JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 8/2002

BEFORE:	**THE HON MR. JUSTICE FORTE, PRESIDENT** **THE HON MR. JUSTICE HARRISON, J.A.** **THE HON MR. JUSTICE CLARKE, J.A. (Ag.)**	
BETWEEN:	**VINCENT A. CHEN**	**DEFENDANT/ APPELLANT**
AND	**BALLENA INVESTMENTS LIMITED**	**PLAINTIFF/ RESPONDENT**

R.N.A. Henrigues, Q.C., and David Batts for appellants instructed by Livingston, Alexander and Levy.

Abe Dabdoub for respondent instructed by Raymond Clough of Clough, Long and Company.

April 22, 23. 24, 25 and July 5, 2002

HARRISON, J.A:

This is an appeal from the judgment of Mrs Zaila McCalla granting leave to enter summary judgment for the respondent against the appellant Vincent Chen in the sum of US$187,312.00 plus interest at the rate of 20% from January 1 1999, to the date of payment. We heard the arguments and allowed this appeal, set aside the summary judgment and ordered that the matter proceed to trial. As promised, these are our reasons in writing.

The relevant facts are that the respondent, a company registered in the Cayman Islands held monies, US$350,000.00, formerly held by another

Caymanian registered company Capstan Ltd., on behalf of one Fay Tortello. This sum of money was loaned to J.H.G. Mapp (Succs.) Ltd, a trading company in Jamaica, after being sent through Caribbean Trust Finance & Investment Ltd. The loan was secured by a promissory note dated July 24 1998, signed by one Ronnie Chinloy and the appellant on behalf of J.H.G. Mapp (Succs.) Ltd, both of whom also signed the said note as guarantors. The said note reads:

> **"PROMISSORY NOTE**
>
> US$ 350,000.00 24TH July 1998
>
> We, J.H.G. MAPP (SUCCESSORS) LIMITED DO HEREBY PROMISE TO BALLENA INVESTMENT LIMITED THE SUM OF THREE HUNDRED AND FIFTY THOUSAND UNITED STATES DOLLARS (US$350,000.00) AFTER SIX (6) MONTHS WITH INTEREST THEREON AT A RATE OF TWENTY PERCENT (20%) PER ANNUM TO BE PAID ON THE 24TH AUGUST, 24TH SEPTEMBER, 23RD OCTOBER, 23RD NOVEMBER, 24TH DECEMBER AND 24TH JANUARY 1999 RESPECTIVELY, PAYABLE IN UNITED STATES DOLLARS
>
> VALUE RECEIVED
>
> J.H.G. MAPP (SUCCESSORS) LIMITED
>
> Sgd/ Ronnie ChinLoy
> Sgd/ Vincent A. Chen
>
> PAYMENT GUARANTEED
> Sgd/
>
> PROMISSORY NOTE #9773/E
>
> THIS NOTE REPLACES NOTE #9773/D"

There was a previous promissory note "#9773" dated March 27 1997, evidencing a promise to repay a similar loan of US$350,000.00. to Capstan Investment Ltd. by the said Mapp (Succs.) "... for three months with interest thereon at the rate of twenty percent (20%) per annum ..." That said note was also similarly signed

and guaranteed. This sum of US$350,000.00 was on March 27 1997, held by Capstan Investments Ltd on behalf of Fay Tortello. It is not challenged that the said interest was paid by Mapp (Succs.) on behalf of Fay Tortello under the terms of the said note "... on the 28th April, 28 May and 27th June (1997) ...". On 5th May 1997, during the currency of promissory note #9773, one Mark Richford, the assistant Manager in Henry Ansbacher (Cayman) Ltd., a Caymanian company managing the said trust fund of Fay Tortello, by facsimile correspondence to the latter, expressed his concern that the said sum of US$350,000.00 was then invested in Mapp (Successors Ltd.), a trading company, instead of in "Jamaica Treasury Notes". He suggested:

> "In the circumstances, with respect to the JHG Mapp investment, I would like to propose two alternatives:
>
> (1) The investment is withdrawn now and the funds invested back into Jamaican Treasury Notes as previously agreed; or
>
> (2) The TRUSTEE distribute $350,000.00 to you by way of transferring the investment with JHG Mapp (Succs.) Limited.
>
> Please let me know which option you prefer and I will instruct Karen Henney arrange".

Fay Tortello, on receipt of the said facsimile correspondence, consulted the appellant, her attorney-at-law then. In his affidavit dated 2nd June 1999, in opposition to the respondent's application for summary judgment, he said:

> "6. That by letter dated 5th May 1997, from Mr. Mark Richford of Ansbacher, the operators of Capstan Investments Limited to Mrs Fay Tortello, Mr. Richford advised Mrs Tortello against placing Capstan's funds

> at Mapp and suggested two (2) options to her. She attended on me with the letter and asked me to communicate with Mr. Richford to arrange the option which allowed the funds to remain at Mapp. Exhibited hereto and marked "VAC-5" is copy letter dated 5th May1997, Richford to Tortello.
>
> 7. I spoke to Mr. Richford and he advised me that he would allow the funds to remain at Mapp on the basis that Capstan Investments Limited would hold as nominee of Mrs Tortello for the remainder of the ninety days under the Promissory Note "VAC-3" and thereafter the funds would be distributed to Mrs Fay Tortello who could lend to Ballena (the plaintiff herein) which would then on lend to Mapp.
>
> 8. This was done by the issue of a note in favour of Ballena Investments Limited (the plaintiff herein), upon the maturity of the note exhibited hereto as "VAC-3". At no time was any money or other consideration paid or given to Mapp by Ballena Investments Limited in return for the issue of the Promissory Note to Ballena.
>
> 9. At the time I gave a statement to the police in August 1998, no default had been made by Mapp under the note and Mrs Tortello had of her own volition renewed the Promissory Notes as they fell due on several prior occasions".

The appellant, at all material times, was the chairman and a director and Ronnie Chin Loy, was the managing director, in J.H.G. Mapp (Succs.). The promissory note #9773/E, the subject matter in issue in these proceedings, being for a duration of six (6) months, would have matured on 24th January 1999. The first payment of interest thereon was due and payable on 24th August 1998.

However, after the signing of the promissory note, Fay Tortello, on the 13th August 1998, wrote demanding from the appellant Vincent Chen "the immediate payment" to her of US$350,000.00 "... loaned ... to yourself," and reported the matter to the police. Consequently, on 14th August 1998, a police officer from the Fraud Squad spoke to the appellant, who on 17th August 1998, was interviewed by the police in respect of the complaint of Fay Tortello of the fraudulent obtaining of the said US$350,000.00 by the appellant.

On 19th August 1998, attorneys-at-law, Clough Long and Company, sent a letter to the appellant, in the following terms:

> "Mr. Vincent A. Chen
> 8 Tavistock Terrace
> Kingston 6
>
> Dear Mr. Chen,
>
> Re: Mrs Fay Tortello
>
> We refer to our several conversations in relation to the indebtedness to the abovenamed.
>
> We hereby demand the immediate payment of the sum of US$300,000.00 with interest thereon.
>
> Yours faithfully,
> CLOUGH, LONG AND CO."

On the said date, a letter in similar terms was sent to:

> "Mr. Ronnie Chin Loy
> c/o J.H.G. Mapp (Successors) Ltd.
> 2A East Avenue
> Kingston 13".

In his statement to the police on 17th August 1998, the appellant had said:

> "At no time did I have any intention of defrauding Mrs Tortello. The second signing of the promissory note issued to Ballena in my personal capacity as a personal guarantee of Mr. Chin-Loy and myself. Mrs Tortello cannot be paid all the money at once because it has been put into stock. I have asked the other Directors of Mapp and the accountant, Mr. Maye, to start pre-paying the principal to Mrs Tortello as of August month end".

By letter dated 27th August 1998, a further demand for payment was made on behalf of the respondent. The said letter reads:

> "J.H.G Mapp (Successors) Limited
> 2A East Avenue
> Kingston 13
>
> Attention: Mr. Canute Maye
>
> Dear Sirs,
>
> Re: Ballena Investments Limited/Mrs Fay Tortello
>
> We have your letter dated the 21 August 1998.
>
> If our client is not paid within the period of the Statutory Notice dated 19th August 1998, we shall proceed to wind up your company.
>
> Yours faithfully,
> Clough, Long & Co.
>
> Per:
> Raymond A Clough
>
> c.c. Mrs Fay Tortello".

As a consequence repayment of a portion of the said US$350,000.00 was made to the respondent by J.H.G Mapp (Succs.) Ltd. One Brian Wright, a

director of the respondent, in his affidavit dated 31st March 1999, at paragraph 8, said:

> "8. The said promissory note matured on the 25th day of January, 1999, and then J.H.G. Mapp (Successors) Limited paid the amount of US$162,688.00, being US$50,000.00 on August 18th 1998, US$50,000.00 on September 18th 1998, US$50,000.0 on October 18th 1998, and US$12,688.00 in December 1998. The balance now due and payable to the plaintiff is the sum of US$187,312.00 with interest, which the maker J.H.G. Mapp (Successors) Limited has refused and neglected to pay to the plaintiff".

The balance due on the promissory note, namely US$187,312.00 was not paid to the respondent.

A criminal prosecution was commenced in the Corporate Area Resident Magistrates' Court indicting Vincent Chen and Ronnie Chin Loy for the offences of:

> (1) Fraudulent conversion by Vincent Chen "... on divers days between the 22nd day of November 1996, and the 21st day of April 1997... of $350,000.00 US ... on account of Capstan Investment Limited ..." and
>
> 2. Conspiracy to defraud by Vincent Chen and Ronnie Chin Loy, " ... on divers days between the 21st day of November 1996, and the 5th day of May 1997 ... Capstan Investments Ltd of $350,000.00 US by placing the said funds in the company J.H.G. Mapp (Successors) Ltd ... contrary to the instructions of Capstan Investments Ltd ....".

The trial of the said indictment commenced in 1999, and is currently part heard.

In addition, Fay Tortello, by a written complaint dated 18th August 1998 to the General Legal Council, stated in an accompanying affidavit dated 8th September 1998:

> "That Vincent Chen by a so called promissory note dated July 24 1998, took monies given to Caribbean Trust Finance and Investment Limited to be invested in Jamaica Treasury Notes amounting to $350,000 and lent same to J.H.G. Mapp (Successors) Ltd.
>
> Took the sum of US$350,000 and loaned the said amount of monies to J.H.G. Mapp (Successors) Ltd without my consent.
>
> That he took the said sum of US$350,000 and lent the monies to himself J.H.G. Mapp (Successors) Ltd ..."

The respondent not having received the balance on the said promissory note dated 24th July 1998, instituted these proceedings against the appellant as guarantor of the said note. Consequently, as stated earlier, leave was granted to the respondent to enter summary judgment against the appellant, Mrs Justice McCalla having found that:

> "... the first defendant does not have a good defence on its merits and there are no facts sufficient to entitle him to defend the action generally".

Mr. Henrigues for the appellant argued that the civil proceedings should be stayed to await the outcome of the criminal proceedings, because both proceedings were against the same defendant, the appellant, and involved the same sum of money; that although involving different complaints, the allegations of fraud and illegality of conduct alleged against the appellant if proven in the

criminal proceedings could prejudice and embarrass the defence of the appellant in these proceedings - ***Bank of Jamaica v Dextra Bank and Trust Co. Ltd*** (1999) 31 JLR 361; that the respondent repudiated the promissory note by demanding payment before the date that it was due, and the debtor accepted the repudiation by repaying a portion of the sum loaned before the due date, thereby discharging the appellant guarantor from liability - ***(National Westminster Bank v Riley*** (1986) BCLC 268); that because the premature payment of capital was a repudiation of the promissory note making it unenforceable against the grantor it was not thereafter capable of being duly presented for payment; that the trial judge erred in refusing to order the respondent to provide security for costs, the latter being a plaintiff resident overseas – ***Watersports Enterprises Ltd v Frank*** (1991) 28 JLR 111.

Mr Dabdoub for the respondent argued that the complainant in the criminal proceedings is a different entity from that in the civil proceedings and the proceedings are in fact different and therefore there should be no stay of proceedings; that the suit is based on the promissory note dated 24th July 1998, that there was a mere variation of the terms of the promissory note by the request of the appellant to the debtor Mapp (Succs.) Ltd to repay the capital sum at the rate of US$50,000.00 per month, which did not operate to discharge the grantor; that the appellant as chairman and director of Mapp (Succs.) had knowledge of the repayment as guarantor and therefore his conduct was not an acceptance of any repudiation which must be clear and unambiguous and he was

estopped from so claiming; that it was not open to the guarantor to plead that there was no presentation of the promissory note, only the debtor, which is in bankruptcy, may do so but chose not to challenge it; that the detriment to the creditors is of such that the guarantor should have given prior notice that the repudiation was being accepted; that no security for costs should be ordered – because the judgment may be registered and enforced in the Cayman Islands; that there is no evidence that the respondent would be unable to pay costs ordered against it and furthermore the application is being made after the close of pleadings. He concluded that the appeal should be dismissed.

A plaintiff who files a suit claiming liquidated damages and that in his belief there is no defence to his action, may seek leave to enter summary judgment. Section 79(1) of the Judicature (Civil Procedure Code) Law (the "Code") reads:

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

> having regard to the nature of the remedy or relief claimed".

The appellant by his pleadings, did not deny that he signed the promissory note dated 24th July 1998, but claims that he is discharged from liability because the respondent repudiated the contract of loan and such repudiation was accepted by the borrower, J.H.G. Mapp (Succs.) The defence of the appellant, inter alia, reads:

> "2. In answer to paragraph 2 of the Statement of Claim the first defendant says that he is an attorney-at-law and was a partner in the law firm of Clinton Hart & Co. At all material times the first defendant was chairman and director of JHG Mapp (Successors) Limited.
> . . .
>
> 6. The first defendant denies that the or any alleged promissory note was presented for payment as alleged in paragraph 7 of the Statement of Claim or at all.
>
> 7. The first defendant admits that he has not paid the sum of US$187,312.00 to the plaintiff as alleged in paragraph 9 of the Statement of Claim and says that such failure is not wrongful and/or unlawful.
> . . .
>
> 9. Further or in the alternative the first defendant says that the plaintiff by itself and/or through its servants and/or agents wrongfully repudiated the alleged or any promissory note in that in breach of the terms thereof the plaintiff by itself and/or its servants or agents made a demand thereon in or about August of 1998.
>
> 10. The first defendant denies being a guarantor of the said promissory note as alleged in the Statement of Claim or at all and says that the alleged or any guarantee is unenforceable as same does not comply

> with the Statute of Frauds and denies the existence of the alleged or any contract of guarantee.
>
> 11. The first defendant denies that he is liable to the plaintiff as alleged or at all".

Although the appellant in his pleadings "... denies being a guarantor of the said promissory note as alleged in the statement of claim or at all ...", (paragraph 10), in his statement to the police on 17th August 1998, he said:

> "From the time the funds US$350,000.00 was loan to Mapp myself and Ronnie Chin-Loy signed on behalf of JHG Mapp (Successors) Limited and also in our own right, personally guarantee the repayment. The initial document and subsequent guarantee were titled promissory notes. From then interest has been paid to Capstan Investment Limited for the first ninety days and thereafter to Ballena Investment Limited. The cheques representing interest payment were delivered to Mrs Tortello, sometime by myself".

It is arguable on the pleadings, that the appellant signed as guarantor.

The authors of the ***Modern Contract of Guarantee by Phillips and O'Donovan,*** 2nd edition, at page 275 say:

> "The effect of termination of the principal contract by the principal in the case of a guarantee will be to relieve the guarantor from any future obligations accruing subsequent to the date of termination, ..."

and at page 276:

> "If the creditor repudiates the principal contract or is in breach of a condition of that contract, and the principal debtor accepts the repudiation or breach as terminating the contract, the guarantor will be discharged".

In ***National Westminster Bank v Riley*** [1986] BCLC 268, the appellant bank appealed against the setting aside of a summary judgment and giving the defendant leave to defend. Judgment had been obtained against the respondent who had guaranteed to the bank the debts of its company which had become insolvent. The bank had honoured several payments on behalf of the company which debts far exceeded an agreed overdraft limit, but subsequently declined to do so. The respondent claimed that the bank had breached its contract with the company and consequently discharged the respondent as surety. It was held, allowing the appeal, that a surety will only be discharged where the breach amounted to a departure from the principal contract and embodied in the contract of guarantee and the departure was "... not unsubstantial". The breach by the bank was unsubstantial and therefore did not operate to discharge the surety. May, LJ at page 275 said:

> "I do not think that a non-repudiatory breach of the principal contract will, with nothing more, discharge a surety who has guaranteed that contract. A repudiatory breach, if accepted, will certainly do so, but a non-repudiatory breach will not unless it can be shown in fact to amount to a 'departure' from a term of the principal contract which has been 'embodied' in the contract of guarantee ..."

Where therefore, the action of the creditor complained of amounts to a substantial departure from the terms of the principal contract or is a breach of a fundamental term of such contract, which is guaranteed, it is arguable that it will serve to discharge the guarantor from liability. Accordingly, the determination

of the fact as to whether the term of the contract allegedly breached is fundamental or unsubstantial, is an issue of mixed law and fact for a trial court.

In ***Polak et al v Everett*** [1876] 1QBD 669, the defendant, surety, guaranteed the performance of an agreement whereby a debtor of the plaintiffs, agreed to pay to the plaintiffs a sum of money, to transfer to the plaintiffs shares in a company to which the debtor was about to assign his business and later to redeem such shares and to transfer half of book debts valued at £8,000.00 due to him, the debtor. Subsequently, the plaintiffs, creditors, agreed with the debtor to release to him their one-half of the book debts for an equivalent in shares and cash. The debtor disposed of them to the company. The defendant, guarantor, was a shareholder and chairman of the company, was present at the meeting of the sale of the book debts, but did not agree to the sale. The debtor had not transferred the shares under the agreement. The defendant was sued under the guarantee for a deficiency in the amount due to the plaintiffs. He disclaimed liability. It was held, by the Court of Appeal, that the new arrangement between the debtor and the plaintiffs was such a variation of the rights of the defendant as surety as to discharge him. Blackburn, J at page 673, said:

> "We think that the defendant is entitled to judgment, on the ground that what has taken place has discharged him as a surety . . .
>
> It has been established for a very long time, beginning with ***Rees v Berrington*** 2 Ves. 540; 2 W.L. & T.L.C. to the present day, without a single case going to the contrary, that on the principles of

> equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether ...
>
> The surety at the time he entered into the suretyship had a right to have these book debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book-debts to the person collecting them. That equitable right has been taken away by his willful act ..."

Mellor, J at p. 676, said:

> "I think it is the old question of contract, and the surety is entitled not be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not. The surety is entitled to remain in the position in which he was at the time when the contract was entered into".

Quain, J at p. 677 said:

> "Without the surety's consent the creditor here has disposed of these book-debts in an entirely different manner to that in which it was intended they should be applied under the original contract. I agree with my Brother Mellor that it is a thoroughly sound and safe principle that, where the act is voluntary and deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer. This is a sound doctrine which ought not to be impeached, and cannot be impeached, because it is established by authority.

> Then, with regard to the second point, whether we ought to draw the inference of fact that the defendant consented to the arrangement, I agree with my Brother Blackburn that the fact of the defendant merely standing by, having no duty to communicate with the plaintiffs, does not amount to a consent".

Significantly, counsel for the respondent argued before us that the appellant as a director of the debtor company had knowledge of the repayment and therefore it could be inferred that from his conduct he was not repudiating the contract and so as guarantor he was estopped from so claiming. This is a vital question of fact.

The authors in the ***Law of Guarantees by Andrews and Millet,*** relied on by counsel for the respondent before us, with reference to the surety's right in circumstances where there is a variation of the contract, at page 295, say:

> "Any material variation of the terms of the principal contract (i.e., between the creditor and the principal) will discharge the surety. This is known as the rule in ***Holme v Brunskill*** (1878) 3 Q.B.D 495 ..."

and continuing, with reference to ***Polak v Everett*** (supra) say:

> "Therefore in general terms the surety is entitled to require that his position shall not be altered by any agreement between the creditor and the principal from that in which he stood at the time of his contract".

The cases therefore seem to demonstrate that, generally, where there is a mere variation of the terms of a contract, which variation is unsubstantial, it will not usually result in a corresponding contract of guarantee being treated as discharged. However, if there is a repudiation of a fundamental term of the

contract by the creditor and it is accepted by the debtor who is not at fault, a guarantor of the performance of such contract is discharged. These are questions of fact for the determination by a trial court, as opposed to the summary procedure under section 79 of the Code.

In ***Moschi v Lep Air Services Ltd et al*** [1972] 2 All ER 393, also relied on by the respondent before us, the respondents, creditors of a company importing goods, signed an agreement by which the company undertook to pay off its debts by specific dates. The appellant who controlled the company guaranteed the performance by the said company of the obligation to pay its debts. The company defaulted in that it failed to pay the installments as agreed. Claiming that the breach was fundamental, the respondents accepted the company's repudiation of the agreement. The respondents sued the appellant on the guarantee. The appellant argued, inter alia, that the purported acceptance of the company's repudiation was a variation of the contract that discharged him from liability. It was held, by the House of Lords, that the failure of the company to pay was a fundamental breach constituting a repudiation, the acceptance of the repudiation was not a variation of the contract and such acceptance did not discharge the guarantor from liability under the guarantee. Lord Diplock, commenting on the rights of the guarantor said at p. 401:

> ". . . where the contract of guarantee was entered into by the guarantor at the debtor's request, the guarantor has a right in equity to compel the debtor to perform his own obligation to the creditor if it is of a kind in which a court of equity is able to compel performance (see ***Ascherson v Tredegar Dry Dock***

> ***& Wharf Co Ltd).*** ([1908-10] ALL ER) Rep. 510. It is the existence of this right on the part of the guarantor that accounts for the rule laid down by Lord Eldon LC in ***Samuell v Howarth*** (1817) 3 Mer 272 at 278) and approved by your Lordships' House in ***Creighton v Rankin*** (1840) Clo & Fin 325 at 345) that where the creditor, after the guarantee has been entered into, gives a contractual promise to the debtor to allow him time to pay the guaranteed debt, the guarantor is discharged from his obligation to the creditor".

It was the debtor company which repudiated the contract and the respondent creditors accepted the repudiation.

In the instant case, the appellant, who was sued as a guarantor of the promissory note dated 24th July 1998, contends that the respondent creditor breached a fundamental term of the contract by requesting in August 1998, the immediate repayment of the total sum loaned, before it was due and payable in January 1999; vide letter dated 13th August 1998, from Fay Tortello letters dated 19th August 1998, to the appellant and the co-guarantor Ronnie Chin Loy, and letter dated 27th August 1998 to the debtor Mapp (Successors) Ltd. The appellant maintains that this conduct is a repudiation of the contract by the creditor which was accepted by the debtor by the payment of $162,688.00 of the capital loaned and consequently he as guarantor is discharged from liability. These are issues of law and fact, that the learned judge should have considered inappropriate to be dealt with on a summons seeking leave to file summary judgment.

A further issue arises, as to whether or not the promissory note was duly presented as contended for by the respondent. Section 45(1) of the Bills of Exchange Act reads:

> **"45.** Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.
>
> A bill is duly presented for payment which is presented in accordance with the following rules –
>
> (a) Where the bill is not payable on demand, presentment must be made on the day it falls due".

The respondent in its statement of claim, at paragraph 7, pleaded:

> "The plaintiff through its attorneys-at-law presented the promissory note for payment to the first and second defendants in their capacity as the representatives of J.H.G. Mapp Successors) Limited as well as on their own behalf as guarantors of the Note, the defendants failed to honour the note".

The appellant contends, on the contrary, that the said promissory note was not duly presented for payment and therefore is unenforceable; thereby releasing the appellant from liability as guarantor. In ***Yeoman Credit Ltd v Gregory*** [1963] 1 WLR 343 it was held that presentment of a bill under the Bills of Exchange Act 1882, on a date other than that on which it fell due, that is on the following day, was bad, absolving the defendant from liability under it.

It is therefore also clearly arguable that the premature payment of US$162,688.00 by Mapp (Successors) Ltd, prior to January 1999, made any

subsequent presentment of the promissory note invalid, contrary to the provisions of the Bills of Exchange Act and unenforceable against the appellant. The appellant contended in his defence pleaded, at paragraph 6:

> "The first defendant denies that the or any alleged promissory note was presented for payment as alleged in paragraph 7 of the Statement of Claim or at all".

That also is an arguable issue of fact. The finding of the learned judge to the contrary is unsupportable.

The appellant also argued that these civil proceedings be ordered stayed to await the outcome of criminal proceedings against the appellant, in order to ensure fairness to him and as a matter of public policy. This Court in the case of ***Panton et al v Financial Institutions Services Ltd*** SCCA No 110/2000 delivered 25th October 2001, re-stated the principles governing a stay of proceedings in these circumstances. Forte, P. at p. 1 said:

> ". . . ***Smith v Selwyn*** [1914-15] All ER (Reprint) 224 should not be followed in this jurisdiction. Instead, the dicta of Carey, J.A. in ***Bank of Jamaica v Dextra Bank v Trust Co. Ltd.*** [1999] 31 JLR 361 cited by Langrin J.A. disclosed the correct approach that should be taken in these matters. I would confirm that the rule is that the Court in exercise of its inherent jurisdiction to control its own proceedings should balance justice between the parties taking of course all relevant factors into account. In determining the balance of justice between the parties in the civil case, the Court must be cognizant that since it is the appellants who seek the stay, then the burden must be on them to show that the respondent's right to have its claim proceed, should await the conclusion of the criminal proceedings".

The complainant in the indictment preferred against the appellant, as exhibited to the affidavit of the appellant dated 2nd June 1999, in the record of

appeal, is Capstan Investments Ltd and the offences are alleged to have been committed between the 21st day of November 1996, and the 5th day of May 1997. Although the monies involved is the said sum of US$350,000.00, such offences relate to a period of time before the promissory note, the subject of the civil proceedings came into existence, on 24th July 1998. The respondent Ballena Investments Ltd has a right to have its action proceeded with. The appellant has not shown this Court, why that right of the respondent should be interfered with by the institution of a stay. In all the circumstances this Court refused the application of the appellant that these civil proceedings await the outcome of the criminal trial.

Security for costs was sought by the appellant and refused by the learned judge below. The respondent is a company resident " ... out of the Island". Section 663 of the Judicature (Civil Procedure Code) Law reads:

> **"663** The court may, if in any case it deems fit, require a plaintiff who may be out of the Island, either at the commencement of any suit or at any time during the progress thereof, to give security for costs to the satisfaction of the Court, by deposit or otherwise; and may stay proceedings until such security be given".

In ***Watersports Enterprises Ltd v Frank*** (1991) 28 JLR 111, this Court stated the circumstances in which security for costs will be ordered by a court. Rowe, P. at page 113 said:

> "A plaintiff who resides outside the jurisdiction, as does this respondent, ought to be ordered to give security for costs, unless there are special circumstances which would make it unjust so to do".

No special circumstances have been advanced by the respondent to explain why the judge below would have been obliged to exercise her discretion not to order such security. Neither has any such been advanced before us. We were not convinced by the argument of counsel for the respondent that any judgment obtained against the respondent could easily be enforced in the Cayman Island where it was resident. The principle is that a successful litigant must "... have a fund available within the jurisdiction ... against which it can enforce the judgment for costs": (Lord Denning in ***Aeronave SPA et al v Westland Charters Ltd et al*** [1971] 3 All ER 531, 533, quoting Sir Nicholas Browne-Wilkinson, V.C. in ***Parzelack v Parzelack*** [1987] The Weekly Law Reports 10/4/87 at p.442). We therefore, ordered that the respondent provide security for costs in the sum of $150,000.00 ($250,000.00 was sought) within 30 days of the date hereof and in the meantime all proceedings herein are stayed. This sum is to be paid into an interest bearing account in a commercial bank agreed on by both parties in the names of the attorneys-at-law on the record.

For the above reasons we allowed the appeal and made the said orders.

FORTE, P.

I agree

CLARKE, J.A. (Ag.)

I agree