limited and the second, third, fourth, fifth, sixth, seventh, eighth and ninth named Defendants thereby jointly and severally guaranteed and /or are liable as indorsers for the payment of the full value of the said note to the Plaintiff.*”

2. **The Plaintiff’s Claim**

- 2.1. The Plaintiff seeks judgment in the sum of six hundred and eighty six thousand, one hundred and twenty six dollars and seventy nine cents (\$686,126.79) against the first Defendant and also makes a claim for judgment in the same sum as against the second, third, fourth, fifth, sixth, seventh, eighth and ninth named Defendants, both with interest on the sum of four hundred and ninety three thousand, six hundred and twelve dollars (\$493, 612.00) at a rate of 18.5% per annum (being minimum rate plus 4%) from 23 January 2002 to the date of payment.
- 2.2. As against the tenth named Defendant, the Plaintiff seeks the sum of fifty thousand dollars (\$50 000.00), together with interest thereon at the rate of 17.5% per annum (being prime lending rate plus 3%) from 24 January 2002 to the date of judgment.
- 2.3. The debt is alleged against the Defendants as follows:
 - 2.3.1. As to the first Defendant, being monies due and owing under the said promissory note dated 14 December 1999 and which was made by the first Defendant in the Plaintiff’s favour.

- 2.3.2. As to the second, third, fourth, fifth, sixth, seventh, eighth and ninth named Defendants as endorsers and/ or guarantors in respect of the first Defendant's indebtedness under the said promissory note.
- 2.3.3. As to the tenth named Defendant, being monies secured by the guarantee in writing made on 8 January 1998 in respect of the first Defendant's indebtedness to the extent of \$50,000.00.
- 2.4. The Plaintiff contends that by letter dated 23 June 2000, payment of the sum due and owing was demanded from the first Defendant but same remains outstanding. The Plaintiff also contends that the first through ninth named Defendants were given notice of the said demand by letter dated 23 June 2000, yet the sum remains unpaid. Moreover, the Plaintiff alleges that the tenth named Defendant has failed to pay the amount due under the terms of the guarantee, despite a demand letter dated 24 January 2002 of similar purport.
- 2.5. The Plaintiff also seeks its costs and any further relief which the Court deems fit.

3. Defence of the First through Ninth Named Defendants

- 3.1. Mr. Montano appeared for the first through ninth named Defendants, and contended on behalf of the first Defendant that the promissory note in question was made for and in consideration of the Plaintiff continuing to deal with and to grant banking facilities to the first Defendant. However immediately after the said promissory note was made, the Plaintiff closed the accounts of the first Defendant and refused to grant said banking facilities. In the premises, it was alleged that the consideration for the promissory note having wholly failed, the first Defendant is not liable thereon to the Plaintiff.
- 3.2. The argument on behalf of the second through ninth named Defendants is that since the consideration on the promissory note failed as aforementioned, the said Defendants are consequently not liable to the Plaintiff as endorsers and/ or guarantors of the said note.
- 3.3. On behalf of these Defendants, Mr. Montano also put forward an argument in the alternative, that the promissory note was given for a consideration that was past, and hence such consideration had wholly failed. He maintains that the first through ninth named Defendants are not liable to the Plaintiff on the promissory note.

3.4. It is notable that the defence did not raise the issue of whether or not a demand had been made so that even though there is **no evidence before this court** of such a demand, the issue does not arise on the pleadings of these Defendants and it seems to have been generally accepted that such a demand was made. In fact, these Defendants did not submit that there was no demand and so this issue is not a live one.

4. **Defence of the Tenth Named Defendant**

4.1. Mr. Huggins who appeared for this Defendant pleaded estoppel on the guarantee in that the tenth named Defendant believed that the Plaintiff had released him from his obligations under the said guarantee and he was therefore not liable thereon. This Defendant did not admit the demand under the promissory note but, in light of the other Defendants' position and the manner in which the matter was conducted, it has to be that the other Defendants, having accepted the issue of the demand and they having been actively involved in the company's business at a time when he was not, this issue is rendered settled. This leads the Court to an acceptance of the remaining Defendants' position that a demand was made under the promissory note. In any event, this Defendant accepted at paragraph 11 of his witness statement that demand was made of him under the guarantee by letter dated the 24th January 2002.

5. **The Witness Statements and evidence for the Plaintiff:**

5.1. ***Sharon Hinds:***

5.2. At the material time, Ms. Hinds says that she was the Branch Manager at Sangre Grande and then of the Starlite Shopping Plaza, Diego Martin offices of the Plaintiff. She does not say when she became the Branch Manager at Diego Martin but she does acknowledge that she came there after the promissory note was signed on the 14th December 1999.

5.3. She detailed the conditions under which the loan was secured by the promissory note and stated that the loan was to run over a period of ten years at an interest rate of 4% above the Plaintiff's minimum lending rate which was 16.5%, thus making a loan rate of 20.5%. The interest was to be repaid monthly with lump sums of the principal to be repaid

intermittently, and should the loan fall into arrears, then demand for full payment would be made. She indicated in cross examination that this money was used to consolidate the first Defendant's existing debts i.e. the first Defendant's existing overdraft, demand loan and credit card were to be paid off from these funds and replaced with a new facility with a fixed repayment schedule. This was not challenged at all in cross examination and it was never suggested to her that no such arrangement was ever agreed upon.

- 5.4. There was also a guarantee made out by the tenth named Defendant to the Plaintiff in the sum of fifty thousand dollars. (\$50 000.00)
- 5.5. The loan granted in December 1999 fell into arrears in that no interest payments were made. As a result, letters were sent to the Defendants dated the 3 March 2000 and 22 March 2000.
- 5.6. The letter of the 3 March 2000 was sent to all of the Defendants.
- 5.7. There was no written or other response to this letter other than the payment of \$10,000.00 towards the outstanding interest on the 10th March 2000.
- 5.8. The letter of the 22nd March 2000 was sent to the first to ninth named Defendants inclusive, acknowledged receipt of the said payment, and also indicated that there was a balance of \$7,132.21 due on the outstanding interest and called upon them to pay off that sum before 1st April 2000 when a further \$8,570.78 in interest became due.
- 5.9. By letter dated 24 March 2000, Ms. Hinds wrote to the tenth named Defendant informing him that in her previous letter of 3 March 2000, she had incorrectly described him as one of the endorsers of the promissory note for which she apologised, and as well, acknowledged that he was no longer associated with the first Defendant.
- 5.10. She stated in evidence that the Plaintiff's claim against the tenth Defendant is based upon the guarantee, and not the promissory note.
- 5.11. In fact, she made no reference to such guarantee in her letter dated 24 March 2000 to the tenth named Defendant.

5.12. **David Christo**

5.13. Although a witness statement was filed on his behalf in respect of the Plaintiff, he did not attend for cross examination and his witness statement was not used.

5.14. **Paul Popplewell**

5.15. An application was made **on the morning of the trial** to obtain leave to file and serve a witness statement in respect of Mr. Popplewell on behalf of the Plaintiff. This application was filed on the 20th January 2000 – almost 2 months after the date of the 26th November 2008 prescribed for filing and serving witness statements. The accompanying affidavit by the Plaintiff's instructing attorney did not explain the reason for the non compliance with the previous court's direction and what little facts were stated therein failed to provide sufficient information for the court to exercise its discretion to allow the extension and so this application was refused. As a result, no evidence was allowed in relation to Mr. Popplewell.

6. **The Witness Statements and evidence for the Defendants:**

6.1. **Louis Driscoll**

6.2. He said that:

6.2.1. At the material time, he was a shareholder and one of two executive directors of the first named Defendant company (the other was James Andrews – another witness who gave evidence).

6.2.2. The company had a lot of good contracts and was capable of getting good business, but was hamstrung by lack of capital and was hampered by the fact that payments were not always received in a timely manner. Also, the lead time on some of the orders were extremely long so their indebtedness continued to grow.

6.2.3. From January to August 1999, several loans were obtained from the Plaintiff bank with an overdraft of about \$250,000.00.

- 6.2.4. By December 1999, the Defendants' total debt to the Plaintiff was about \$500,000.00. As a result of a request to come in to the Plaintiff bank, Mr. Driscoll and Mr. Andrews went to meet one Mr. Popplewell, who told them that:-
- 6.2.4.1. The company's various loans with the Bank were "*most untidy*";
 - 6.2.4.2. The first Defendant and the Plaintiff had to get things straightened up if they wanted to continue doing business;
 - 6.2.4.3. He would put everything under one loan to be secured by a promissory note to be signed by all of the Defendants to guarantee that loan;
 - 6.2.4.4. If the Defendants refused or did not do this, he would have to shut down the Company's loan facilities.
- 6.2.5. Mr. Andrews says that he directly enquired of Mr. Popplewell whether the Bank would continue to extend credit to the Defendants if they signed the note, and he replied in the affirmative.
- 6.2.6. On 14 December 1999, the second through ninth named Defendants returned to the Bank to sign the note. However before the note was signed, Mr. Driscoll in everyone's presence asked Mr. Popplewell "how was this going to operate?" This was to allow the others to hear directly from Mr. Popplewell what the arrangement would be. Mr. Popplewell's response was:-
- 6.2.6.1. This loan was going to be put to one side and that separate terms for paying it off would have to be established
 - 6.2.6.2. In the meantime, the Defendants would be allowed to do business as usual;
 - 6.2.6.3. If the Defendants did not sign, the bank would have to pull the plug on the Defendants.
- 6.2.7. The Defendants understood this to mean that the signing of the promissory note was the consideration for credit facilities.
- 6.2.8. A few days later, Mr. Driscoll was astonished to learn that the Defendants' cheque for two months rent had bounced.

- 6.2.9. They were never informed by the Plaintiff that their account had been frozen.
- 6.3. In cross examination, Mr. Driscoll said that Mr. Andrews was responsible for the finance aspect of the company. He admitted that the bank's credit was used to finance the first named Defendant's operations. Strangely, even though he agreed that insolvency means the inability to settle current liabilities, he would not agree that the company was insolvent even though he admitted in cross examination that:-
- 6.3.1. There was a clear excess of current liabilities over current assets in the financial statements which were tendered as "JA 1" and which were shown to him.
- 6.3.2. By the 31st of December 1999 they had no money;
- 6.3.3. They were "*in a deep deep hole*";
- 6.4. In cross examination, Mr. Driscoll said that at the first meeting he had with Mr. Popplewell, it was not clear what Mr. Popplewell wanted to do. That however flies in the face of what he said in his witness statement which was that Mr. Popplewell wanted to put everything under one loan and that all the Defendants would have to sign a promissory note guaranteeing that loan otherwise the Bank would have called in the debt owing at that time. His evidence in cross examination was rather telling when he said that:
- 6.4.1. He did not know if the existing liabilities had been paid off – this seems rather difficult to believe because as a director, he ought to have been aware of what had happened to those liabilities.
- 6.4.2. He did not understand the promissory note to be a loan but went on to say that the promissory note was used to secure the debt at the time especially since Mr. Popplewell specifically said that "everything" would be put under one loan.
- 6.4.3. He acted on the letter from the bank dated 3rd March 2000 by paying \$10,000 on account of the interest which was outstanding up to that date in relation to the loan granted in December of 1999 and which was specifically referred to in the reference section of the letter of the 3 March 2000.
- 6.4.4. He was not surprised when he received the letter dated 22 March 2000 -- this letter again referred to the loan account and outstanding interest and, very importantly, referred to another interest payment becoming due by 1 April 2000 which suggests

to me that there was some acknowledged arrangement for the payment of interest on the outstanding principal on a monthly basis.

6.4.5. The amount of the principal and outstanding interest due and owing as at the 14th December 1999 was consistent with the amount on the promissory note.

6.5. Mr. Driscoll went on in cross examination to say that to place an order for a supply the Defendants needed a credit facility and no such facility was available, yet he did not go on to say whether, in fact, the Defendants received any orders which they were unable to meet because of the lack of the credit facility.

6.6. **James Andrews**

6.7. Mr. Andrews is a retired journalist and at the material time, he was a shareholder and director of the company. In fact, he was the founder of the company which he started in or about September 1997.

6.8. Mr. Andrews' statement was, in effect, similar to the witness statement of Louis Driscoll above.

6.9. He further re-emphasised that at all material times, the Defendants understood that they would be allowed to continue doing business with the bank.

6.10. Indeed he said he would never have signed the promissory note, nor would he have encouraged the others to do so, if he had known that the bank was going to put a freeze on their account and not allow them to withdraw monies from it. There is no evidence of him encouraging anyone to sign any document however.

6.11. The bank never told the Defendants that they were closing down the account. About 5 days after signing the promissory note, Mr. Andrews learnt that a cheque he had written for rent had bounced.

6.12. Believing that the bank had bounced the cheque in error, he called the bank and spoke to Mr. Popplewell who told him, "*I want you to return all your cheque books and the deposit books which you have in your possession.*"

- 6.13. He believed that Mr. Popplewell had tricked him and the other Defendants into signing the promissory note.
- 6.14. The promissory note which he had signed along with the other Defendants referred to the debts that the company had already created with the bank. No new business was done with the bank and no new facilities were ever granted.
- 6.15. In cross examination, Mr. Andrews gave the following evidence:
- 6.15.1. He did not agree that the first named Defendant was not up to date in the servicing of the account but he did agree that the first named Defendant had difficulty in recovering its receivables, as a result of which he had to increase his borrowing from time to time.
- 6.15.2. He agreed however that when he and Mr. Driscoll went in to meet Mr. Popplewell, the loans and overdraft were in an unsatisfactory state.
- 6.15.3. He then claimed that he did not know if the promissory note took the place of the demand loan and other overdraft facilities from the Plaintiff. However, later on in his cross examination, when it was suggested to him that the promissory note loan paid off the overdraft facilities and demand loan, his response was:- "*It appears that's what happened*". When pressed by the Plaintiff's attorney to say that that appearance was confirmed by the accounts, he said that he did not know and he could not say. He then said that the purpose of the promissory note was not to pay off those facilities. Quite remarkably, he did say however that the loan secured by the promissory note was **in addition** to the overdraft and demand loan. Later on in cross examination he denied that the purpose of the promissory note was to consolidate the pre-existing liabilities. Further, he did not agree that Mr. Popplewell told him that by signing the promissory note everything would be put in one loan but later on in his cross examination, he agreed that the liabilities were put into one loan.
- 6.15.4. He could not say if his company had the ability to finance the demand loan, the overdraft facility, the credit card and the loan secured by the promissory note.

- 6.15.5. He did not recall signing the Personal Credit Application Form. When he was shown the document, he admitted that his signature was on it but that he was given a blank paper to sign and was told that "they" would put in the details. He maintained that there was nothing written on the said paper when he signed it, and when asked why he never mentioned that in his witness statement, he replied that the issue never arose.
- 6.15.6. He admitted that he did not mention anything about a proposed \$2,000,000 contract which was being negotiated in his witness statement. The proposed contract seems neither to have been mentioned to Mr. Popplewell. In cross-examination however, Mr. Andrews said he hoped that the contract would come through and provide him with funds to clear off the liabilities.
- 6.15.7. He denied knowing that Mrs. Hinds had given a witness statement in this matter and said that he did not hear a word she had said in her cross-examination that very day.
- 6.15.8. Despite the payment of \$10,000 in March of 2000 toward the outstanding interest as requested by the Plaintiff in its letter of 3 March 2000, Mr. Andrews denied that his company was servicing the promissory note facility.
- 6.15.9. He admitted in cross examination that the Plaintiff did not call upon him to service any other facility than the loan secured by the promissory note, and also admitted that when he signed the promissory note, he knew that the amount due by the company to the Plaintiff at that time was the same amount that was mentioned in the promissory note.
- 6.15.10. He said that after 14 December 1999 if the money went into the company's current account, the company was not able to use it. He did not agree with the Plaintiff's attorney that that suggestion did not make any sense.
- 6.15.11. He said that he was not aware that the loan secured by the promissory note required him to pay interest only or that he could pay lump sums as the company went along its business.

6.15.12. He denied the suggestion that in accepting the loan secured by the promissory note the company was replacing the earlier loans with that promissory note.

6.15.13. He said that the Defendants were supposed to go back to discuss the terms of the loan secured by the promissory note but that was never mentioned in his witness statement or by any other person. None of them ever went back to discuss the arrangements.

6.16. **Albert Sydney**

6.17. At the material time, he was a shareholder and non-executive director of the company.

6.18. His statement confirms that of Louis Driscoll and James Andrews above.

6.19. In cross examination:-

6.19.1. He at first said that he not understand what he was signing when he signed the promissory note, and could not remember if he read it before signing it. He did not ask the fellow members of his company or Mr. Popplewell to explain it to him before he signed it. He also said that no one else asked what the promissory note meant.

6.19.2. He then acknowledged that when he signed the promissory note, he understood that all of the accounts would be brought together and consolidated and that, specifically, the overdraft, the demand loan and the credit card were consolidated into the loan secured by the promissory note. He accepted, unlike the others, that the principal on the loan would be paid from time to time as and when the company received the proceeds of sale from its business and that the Plaintiff only wanted its interest on a monthly basis in the meantime and that as long as the interest was paid the relationship was good.

6.19.3. He accepted that Mr. Popplewell made it clear that they could continue to use the current account but that they would have no overdraft on it.

6.19.4. Like the others who gave evidence, Mr. Sydney did not accept that the company was insolvent by the end of 1998 and he admitted that he never mentioned anything in his witness statement about the proposed sizable amount of business which was being negotiated.

6.19.5. Unlike the others, he said that that sizable amount of business most definitely would have been secured.

6.19.6. He said that the tenth named Defendant spoke to him and indicated that he had resigned and that when he received the letter of resignation, he gave a copy to the other director and chairman Mr. Gerald Major.

6.20. Edison Isaac

6.21. In 1997, he was invited to become Chairman of the First Named Defendant company.

6.22. On 14 December 1999, the said company secured a loan from the Plaintiff in the sum of \$493 612.00, which was to be repayable over a ten year period. The loan was to be secured by a promissory note and by guarantee.

6.23. By this note, the second through ninth named Defendants promised to pay on demand to the Plaintiff the said sum of \$493 612.00.

6.24. On 8 January 1998, Mr. Isaac signed a Guarantee and Postponement of Claim in the sum of \$50 000.00.

6.25. In about January 2000, he tendered his resignation as Chairman of the First Named Defendant company.

6.26. That same month he informed Miss Sharon Hinds of the Plaintiff bank of his resignation, and requested that he be relieved of his liability as guarantor under the guarantee. Ms. Hinds assured him that he would be so relieved.

6.27. Thus, acting on the faith of the undertaking given by Ms. Hinds, Mr. Isaac was of the opinion that he was no longer liable under the guarantee.

- 6.28. By letter dated 3 March 2000, the Plaintiff demanded full payment of the loan under the promissory note from the first named Defendant. Mr. Isaac was surprised when the said letter was copied to him along with the second through ninth named Defendants.
- 6.29. On receipt of said letter, he contacted Ms. Hinds and reminded her of her previous assurances that he would be discharged of any liabilities under the guarantee.
- 6.30. By letter dated 24 March 2000, Ms. Hinds apologised for copying the previous letter of 3 March 2000 to Mr. Isaac, and re-emphasised the understanding that he was no longer associated with the first named Defendant.
- 6.31. He thoroughly believed he was released from all liabilities.
- 6.32. By letter dated 24 January 2002, a demand of \$50,000.00 under the guarantee was made by the Plaintiff's attorneys to Mr. Isaac. Prior to receiving this letter, he had not been associated with the first named Defendant for a period of two years.
- 6.33. In cross examination he admitted that he never mentioned in his witness statement that he had resigned in writing and he also admitted that there was no evidence before this Court of any written letter indicating his resignation.
- 6.34. He also accepted that there was not one letter addressed to the Plaintiff asking for relief from his guarantee nor, in fact, was there any written letter to the Plaintiff whatsoever from him. Further, despite receiving a letter from attorneys for the Plaintiff bank on 24 January 2002, he never responded thereto in writing.
- 6.35. He accepted that the letter of 24 March 2000 from the Plaintiff made no reference to the guarantee that he had signed.
- 6.36. In cross examination he mentioned that he knew that negotiations were fairly well advanced for a big contract and the detail was \$2.2 million to \$2.5 million.

7. **THE ISSUES:**

- 7.1. The issues, as I see it, are quite narrow and largely based on the facts of the case.

8. **The first through ninth named Defendants:**

- 8.1. What, if any, consideration arose on the promissory note?
- 8.2. In particular, did the Plaintiff close the first Defendant's accounts immediately after the promissory note was made and did the Plaintiff refuse to grant any banking facilities at all to the first Defendant?
- 8.3. Can the Defendants rely on an alleged trickery of the Plaintiff as set out in their witness statements when in fact this was not pleaded?

9. **The tenth named Defendant:**

- 9.1. Whether this Defendant was released by the Plaintiff of his liability to the extent of \$50,000.00 on the guarantee?
- 9.2. Whether the Plaintiff is therefore estopped from enforcing the said guarantee?

10. **THE LAW**

- 10.1. **The first through ninth named Defendants:**
- 10.2. These Defendants' pleadings fundamentally rested on the contention that they understood the consideration for the promissory note to be the provision of continued banking facilities from the Plaintiff to finance the first Defendant's business. Such continued banking facilities never came to fruition and as a result, the consideration on the promissory note failed.
- 10.3. Mr. Benjamin on behalf of the Plaintiff argued that the consideration for the note was the refinanced demand loan, current account and overdraft facilities that were consolidated under one facility- the promissory note - to be repaid over a ten year period with interest

attached. Therefore, in effect, what the Defendants received for promising to repay their outstanding loan was a further grant of time to so do.

10.4. It must be remembered that as a general principle, in order for a promise to be binding, it must either be made by deed or supported by “consideration”: **Chitty on Contracts**, 29th ed. (2004) Vol.1, paras. 3-001.

10.5. Since the allegation concerns consideration, the following pronouncement by Lord Denning M.R. in **Fielding and Platt Ltd. V. Selim Najjar [1969]** 2 All ER 150 at 152 is instructive:

“We have repeatedly said in this court that a bill of exchange or a promissory note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary, e.g. if there is an arguable case based on total failure of consideration.”

10.6. This principle I conceive to be a well established one.

10.7. The defences therefore available on a claim on a bill of exchange or promissory note are limited. These have been specified as traditionally being “*illegality, fraud, duress, failure or absence of consideration, satisfaction of the bill or note, material alteration or non est factum*”: **Gokool v Ibemerum** et al, (unreported) HCA 1142 of 1998 per Stollmeyer J at page 12.

10.8. The Defendants’ allegation of failure of consideration is not one to be treated lightly, as bills of exchange and promissory notes are presumed to stand upon the basis of a valuable consideration. Thus in the absence of valuable consideration, an action on an instrument, as on any simple contract, will fail: **Halsbury’s Laws of England, Vol. 4 (1) 4th ed. Reissue at para. 379- 380.**

10.9. Such consideration is defined by **section 27 (1) of the Bill of Exchange Act, Chap. 82:31** (hereinafter called the Act) as follows:

(1) Valuable consideration for a bill may be constituted by:

(a) any consideration sufficient to support a simple contract;

(b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

- 10.10. It is to be noted that under **section 89 of the Act**, the provisions therein relating to bills of exchange apply with the necessary modifications to promissory notes. What then is a promissory note? **Section 83 of the Act** reads as follows:
- “83.(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.”*
- 10.11. That stated, I shall now examine the evidence before me on this issue of failure of consideration.
- 10.12. The unchallenged evidence of Ms. Sharon Hinds is that the promissory note was made out to secure the Defendant’s outstanding loan of four hundred and ninety three thousand, six hundred and twelve dollars (\$493, 612.00) and was granted to refinance a previous demand loan, current account and overdraft facilities.
- 10.13. Ms. Sharon Hinds of the Plaintiff bank came on board the “Def Sec” file after the fresh loan by way of the promissory note was granted and confirmed that *it was a consolidation of existing debts*. Mr. Montano in cross-examination asked Ms. Hinds whether in fact the loan was a conversion from the Bank of monies already lent, to which she duly replied in the affirmative. He then asked whether her only knowledge of any consideration given was gained from documents in the file, to which she again replied in the affirmative.
- 10.14. Mr. Montano made much of this evidence from Ms. Hinds, but to my mind, all it does is lend credibility to the Plaintiff’s case that the consolidation of the Defendants’ heavy debts was in itself valuable consideration.
- 10.15. This brings to bear Mr. Montano’s argument in the alternative (which I shall now deal with), that the consideration was past, and therefore not valid.
- 10.16. The very fact of an antecedent debt or liability constitutes valuable consideration according to **section 27 (1) (b)** of the Act. **Byles on Bills of Exchange and Cheques**, 28th ed; para. 19-012 states that the said section *“provides for an exception to the ordinary rules as to consideration, by providing that past consideration is acceptable as “valuable consideration.”*

- 10.17. This view is confirmed by Evershed M.R. in **Oliver v. Davis [1949] 2 K.B. 727 at 735** thus:
- “The proper construction of the words antecedent debt or liability in paragraph [27 (1)] (b) is that they refer to an antecedent debt or liability of the promisor or drawer of the bill and are intended to get over what would otherwise have been prima facie the result that at common law the giving of a cheque for an amount for which you are already indebted imports no consideration since the obligation is past and has already occurred.”*
- 10.18. The clear evidence of James Andrews and Louis Driscoll was that they were informed by Mr. Paul Popplewell that the Defendants’ account was in an unsatisfactory state and needed to be "tidied up", meaning that all of the loans would be consolidated and put into one to be secured by the promissory note and that, if they failed to sign the note, the bank would "pull the plug" on them.
- 10.19. In the business of financing transactions, it is expected, and indeed reasonably so, that creditors safeguard their loans by securing repayment thereof: **Gookol** at page 23. In this case, the Plaintiffs did so by way of the promissory note whereby the Defendants’ existing debts were consolidated into a fresh loan. Without it, the Defendants would have been called upon to settle the outstanding liabilities as the bank would otherwise have "pulled the plug" and they would not have been able to continue business at all after that.
- 10.20. This past consideration (antecedent debt) amounted to valuable consideration within the meaning of **section 27 (1) (b)** of the Act.
- 10.21. The Defendants’ argument in the alternative must therefore fail.
- 10.22. Having determined (1) the existence of an antecedent debt and (2) that such debt constituted valuable consideration, the Defendants’ primary line of defence becomes moot. I shall however discuss it as it raises some points of general importance.
- 10.23. The primary defence is that the promissory note was made for and in consideration of the Plaintiff continuing to deal with and to grant banking facilities to the first Defendant but that the Plaintiff closed the first Defendant’s account with the Plaintiff immediately after the promissory note was made and refused to grant any banking facilities at all. As a result, the consideration had wholly failed. In essence, what these Defendants seem to be saying

is that without the continued line of credit which the Defendants expected to receive upon signing the promissory note, it cannot be said that any consideration was provided on the note, and therefore the Defendants cannot be thereon liable to the Plaintiff.

10.24. To come to a finding on this issue, it is necessary to look at the evidence of these Defendants in detail.

11. **The court's analysis of the evidence of Louis Driscoll, James Andrews and Albert Sydney:**

12. Mr. Driscoll's evidence as to what happened in the presence of Mr. Popplewell on 14 December 1999 was as follows:-

12.1. This loan was going to be put to one side and that separate terms for paying it off would have to be established

12.2. In the meantime, the Defendants would be allowed to do business as usual;

12.3. If the Defendants did not sign the bank would have pulled the plug on the Defendants.

13. This is a clear indication that the bank intended to put an end to the continued advancement of monies which had been going on prior to that date and for which there was insufficient security. As Mr. Driscoll said, if they did not sign, the bank would have pulled the plug on the Defendants. What that means to my mind is that the existing arrangement which had been agreed under one Mrs. Pinder – Mr. Popplewell and Mrs. Hinds' predecessor - was, as he agreed in cross examination, unsatisfactory and if that arrangement was not regularised or, in the words of Mr. Popplewell, "tidied up", the bank would have stopped the Defendants' accounts, called in the outstanding balances and demanded payment at that time. If they had so done, the Plaintiff could only have sued the first Defendant in respect of the debt and the tenth Defendant on the guarantee because there was no existing guarantee in respect of the second to ninth named Defendants. However, by pursuing this new approach, both parties were likely to benefit. The Plaintiff would have obtained a guarantee for the outstanding amount and the first Defendant would not have been called upon to pay the outstanding balance at that time thereby allowing the postponement of the repayment of the debt under the terms and conditions mentioned by Ms. Hinds and the first named Defendant and its directors. The Defendants would therefore have been able to carry on business

and so have a chance at making a profit and becoming successful. There was therefore an element of forbearance by the Plaintiff in relation to the first named Defendant's liabilities at that time.

14. In relation to Mr. Driscoll's evidence in chief, he did not mention that on 14 December 1999, Mr. Popplewell said directly that the Defendants would be allowed to continue operating and continue to get credit. Mr. Driscoll's evidence is that they would be allowed to do business as usual. The meaning of the words "as usual" was not explained but he seemed to go on to say in his statement that the first through ninth named Defendants understood that the signing of the promissory note was the consideration for continued credit facilities. That understanding however does not follow from his evidence as to what Mr. Popplewell said previously and it is clear that the stated intention of Mr. Popplewell in respect of the signing of the promissory note was to prevent the bank from "pulling the plug" on the Defendants by tidying up the account.

15. **The alleged major account for \$2,000,000:**

16. No mention was ever made of this alleged account in any of the Defendants' witness statements. This is extremely strange since this was a consideration which, if it were true, would have given the bank hope that the existing liabilities would be liquidated from the proceeds of this account. It also would have been instrumental in any decision-making process in which the bank would have had to engage, in considering how best to treat with this outstanding debt. No reason was given as to the failure to mention this very important fact in any of the witness statements. No document in relation to this alleged proposed major account was produced in evidence and these allegations were not substantiated in any way by any contemporaneous document whatsoever to lend credibility to this very important prospect of future business. In those circumstances, it seems to me that such a major account was not in fact in the contemplation of the parties and I therefore reject it as having been in any way significant at the material time. Its relevance goes to the whole state of mind of these witnesses for the Defendants at that time and to their credibility and I do not accept that they were truthful in this regard.

17. **The lack of further credit facilities**

18. One would have expected that if an order was received and the Defendants were unable to meet that order after 14 December 1999, this state of affairs would have been promptly brought to the Plaintiff's attention since the promised credit facility which the Defendants understood would be continued when they met in December 1999 was no longer available. Very early on therefore, the Defendants could have disputed the understanding of 14 December 1999 meeting with the Plaintiff if in fact there was a conflict. However, no evidence of such a dispute or complaint was made until the filing of this action. Instead, the Defendants ratified the arrangement when, upon receiving the letter of the 3 March 2000, they proceeded to make a payment towards the interest thereby acknowledging an arrangement to pay on the loan secured by the promissory note.

19. **What happened to the liability which was existing at 14 December 1999? Did the Plaintiff close the Defendants' accounts?**

19.1. **Louis Driscoll -- the court's impression of his evidence**

19.2. Mr. Driscoll impressed this court as being an evasive witness and this is exemplified from the following exchange with counsel for the Plaintiff:

Q:- The current account was not closed?

A:- I am not sure

Q:- I suggest the overdraft was closed and withdrawn and paid off

A:- I do not understand the question.

Q:- The overdraft was paid off, correct?

A:- I do not follow. I am not sure

Q:- After December 1999 neither you nor any other Defendant received any communication in respect of the overdraft did you?

A:- To the best of my knowledge

Q:- The bank would write to you when it wanted money, correct?

A:- Correct

Q:- The demand loan from Mrs. Pinder was paid off?

A:- *I do not know. The term "paid off". I do not know if the demand loan was paid off. I did not receive any letter with respect to the demand loan from the bank after December 1999.*

Q:- *The credit card was paid off?*

A:- *I do not know.*

19.3. It strikes me as rather odd that this Defendant would suggest that he did not understand a simple question which, in this court's view, was rather uncomplicated and direct. Further, as executive director of the Defendant company, Mr. Driscoll was in a position, and ought to have known if these loans/facilities and the credit card facility were paid off and yet he found great difficulty in accepting that they were so liquidated out of the proceeds of the loan secured by the promissory note.

19.4. **James Andrews -- the court's impression of his evidence**

19.5. Mr. Andrews was also evasive and, in this court's view, untruthful in his evidence. Like Mr. Driscoll, his evidence in chief was that at the initial meeting with Mr. Popplewell, Mr. Popplewell specifically said that all of the existing liabilities would be put into a loan and secured by a promissory note. Yet, both he and Mr. Driscoll refused to accept that in fact those loans and other liabilities which existed on 14 December 1999 were liquidated with the proceeds of the loan which was secured by the promissory note and which loan was referred to in the bank's letters of the 3 March 2000 and 22 March 2000.

19.6. Mr. Andrews seemed to flip-flop back and forth when it came to the purpose of the promissory note. In his witness statement he gave evidence as to its purpose as defined by Mr. Popplewell yet in cross examination even though he admitted that it appeared that the promissory note loan paid off the overdraft facilities and demand loan, he shortly after denied that that was the purpose of the promissory note loan. It is quite instructive that Mr. Andrews recognised that the amount stated on the promissory note was the exact amount due and owing to the Plaintiff at that time under the previous arrangement and facilities. What else then could this promissory note loan have been for? What seemed rather contradictory was, despite his evidence in his witness statement that

19.6.1.1. Mr. Popplewell would put everything under one loan to be secured by a promissory note to be signed by all of the Defendants to guarantee that loan;

19.6.1.2. If the Defendants refused or did not do this, he would have to shut down the Company's loan facilities.

when asked if Mr. Popplewell told him that by signing the promissory note everything would be put under one loan, his response was that "*that is not quite what he said*". He finally reverted in cross examination to the position that all of the liabilities were in fact put into one loan.

19.7. Incredibly, he said that this promissory note loan was in addition to the overdraft and demand loan. This could not possibly be the case as it seems unbelievable that the bank would extend further facilities to a customer who had already incurred a debt far in excess of what was previously agreed and who did not seem to have any ability to meet its obligations.

19.8. A further remarkable portion of his evidence was that even if the money went into the company's account after 14 December 1999, the company was not able to access that money. This, however, was not corroborated by any piece of evidence whatsoever – as for example, by providing to the court, the Defendant company's bank statements along with cheques which may have been returned as a result of the bank's deliberate decision not to allow them access to their current account.

19.9. Further, Mr. Andrews, like Mr. Driscoll, found great difficulty in agreeing that the company was insolvent. When asked if the balance sheet showed that the company was insolvent, his response was that he was not a lawyer so he could not say and that by looking at the balance sheet he could not confirm that the company was insolvent. Yet, as Mr. Driscoll pointed out, he was the man in charge of finance and he ought to have known the financial position of the first named Defendant and, despite attorney for the Plaintiff going through, in detail, the financial statements which were put into evidence, Mr. Andrews remained unwilling to accept the Defendant company's insolvency.

- 19.10. His position as the person in charge of finance also put into question his response in cross examination as to his inability to say if the company could have financed the demand loan, overdraft facility, credit card and a new loan secured by the promissory note which would have amounted to a debt of about \$1,000,000 -- it was clear that the company could not have done so as it was already unable to service its existing liabilities much less for any further liability. His attempt to evade that reality speaks volumes as to how far he was willing to go in this matter and in his evidence to avoid the liabilities which were plainly incurred.
- 19.11. The court also asks itself why the proposed \$2,000,000.00 contract was never mentioned in the witness statement when this clearly would have been a material fact which would have influenced this entire transaction. Further, why was no real evidence provided of this alleged transaction?
- 19.12. Again, in cross examination, Mr. Andrews denied that he knew that Ms. Hinds had given a witness statement in this matter. This seemed rather strange to me especially since that statement was filed since 26 November 2008 and annexed to it, were the documents which the Plaintiff was seeking to rely upon in proof of its case before this court. Mr. Andrews' allegation that he did not hear Ms. Hinds' evidence was also rather startling especially since it was clear that she was to be the only witness for the Plaintiff. One would have expected him to be anxious to hear what she had to say in the box since her evidence would have been crucial to the Plaintiff's case and what she had to say in the box could have been challenged if it were not true.
- 19.13. The court finds it hard to believe Mr. Andrews' assertion that he did not mention in his witness statement, the fact that the Personal Credit Application Form was signed by him with no details on it, because the issue never arose. That form was disclosed in the Plaintiff's list of documents filed on 3 November 2008 [prior to the filing of Mr. Andrews' witness statement on 21 November 2008] as item number 2 and it clearly was relevant to the issue before this Court as it stated:
- 19.13.1. The customer number and the loan account number which are the same as those referred to in the Plaintiff's letters of 3 March 2000 and 22 March 2000.

19.13.2. Under the heading "Purpose of Loan" the following words:

"To re-finance Demand Ln and liquidate C/A O/D"

19.13.3. Under the heading "Loan Payment Schedules" the following words:

"Interest to be paid monthly with intermittent lump sum payments to principal"

19.14. That Form was clearly a relevant matter which ought to have been considered by Mr. Andrews and addressed in his witness statement. In this court's view, it was quite a significant piece of evidence since it was the only document setting out the intention of the loan and the terms of its repayment.

19.15. All in all, Mr. James Andrews was not a credible witness in this court's view and the court does not accept his evidence as being wholesome and truthful. He was obviously a person who had come to give a certain impression to the court and he ended up giving the impression in the box that he was shifty and evasive. His evidence was therefore not viewed by me as being reliable.

19.16. **Albert Sydney -- the court's impression of his evidence**

19.17. Mr. Albert Sydney did not corroborate the evidence of Mr. Driscoll or Mr. Andrews who said in cross examination that they denied knowing the purpose of the promissory note. He was specific when he acknowledged that the promissory note was used to provide a loan to meet the amounts owing on the overdraft, the demand loan and the credit card. Unlike Mr. Driscoll and Mr. Andrews, Mr. Sydney said that most definitely a sizable amount of business was confirmed and promised from a large government ministry and that business would have been secured. The others, on the contrary, never suggested anything more than that negotiations were ongoing but no final decision had been made.

19.18. Mr. Sydney seemed to this court to be a person who came to tow the line along with Mr. Andrews and Mr. Driscoll but was not sure what that line was and so drifted into moments of truthfulness and clarity punctuated with moments of confusion as to exactly what he was supposed to have said.

CONCLUSIONS:

20. Returning to the Defendants' primary argument, and having reviewed the evidence before me, I am unable to accede to Mr. Montano's suggestion that there has been a 'material variation' of the terms of the promissory note. Mr. Benjamin submitted that the promissory note was on its face, an unconditional promise in writing, and there was nothing in the evidence of the Defendants, taken at the highest, that showed a definite promise to provide any specified credit facility to the Defendants. I agree.
21. In any event, I find it incredible that the Plaintiff bank would lend additional monies to the Defendant company over and above the demand loan, especially in light of the first Defendant's heavy debts by 1999, and the fact that any prospects of income for the company remained uncertain. The financial accounts of the first named Defendant for 1999 and 2000 suggested that the company was insolvent to the tune of \$500,000.00. The company's current account was also severely overdrawn, and Mr. Andrews and Mr. Driscoll both accepted in cross-examination that at the time of signing the promissory note, the first named Defendant had "*no firm commitment for sale*" and at best, was "*still in discussion with suppliers and clients.*"
22. Although Mr. Sydney's evidence was to the contrary, as aforementioned, I have been provided with no evidence of any such prospects. As such, I am inclined to the overall view that the allegation of continued credit expected by the Defendants from the promissory note defies any reasonable sense of business efficacy, and is wholly unsupported by the evidence. As such, the allegation that the Plaintiff closed the first Defendant's accounts immediately after the promissory note was made and refused to grant any banking facilities at all, when placed in the context of what in fact seems to have happened, seems very far from the mark in these Defendants' attempts to claim a total failure of consideration. It was accepted that the current account would remain open but it just would not have an overdraft facility. The demand loan and the credit card would have both been paid off from the loan secured by the promissory note and, as such, were no longer in existence. It was then up to the first named Defendant to carry on its business and to take steps to bring in monies to maintain its current account "in the black" rather than "in the red". Therefore, banking facilities were in fact granted but without an overdraft. Anyone looking at the financial history of the first Defendant would agree that the grant of overdraft facilities would have been

quite an unprofessional and non-businesslike move by the Plaintiff as a bank in the business of making money and profits.

23. Consequently I am of the view that the defence of these Defendants must fail.
24. In relation to the first through ninth named Defendants, one final issue remains outstanding. In written submissions to the Court, Mr. Montano submitted that said Defendants were tricked into signing the promissory note as same was signed on the tacit understanding that a continued line of credit would be made available to the first named Defendant. In fact, Mr. Andrews in his witness statement said that Mr. Popplewell “*tricked us into signing the promissory note.*” [para.15]. In cross-examination, Mr. Andrews revealed the following:

“Q: On 14/12/99, when you signed the promissory note in the presence of the other Directors, you did so willingly?”

A: I signed it in particular circumstances.

Q: You did so willingly, isn’t that correct?

A: If you mean there was no gun, then it was willingly.”

25. It is most significant to observe that the Defendants’ pleaded case was based solely on failure of consideration, and not on undue influence, trickery, deceit or fraudulent misrepresentation. These latter ‘defences’ raise an issue of a specific type of impropriety on the part of the Plaintiff bank that ought to have been pleaded by the Defendants so that the Plaintiff could properly meet *that* case.
26. This was not done and I have no hesitation in dismissing this ‘new’ allegation. In **Loveridge v. Healey [2004]** EWCA Civ. 173, Lord Phillips MR pronounced as follows:

"It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or

not the party in question should be permitted to advance a case which has not hitherto been pleaded." [emphasis added]

27. In the present case, the Defendants had ample opportunity to amend their defence. No such application for amendment was sought, and one was certainly required if the Defendants intended to rely on as serious an allegation as trickery and/ or any of its derivatives aforementioned.

28. For reasons that shall become apparent shortly, the gravity of this allegation demands that I do more than comment *en passant* on the importance that a defence such as trickery be pleaded. In his oral evidence, Mr. Andrews stated thus:

“Q: The sum of the bank loan of \$493 612.00 is the same as in the loan application form?”

A: I do not recall signing any loan application.

Q: I mean personal credit application form.

A: I do not recall signing any such form.

[Witness shown S.H.1]

Q: Do you see the document headed Personal Application Form?”

A: Yes

Q: Turn to page 2- see signature there?”

A: Yes, that is my signature. I was given a blank paper to sign and I was told that they would put in the details. There was nothing written on it when I signed.

Q: You did not say that in your witness statement?”

A: The issue never arose in witness statement.” [emphasis added]

29. This evidence is important and its implications far-reaching, as it goes to the state of mind of the Defendants at the time of signing the promissory note- yet more the reason it should have been pleaded. This was explained in **Ultraframe (UK) Ltd v. Gary Fielding [2005] EWHC 1638 (Ch.), para. 119** as follows:

“...the Particulars of Claim must "specifically set out" "any allegation of fraud" and "details of all breaches of trust" on which the claimant intends to rely in support of his

claim. To my mind this includes not only the relevant state of mind; but also the overt acts that are relied on as amounting either to fraud or to breach of trust.”

30. In **Foster v. Mackinnon (1869)** L.R. 4 C.P. 704, the Defendant, a man advanced in age, was induced to put his name on the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee. Byles J. at paragraph 711 of the judgment stated:

“It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.”
[emphasis added]

31. This principle, when applied to negotiable instruments, such as the promissory note in the instant case, must be and is limited in its application. Byles J. continues on page 712:

“These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man writes his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.”
[emphasis added]

32. I think the instant case falls squarely within the domain of what Byles J. said above of an indorser's obligation under a promissory note. The principle is put another way in **Putman v. Sullivan** reported in 4 Mass. 45 and cited in **Parsons on Bills of Exchange**, vol. i. p. 111, n., where a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to indorse a different note and for a different purpose. The Court intimated an opinion that, even in such a case as that, a distinction might prevail and protect the indorsee.
33. This, of course, is quite different from the situation in **Foster v. Mackinnon** above, where the Defendant never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument, and was held not to be bound by his signature.
34. See also the concept of *non est factum* in relation to the signing of a blank document and expounded upon in **Gallie v. Lee and another** [1968] 2 All ER 322, [1968] 1 WLR 1190; **United Dominions Trust LTD. v Western BS Romanay (trading as Romanay Car Sales), Third Party** [1976] QB 513. This issue was not pleaded in this matter.
35. I have sought to expound quite a bit on these defences that import some form of deceit, as they attract important consequences to both indorsor and indorsee. In the instant case, the trickery alleged was not pleaded, and it was crucial that it should have been. I am here reminded of what Lord Woolf M.R. said in **McPhilemy v. Times Newspapers Ltd.** [1999] 3 All E.R. 775 at 93:
- “Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.”*
36. Each party must plead the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action. (**West Rand Co. v. Rex** [1905] 2 K.B. 399.)

37. The Defendants' allegation of trickery represents a substantial departure from their pleaded case, sufficient to amount to a new cause of action. The Plaintiff would have doubtless been ambushed, and severely prejudiced given the seriousness of the allegation against it.

38. In the premises, I find no difficulty in ruling that the Defendants are limited to their pleadings. They are therefore precluded from relying on any undue influence and/ or trickery subsequently advanced.

39. **The Tenth Named Defendant's Case**

40. At the outset, I must highlight that paragraph 4 of the Guarantee agreement between the Plaintiff and tenth Named Defendant, explicitly states *inter alia*, that the undersigned may, by notice in writing, determine his liability under this guarantee. The said guarantee agreement governed the arrangement between the Plaintiff and Mr. Isaacs, and it seems to me, that if Mr. Isaacs intended to determine said guarantee, he should have provided the Plaintiff with notice in writing of such intention.

41. He did not do this, and his counsel has invoked a plea of promissory estoppel. At the beginning of submissions, both Mr. Huggins and Mr. Benjamin agreed that this Defendant's plea fell for consideration under the broad principle extracted from **Hughes v. Metropolitan Railway Co.** [1877] 2 A.C. 439 at 448 thus:

"...it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture- afterwards by their own act or their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

42. It is worth noticing that the principle may be applied, not only to suspend strict legal rights, but also to preclude the enforcement of them: **D & C Builders Ltd. v. Rees** [1966] 2 QB 617. This is the crux of the tenth Defendant's plea that, based on Ms. Hinds' representations, he believed his

obligation under the guarantee was discharged, and that therefore the Plaintiff is precluded from its present claim against him. The burden was definitely on him to prove these representations upon a balance of probabilities since he who asserts must prove.

43. **D & C Builders** is an interesting case in that although it concerned a defence of accord and satisfaction, its analogous principles pose very real questions to be resolved in the instant case. Lord Denning, M.R. pointed out the following at page 625 of that judgment:

*“In applying this principle [from **Hughes** above], however, we must note the qualification: The creditor is only barred from his legal rights when it would be inequitable for him to insist upon them. Where there has been true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has truly been an accord between them.”*

44. The following questions now arise in the instant case:

- 44.1. Was there a true “accord” or assurance or a release by the Plaintiff to the Defendant?
- 44.2. If there was, did the Defendant act or rely upon that “accord” or “assurance” or “release” to his detriment?

45. Against that framework, I shall also examine, in detail, the Defendant’s submissions on promissory estoppel, which is the essence of his entire defence. Promissory estoppel was described by Denning L.J. in **Combe v. Combe [1951]** 1 All ER 767 at 770 thus:

“The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself so introduced, even though it is not supported in point of law by any consideration, but only by his word.”

46. The first issue I have to resolve is whether Ms. Hinds did indeed give Mr. Isaacs the assurance that he would be relieved of his liability under the guarantee. Mr. Huggins submitted that on three occasions, Ms. Hinds gave undertakings and/ or assurances to the Defendant that he was so absolved from liability:
- 46.1. In telephone conversation upon his resignation;
 - 46.2. In telephone conversation upon receipt of letter dated 3 March 2000;
 - 46.3. By letter dated 24 March 2000.
47. I shall deal with each in turn.

Telephone conversation upon his resignation:

48. The tenth named Defendant's testimony was that he resigned from the Defendant company in or about January 2000. No proof of resignation was tendered and this court is cognisant of the provisions of the **Companies Act Chapter 81:01** of the laws of Trinidad and Tobago which provides for resignations of directors of companies to be in writing under **section 74** and the legal requirement under **section 79** to deliver to the Registrar of Companies a notice in the prescribed form informing the Registrar of the resignation of the director. The court is also aware of **section 194** which provides for the filing of annual returns with the Registrar of Companies, a procedure which, amongst other things, informs the world at large, of the company's directorship. None of this evidence was placed before the court.
49. In January 2000, Mr. Isaacs says he called and informed Ms. Hinds of his resignation and she gave him a verbal assurance that he would be relieved of his obligations under the guarantee. (There was some dispute as to exactly when Mr. Isaacs informed Ms. Hinds of his resignation, but this is not material as it does not affect whether the assurances were given as alleged).
50. At the material time, Mr. Isaac was a director and the Chairman of the first Defendant company. On the express words of Clause 4 of the Guarantee, I cannot see how Mr. Isaac, as guarantor, could have been absolved from his obligations merely because he had resigned from the company, even if that were proven. It is more so disturbing that this Defendant's resignation was used in his defence as the catalyst for his alleged release from liability. That cannot be the case, especially

considering the fact that Mr. Isaacs signed the said guarantee agreement *during* the period of his chairmanship of the Defendant company.

51. That being the case, I still have to determine whether this Defendant did, in fact, receive the alleged assurances from Ms. Hinds. The overriding principle is that a guarantor must produce clear and strong evidence to support his plea: see **Collier v. Wright (Holdings) Limited [2007]** EWCA 1329 at para.38, where even at an interlocutory stage, the debtor was required to produce some tangible evidence, enough to support his case.

52. In **Birmingham Land Co. v. L.N.W.R. Co. [1888]** All ER, the Plaintiffs had to adduce evidence to show that there had been conduct on the part of their lessor which, notwithstanding the expiration of the terms of their building leases, disentitled him to treat the agreements as at an end. At page 625 of the judgment, Lindley L.J. stated:

“There is a great mass of evidence, the general short effect of which appears to be that all parties understood that these building operations were to be suspended until the result of the railway scheme was known. In addition to that, the applications made in June 1882 for rent under the agreement expiring in November, 1881, and the accounts sent in, show conclusively that these agreements were then treated as still subsisting between the parties to them.” (emphasis added]

53. In the instant case, all the Court has been provided with is an allegation of a telephone conversation having occurred, with an alleged commitment by Ms. Hinds to absolve Mr. Isaacs of his liability under the guarantee. In cross-examination, Ms. Hinds clearly denied ever having made such a representation to this Defendant. While she accepted that the Defendant did telephone her, (but that was only after the receipt of the letter which she sent out to him dated the 3rd March rather than before), she remained adamant that the extent of that conversation was that *“he said he got the letter, he was not an indorser and no longer with the company, that’s all.”*

54. Ms. Hinds remained unshaken in her evidence that she never gave any assurance to this Defendant that he would no longer be held liable on the guarantee. I believe this to be the case.

Telephone conversation upon receipt of letter dated 3 March 2000:

55. This letter referred to the loan under the promissory note and demanded payment of all outstandings that had become due by 3 March 2000. It was signed by Ms. Hinds on behalf of the Plaintiff and copied to the second through tenth named Defendant including Mr. Isaac.
56. The following came out in the cross-examination of Ms. Hinds:
- “Q: Did he (Mr. Isaacs) not express surprise at having received the letter after previous discussion with you?”*
- A: He expressed surprise.*
- Q: As part of this expression of surprise, did he not say he was surprised because he thought he would be relieved?”*
- A: I have no recollection of that.”*
57. In written submissions, Mr. Huggins asked the Court to make a finding of fact that the Defendant’s “surprise” could only have been as a result of having been previously reassured that he would be relieved of his liability, and thereafter receiving the letter in question.
58. I do not find that this a reasonable inference to make since the Defendant’s “surprise” could similarly, and perhaps, more plausibly, have been exactly as Mr. Benjamin said, that the Plaintiff wrote to this Defendant as an indorser of a promissory note he did not sign. Hence the “surprise.” No attempt was made to clarify what Ms. Hinds meant when she said that Mr. Isaacs was surprised, and this court is none the better for that bit of evidence.
59. Ms. Hinds again remained unshaken in her evidence as to the extent of the telephone conversation with Mr. Isaac, and in the absence of cogent evidence to the contrary, I find that no such assurances were made to this Defendant as alleged.
60. Further, to my mind, it is implausible to suppose that the Plaintiff, as an established banking facility, would forego the guarantee without written documentation signed by both parties. It had taken due care, by its established procedures, to ensure a written arrangement when the guarantee was executed in the very first place. I have no reason to believe that the Plaintiff would not have exercised that same diligence in determining the said guarantee.

61. In any event, no empirical evidence was produced by this Defendant such as a listing of calls made by this Defendant showing the date when he would have made a call to Mrs. Hinds, confirmatory letters made subsequent to the telephone call confirming their discussion and the alleged release, etc.

Letter dated 24 March 2000.

62. This letter referred to the letter of 3 March 2000, and it is here necessary to reproduce the relevant parts of the latter. Having inserted the loan number, principal balance and outstanding balance as at 3 March 2000, the said letter read as follows:

“We note with extreme concern that the Demand Loan at caption became due for payment on December 31, 1999 and to that date, the matter is still outstanding.

This situation is most unsatisfactory and cannot be allowed to continue.

We therefore now demand settlement of all outstandings by March 17, 2000. Failure to do so will result in our call on the Guarantors for payment and/or referring the matter to our Attorneys for legal action.”

63. The subsequent letter dated 24 March 2000 was addressed to Mr. Isaac and its contents were as follows:

“Demand Loan in the Name of Def Sec Technologies Ltd.

We refer to our letter of March 3, 2000 with respect to the subject at caption, and note that it was erroneously copied to yourself as one of the endorsers.

We apologise for this oversight on our part, as it is our understanding that you are no longer associated with the company.”

64. Both letters were signed by Ms. Hinds on behalf of the Plaintiff.
65. The wording of both letters is plain and unambiguous. The first referred to the loan under the promissory note and demanded payment of outstandings. The second expressly recognised that Mr. Isaac was not an indorser of the note.
66. I cannot conceive how this letter of 24 March 2000 could have been construed by the Defendant to mean that he was absolved from his obligations under the guarantee. A plain and literal approach to the said letter, and indeed that was all it required, reveals nothing except as I have stated above.

67. When one considers that this tenth named Defendant did not write to the Plaintiff clarifying his position, failed to produce a letter of resignation, failed to produce the necessary company documents to be filed with the Registrar of Companies and failed to respond to the Plaintiff's attorney's letters, it is difficult to see that his action is one consistent with an ordinary prudent man of business seeking to carefully preserve his position as one would have expected in these circumstances. In all of the circumstances, and having seen and heard the witnesses, it is my view that, on a balance of probabilities, no assurance as alleged by this Defendant was given by Mrs. Hinds to the tenth named Defendant.
68. Having determined from the evidence that there was no "true accord" or assurance from the Plaintiff to the tenth named Defendant as there is no evidence of a clear and unequivocal representation from the Plaintiff, which would make it unconscionable for the Plaintiff to now rely upon the written guarantee and so invoke this court's equitable jurisdiction, the arguments as to estoppel and detrimental reliance must accordingly fail.
69. On a final note, it is correct to say that in order to support such a promise or assurance, it would also have been necessary for Mr. Isaac to show that consideration moved from him as a promisee. He can only enforce that promise if he himself provided consideration for it, in terms either of some detriment which he has suffered or some benefit which he conferred on the Plaintiff. In effect, Mr. Isaac would have had to show that it is inequitable for the Plaintiff to resile from its alleged assurance. (**Collier v. Wright (Holdings) Limited [2007]** EWCA 1329).
70. I have been provided with no such evidence of detrimental reliance and/ or alteration of position on the part of this Defendant which may render it inequitable for the Plaintiff now to resile from its alleged assurance that Mr. Isaac would be discharged from liability under the guarantee.
71. The Plaintiff is therefore entitled to claim from Mr. Isaacs under the guarantee to the extent of \$50 000.00 together with interest.
72. For these reasons, the Plaintiff's claim must succeed against the first through ninth named Defendants, and as well, against the tenth named Defendant.

73. **The Interest claimed:**

- 73.1. The promissory note provided for interest “...on \$493,612.00 until payment monthly both before and after default and judgment at the rate of 4.0 per centum above the bank’s minimum lending rate as declared by the bank from time to time which rate of interest payable on the said sum shall vary automatically on the day such minimum lending rate is varied by the bank without notice by the bank for any party hereto and on the day hereof is 20.5 % per annum.” [Emphasis mine]
- 73.2. The guarantee provided for interest on \$50,000.00 “from the date of demand for payment at the rate of the bank’s prime lending rate of interest plus 3 % per centum per annum.”
- 73.3. As set out in its Particulars of Claim, the Plaintiff claims against the second to ninth named Defendants, the sum of \$686,126.79 together with interest on the sum of \$493,612.00 at the rate of 18.5 % per annum (being minimum lending rate plus 4 %) from the 23rd day of January, 2002 to the date of payment. The Plaintiff also claims against the tenth named Defendant, the sum of \$50,000.00 together with interest thereon at the rate of 17.5 % per annum (being prime lending rate plus 3 %) from the 24th January, 2002 (which was the date of the demand for payment) to the date of payment or judgment.
- 73.4. Although these particulars were set out in the Plaintiff’s Statement of Claim, they were not set down in specific terms in any of the Plaintiff’s witness statements. Ms. Hinds’ witness statement refers, in general terms, to the arrangement on interest between the parties. The Court has however been provided with an account statement (S.H.7), which was exhibited to the witness statement of Ms. Hinds’ and which provides a breakdown of the minimum lending rate plus 4 % with respect to the promissory note from the date of its execution to 2008 showing the rise and fall and the variations in the prime lending rate. I have not been provided with a similar account statement for the guarantee but that figure can be deduced from S.H.7.
- 73.5. While the accuracy of the said account statement for the promissory note is hardly in question, there remains the issue of ascertaining, in precise terms, the interest I am to award on the principal of both the promissory note and the guarantee. In light of this, I have therefore had cause to adjourn this matter in order that the interest be precisely worked out and quantified on both the promissory note and the guarantee up to the date of judgment.

73.6. With respect to the interest after judgment, there is a formula for the determination of the interest on the promissory note beyond the statutory rate. Following the learning in the cases of **Economic Life Assurance Society v Usborne** [1902] AC 147 and **National Bank of Greece S.A. v Pinios Shipping Co. No. 1 and another** [1990] 1 AC 637, the contracted rate of interest on the promissory note shall prevail after judgment as well and does not merge in the judgment. The statutory rate of interest shall apply to the judgment on the guarantee after judgment since there was no express agreement for the non-merger of the contractual rate of interest with the judgment.

74. **THE ORDER**

74.1. Judgment against the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth named Defendants in the sum of \$ 493,612.00 together with interest thereon at the rate of 4.0 per centum above the bank's minimum lending rate from the 14th day of December 1999 until payment less the sum of \$10,000.00 paid in March 2000 towards interest;

74.2. Judgment against the tenth named Defendant in the sum of \$50,000.00 together with interest thereon at the rate of the bank's prime lending rate of interest plus 3 % per centum per annum from the 24th January 2002 to today;

74.3. The Defendants are to pay the Plaintiff's costs of this action.

74.4. The matter is adjourned to the 6th day of July 2009 for the quantification of the interest referred to in paragraphs 74.1 and 74.2.

Devindra Rampersad
Judge