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IANTHI A NICOLAIDES
v.
CHARTERED BANK OF FAMAGUSTA

[ZEKIA, P., VASSILIADES, JOSEPHIDES, JJ].

IANTHI A. NICOLAIDES,
Appellant-Defendant,

v.

THE CHARTERED BANK OF FAMAGUSTA,
Respondent-Plaintiff

(*Civil Appeal No.* 4536)

Contracts. Guarantee - Misrepresentation - Concealment of material facts. Duty of creditor not to mislead a prospective guarantor or not to keep silence on a material circumstance - The Contract Law, Cap. 149, sections 2(1), 18(b), 100 and 101 — No defraction from such duty because the guarantor is the wife of the debtor. On the contrary, owing to the fiduciary relations existing between husband and wife, it behoves a creditor or banker to be more strict and careful when accepting as guarantor a wife for the husband's debt.

Banking Contract. Guarantee - Credit account commonly known as overdraft account - Opened in favour of a merchant under the guarantee of his wife - Extension of credit facilities under the guarantee of the wife - In the instant case the said guarantee were held to be invalid under sections 100 and 101 of Cap. 149, (supra), because the relevant letter of guarantee was framed in a way amounting to misrepresentation concerning a material part of the transaction without which, on the balance of probabilities the appellant-wife would not have entered into it. And the banker having so framed the said letter kept silence on the same material circumstance viz. that at the time of the signing of the guarantee the husband-debtor was already indebted to the bank (respondent) in a considerable amount exceeding the future credit limit sought to be granted by the letter of guarantee in question.

This is an appeal from the judgment of the District Court of Famagusta whereby the appellant (defendant No. 2) was adjudged, as guarantor to her husband (defendant No. 1), the principal debtor, to pay to the plaintiff Bank (now respondent) the sum of £15,000 plus interest thereon at 8% per annum from the 6th October, 1964, to the date of payment. The facts of the case may be summarized as follows:

The husband, the principal judgment debtor, who is a merchant, signed on the 12th December, 1961, a contract with the respondent Bank with a view to opening a credit current account (more commonly known as overdraft account) up to the amount of £5,000, such credit account to remain open to the 12th December, 1963. The appellant wife signed on the same day the said contract as guarantor The contract and the guarantee are set out fully in the judgment of the Court (*infra*) The account opened was entered in the books of the Bank as overdraft No 118 and started to operate on the 4th January, 1962.

The account was fluctuating and by the end of August, 1962, it showed a debit balance of £17,563 There being no substantial payments to the said overdraft account, the respondent Bank asked for supplementary security from the debtor The Bank drafted a letter to be signed by the principal debtor and a form of guarantee to be signed by the guarantor, the appellant wife, both of which were signed, respectively, on the 31st August, 1962. They read as follows

"Famagusta, 31st August 1962

The Manager,
The Chartered Bank,
Famagusta

Dear sir,

OVERDRAFT ACCOUNT No. 118

With reference to the above Overdraft Account No 118 on which you have granted to me a Limit of £5,000 by virtue of contract dated 12th December, 1961, I shall be obliged if you will kindly allow me at your discretion temporarily to draw upon my said account until the 31st January, 1963, UP TO A maximum of £18,000 (say Eighteen thousand pounds) that is to say an excess of £13,000 over and above the original agreed Limit of £5,000.

I undertake to repay you any debit balance outstanding on the said account upon your first demand

Yours faithfully,
(*Sgd*) *N. Nicolaides*

I, the undersigned who jointly and severally guaranteed the obligations of Mr. Ntinos A. Nicolaides Famagusta,

under contract dated 12th December, 1961, UP TO A maximum of £5,000 hereby personally jointly and severally extend my guarantee UP TO A maximum of £18,000 (Say Eighteen thousand pounds) to cover temporary excess drawings which you agreed at your discretion to allow Mr. Ntinos A. Nicolaides, Famagusta, in accordance with his above mentioned request.

I further agree to repay you upon your first demand any debit balance outstanding on the said account UP TO A maximum of £18,000

(Sgd) Ianthi N Nicolaides

After the date of execution of the last described supplementary security, the debtor in September, 1962, made some deposits into his aforesaid overdraft account No 118 Thereafter, however, his debit balance went up gradually until the 25th January, 1963, when it reached the figure of £37,496 On that day further security was demanded by the respondent Bank and as a result again a letter of request to extend the credit to the figure of £20,000 plus a form of guarantee were prepared by the Bank, both of which were duly signed by the husband and wife respectively on the 25th January, 1963 These documents read as follows -

'Famagusta, 25th January, 1963

The Manager,
The Chartered Bank,
Famagusta

Dear Sir,

OVERDRAFT ACCOUNT No 118

With reference to the above mentioned Overdraft A/C No 118 on which you have granted to me a limit of £ 5,000 by virtue of contract dated 12th December, 1961, I shall be obliged if you will kindly allow me at your discretion temporarily to draw upon my said account until the 31st July 1963, UP TO a maximum of £20,000 (Say Twenty thousand pounds) that is to say an excess of £15,000 over and above the original agreed limit of £5,000

I undertake to repay you any debit balance outstanding on the said account upon your first demand

Yours faithfully,
(Sgd) *N. Nicolaides*

I the undersigned who jointly and severally guaranteed the obligations of Mr. Ntinos Nicolaides, Famagusta, under contract dated 12th December, 1961, UP TO a maximum of £5,000.—hereby personally jointly and severally extend my guarantee UP TO a maximum of £20,000 (Say : Twenty thousand pounds) to cover temporary excess drawings which you agreed at your discretion temporarily to allow him in accordance with his above mentioned request.

I further agree to repay you upon your first demand any balance outstanding on the said account UP TO a maximum of £20,000.

(Sgd) *Ianthi Nt. Nicolaides.*"

The responsible bank's Manager did not inverview or meet the appellant-wife in connection with the guarantees that she signed. Both supplementary agreements were drawn up and typed by the respondent Bank ; apparently these agreements were signed later, not in the presence of any bank's representative. Another relevant fact which emerged from the evidence is that the statement of accounts on the said overdraft account No. 118 was sent twice yearly only to the principal debtor, the husband, and not to the guarantor, that being the bank's practice.

On the 4th August, 1964, the debit balance of the said account No. 118 was £29,973. A demand for payment made on that day having proved of no avail, the Bank instituted the proceedings in the District Court of Famagusta which resulted in the judgment appealed from by the wife, defendant No. 2, the guarantor.

It was argued on behalf of the appellant that the said supplementary guarantees sued on are void *ab initio, inter alia,* because of misrepresentation and non-disclosure of a material fact, that is, the fact that on the dates of the execution of the guarantees the debtor-husband was already indebted over and above the full amount guaranteed.

Sections 100 and 101 of the Contract Law, Cap. 149 provide :

"100. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid ".

"101. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid."

On the other hand, section 18 of the statute *viz* the Contract Law, Cap. 149 provides

"18 Misrepresentation includes—

'(a) (b) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him by misleading another to his prejudice or to the prejudice of any one claiming under him

Section 2 of the said statute Cap 149 provides

'2(1) This Law shall be interpreted in accordance with the *principles of legal interpretation obtaining in* England and expressions used in it shall be presumed so far as is consistent with their context, and except as may be otherwise expressly provided to be used with the meaning attaching to them in English law and shall be construed in accordance therewith'

The Supreme Court in allowing the appeal

Held, (1) the application of section 100 and 101 of the Contract Law, Cap 149 (*supra*) or either of them to the facts of the case resolves the question in issue

(2) It is obvious from the judgment appealed from that the learned trial Judges in holding that there was no concealment within the meaning of section 101 (*supra*) took only into account the fact that the overdraft said account No 118 of the principal debtor was already overdrawn when the said supplementary agreements of guarantee were signed by the appellant-guarantor and nothing else Had the case of the appellant rested on this point alone, the trial Court might have been justified in not dismissing the action on this ground on the authority of *J Hamilton* v *J Watson*, 8 *E R* 1339

(3) However, certain vital points were apparently left out of consideration One is he accounts under the original contract of guarantee as well as under the supplementary letters of guarantee were kept in one and the same overdraft account No 118 Drawings beyond the guarantee limit were also debited to this account All these documents of guarantee were prepared by the respondent bank Another

important point was the way the supplementary letters of guarantee were drafted. Both supplementary guarantees provided for future temporary excess drawings over and above the original guarantee of £5,000 for periods of 5-6 months each respectively. These kind of advances are normally made for business transactions expected to be terminated within the periods stated. Such short term credits are usually open to merchants—as the husband, principal debtor in this case—who export agricultural products or import manufactured goods to this country. Merchants securing such credits are expected to pay off their debts within a reasonable time after such business transactions are over.

(4) From the wording of both supplementary letters of guarantee (*supra*) it is clear that temporary excess advances were to be made after the signing of the said letters, in other words, future credit advances were contemplated.

(5) (a) Therefore, the said supplementary agreements for extension of credit were framed in such a way as to mislead the appellant-guarantor on the fact that her husband, the principal debtor, was, at the time of the signing of the aforesaid letters of guarantee, already indebted to the respondent-bank in a considerable amount exceeding the future credit limit sought to be granted by the letters in question.

(b) This amounts, in our opinion, to a misrepresentation within the meaning of section 18 (b) of the Contract Law, Cap. 149 (*supra*) and we take it to be the duty of the creditor not to mislead any prospective guarantor on a material circumstance. The very fact that the husband-debtor was indebted in the sum of £38,000 at the time the second guarantee was obtained from the appellant-wife (*supra*) was indeed a material circumstance for the guarantor.

(c) There is no evidence whatsoever that the appellant wife knew of the fact that her husband was so heavily indebted as aforesaid at the time of the execution of the said guarantees and the Court cannot act by guessing on the matter.

(d) On the other hand to the question—as suggested by Vaughan Williams, L.J. in *Holloway's* case (*infra*), namely "Would the surety have entered into this contract of suretyship if the non-disclosed fact had been disclosed to him", we answer in the negative.

(6) It follows that the appellant is entitled to a relief either under section 100 or section 101 or both of the Contract Law, Cap. 149 (*supra*) in this way :

We have found that the way the guarantees under consideration were framed amounted to misrepresentation and, *without it, on the balance of probabilities*, the appellant-wife would not have entered into such guarantee and that the misrepresentation concerns undoubtedly material part of the transaction in question. Therefore the guarantees in question are invalid under section 100 (*supra*). On the other hand, this creditor (the respondent-Bank by the form of guarantee as drafted, having misled the guarantor in a material circumstance, it was his duty to disclose the excessive debit balances standing in the said overdraft credit account No. 118 of the husband, the principal debtor. Having failed to do so, the guarantee is equally invalid under section 101 of the Contract Law, Cap. 149 (*supra*).

(7) The fact that the guarantor in this case is the wife of the principal debtor does not detract anything from the duty of a creditor not to mislead the guarantor on any material circumstance touching the solvency or financial standing of her husband, the debtor. On the contrary owing to the fiduciary relations existing between a husband and wife it behoves a creditor or banker to be more strict and careful when accepting as guarantor a wife for the husband's debt.

Appeal allowed. No order as to costs here and below.

Cases referred to :

J. Hamilton v. *J. Watson*, 8 *E.R.* 1339;

Chaplin and Co. Ltd v. *Brammall* [1908] 1 *K.B.* 233, *at p.* 237 per Vaughan Williams, C.J.

Pidcok v. *Bishop*, 27 *E.R.* 433 ;

Edward Railton v. *Thomas Gadd and Robert Leonard and Another*, 8 E.R. 993 ;

London General Omnibus Company Ltd v. *Holloway*, [1912] 2 K.B. 72

Lee and Another v. *Jones* (1864) 144 E.R. 194 ;

Jean Mackenzie v. *Royal Bank of Canada* [1934] A.C. 468, P.C ;

Appeal.

Appeal against the judgment of the District Court of Famagusta (Evangelides P.D.C. & Kourris D.J.) dated the 31st July, 1965 (Action No. 1681/64) whereby the defendant was adjudged to pay as guarantor to her husband, the principal debtor, the sum of £15,000.

S. Pavlides with *Chr. P. Mitsides* and *A. Antoniades*, for the appellant.

M. Montanios, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by :

ZEKIA, P. : This is an appeal from the judgment of the District Court of Famagusta whereby the defendant (appellant) was adjudged to pay as guarantor to her husband, the principal judgment debtor, the sum of £15.000 with interest thereon at 8% per annum from the 6th October, 1964, to the date of payment The facts of the case could be summarized as follows :

The husband, the judgment principal debtor (defendant No. 1 in the action), is a merchant engaged in buying, among other things, agricultural produce such as potatoes, carrots, and exporting them. On the 12th December, 1961, he signed a contract with the respondent bank with a view to opening a credit current account (more commonly known as overdraft account) up to the amount of £5,000. The credit would have remained open up to the 12th December, 1963. The appellant signed the same day the said contract as guarantor. The terms and conditions embodied in the contract and the guarantee given by the wife appear in the document exhibited as exhibit No. 1 which we quote hereunder :

"CONTRACT OF AGREEMENT No. 118

The undersigned, THE CHARTERED BANK, of the one part, hereinafter called "THE BANK" and Ntinos A. Nicolaides, P.O. Box No.143, Famagusta, of the other part, hereinafter called "THE DEBTOR", which will have in appropriate cases also a plural meaning, have agreed as follows :

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1 The Bank opens for account of the Debtor a Credit in current account, up to the amount of FIVE THOUSAND POUNDS ONLY (Pounds Sterling £5,000)

This Current Account shall be debited, at the end of June and at the end of December, of each and every year

a) With interest at the rate of 8% per cent, per annum, (as from the day of payment for withdrawals, and as from the following working day for deposits or lodgements) In calculating the Interest, the number of days of each month shall be taken as the case may be (calendar months), but the financial year shall be computed at the Fixed Divisor of 360 days

b) With commission at the rate of - per cent half yearly calculated upon the maximum Debit Balance which *the Current account will show during the relevant* half yearly period

The Bank has the right to alter the rate of Interest, at any time by simply informing in writing the debtor to that effect

2 The Credit will remain open up to and *including* the 12th December, 1962, or until such later date or dates as *may* be *mutually agreed upon* between the parties hereto and endorsed on the reverse hereof in the form of a renewal of this agreement, but the Bank has the right to cancel at any time and prior to its determination the present Credit by simply informing the DEBTOR to that effect when any sum due will become payable at once

The Bank will always be entitled to debit the present Current Account with any sum owed and payable by the Debtor whether it is due by him as DEBTOR, or GUARANTOR, or ENDORSER of a Bill of Exchange if such Bill of Exchange is not honoured at maturity, and also with any other amount owed and payable by the DEBTOR to the Bank and accruing from any cause whatsoever

3 As soon as the said Credit is closed for any reason whatsoever the Account shall thereupon be settled and the DEBTOR must pay forthwith any amount due to the Bank plus interest and all other charges of the Bank,

otherwise the interest shall be calculated at the rate of nine per cent (9%) per annum, as from that day and the Bank shall have the right to demand through legal proceedings the payment of the Debt, plus legal and any other expenses whatsoever, up to full and final settlement.

5. Any notice shall be considered as having been formally served on the Debtor, if it is sent to his last known address by prepaid post or to the address mentioned in this agreement.

6. The Debtor agrees to all the terms and conditions of this Agreement.

MADE IN Famagusta the 12th day of December, 1961.

The Debtor
(Sgd) *N. Nicolaides*

Whereas the Credit has been opened at my request, I personally jointly and severally guarantee the fulfilment of all the terms and conditions by the said Debtor Mr. Ntinos A. Nicolaides, Famagusta, up to final settlement, the Bank being entitled to grant extensions to the Debtor without any previous advice to me and to accept also payments on account, and I undertake to pay forthwith any sum due as soon as the said Credit shall be closed for any cause whatsoever without any legal action or any objection on our part.

In the event of the said Current account exceeding the above mentioned limit during the duration of this Credit, our obligation, as Guarantors shall continue being valid and in force but for an amount not exceeding the limit of the Credit that is to say £5,000, plus interest, and/or Commissions and/or charges and irrespective of whether such Interest and Commission are as originally agreed upon or have been amended as provided for in the present Agreement.

I moreover agree that my Guarantee shall be a continuing Guarantee, and with a view of giving full effect to our Guarantee, I by the present declare, that I waive any privileges or rights which I may have as Guarantor and I authorise you to take if necessary legal steps agaist me just as if I were your own original DEBTOR.

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I further agree that this my guarantee is not to be revoked by any change in the constitution of the firm unless you receive from me a written advice of the termination of my guarantee after any such change

(Sgd) *Ianthi N Nicolaidou*
Guarantor

Witness

"

The account opened was entered in the books of the Bank as Overdraft No 118 This account started to operate on the 4th day of January, 1962 The account was fluctuating and on the 6th June, 1962, showed a credit balance of £38,000 It dropped, however, in July and August of the same year and by the end of August there was a bebit balance of £17,563 There being no substantial payments to the said account the respondent bank asked for supplementary security from the debtor The Bank drafted a letter to be signed by the principal debtor and a form of guarantee to be signed by the guarantor, the appellant, both of which were signed, respectively on the 31st August, 1962 They read as follows

'Famagusta, 31st August, 1962

The Manager,
The Chartered Bank
Famagusta

Dear sir,

OVERDRAFT ACCOUNT No 118

With reference to the above Overdraft Account No 118 on which you have granted to me a limit of £5,000 by virtue of contract dated 12th December, 1961, I shall be obliged if you will kindly allow me at your discretion temporarily to draw upon my said account until the 31st January, 1963 UP TO A maximum of £18 000 (Say Eighteen thousand pounds) that is to say an excess of £13,000 over and above the original agreed Limit of £5 000

I undertake to repay you any debit balance outstanding on the said account upon your first demand

Yours faithfully,
(Sgd) *N Nicolaides*

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I the undersigned who jointly and severally guaranteed the obligations of Mr. Ntinos A. Nicolaides Famagusta, under contract dated 12th December, 1961, UP TO A maximum of £5,000 hereby personally jointly and severally extend my guarantee UP TO A maximum of £18.000 (Say : Eighteen thousand pounds) to cover temporary excess drawings which you agreed at your discretion to allow Mr. Ntinos A. Nicolaides, Famagusta, in accordance with his above mentioned request.

I further agree to repay you upon your first demand any debit balance outstanding on the said account UP TO A maximum of £18,000

(Sgd) *Ianthi N. Nicolaides.*"

After the date of execution of the last described supplementary security in September, 1962, the debtor made two deposits amounting to £6,500 with which his Account No. 118 was credited. Thereafter, however, his debit balance went up gradually until the 25th January, 1963, when it reached the figure of £37,496. On that day further security was demanded by the respondent-bank and as a result again a letter of request to extend credit to the figure of £20,000 plus a form of guarantee were prepared by the respondent-bank, both of which were duly signed by the husband and wife respectively. This was produced as exhibit No. 3, which reads as follows :

" Famagusta, 25th January, 1963.

The Manager,
The Chartered Bank,
Famagusta.

Dear sir,

OVERDRAFT ACCOUNT No. 118

With reference to the above mentioned Overdraft A/C No. 118 on which you have granted to me a limit of £5,000 by virtue of contract dated 12th December, 1961, I shall be obliged if you will kindly allow me at your discretion temporarily to draw upon my said account until the 31st July, 1963, UP TO a maximum of £20,000 (Say: Twenty thousand pounds) that is to say an excess of £15,000 over and above the original agreed limit of 5,000.

I undertake to repay you any debit balance outstanding on the said account upon your first demand.

Yours faithfully,
(Sgd) *N. Nicolaides.*

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I the undersigned who jointly and severally guaranteed the obligations of Mr. Ntinos Nicolaides, Famagusta, under contract dated 12th December, 1961, UP TO a maximum of £5,000 hereby personally jointly and severally extend my guarantee UP TO a maximum of £20,000 (Say : Twenty thousand pounds to cover temporary excess drawings which you agreed at your discretion temporarily to allow him in accordance with his above mentioned request.

I further agree to repay you upon your first demand any balance outstanding on the said account UP TO a maximum of £20,000.

(Sgd) *Ianthi Nt. Nicolaides.*"

On the 31st July, 1963, the debit balance reached the figure of £61,744 ; by the 31.12.1963 it dropped to £28,808. From the evidence of the manager of the bank it appears that the reduction in the debit balance was brought about by transferring on 21.9.1963 from the cash guarantee of the debtor held by the bank to the overdraft account No.118 the sum of £10,086, and also by crediting this account with the sum of £25,000 which amount was raised by a mortgage made by the debtor in favour of the respondent bank effected on the 10th October, 1963.

On the 4th August, 1964, the debit balance Account No. 118 was £29,973. On that day the following letter was sent to the debtor and a copy of it to the guarantor (exhibit 4) :

" 4th August, 1964.

Mr. Ntinos Arseniou Nicolaides,
5, Olymbus Street,
Famagusta.

Dear Sir,

YOUR OVERDRAFT ACCOUNT No. 118.

We wish to remind you that both your contract and last annex in connection with the above Overdraft account, expired on 12.12.1963 and 31.7.1963 respectively and shall be glad if you will kindly see for repayment of the balance due to us i.e. £29,973.679 mils plus interest at 8% as from 25.6.1964 without any delay.

Yours faithfully,
for THE CHARTERED BANK.

(Sgd)..... .....
Accountant Manager

Copy to guarantor :

Mrs. Ianthi Nt. Nicolaides,
11, Kartessiou Street,
Famagusta."

On the 3rd October, 1964, the debtor and the guarantor were informed of the legal proceedings to be taken against them (exhibit 5) :

" Famagusta, 3rd October, 1964.

Mr. Ntinos Arseniou Nicolaides,
P. O. Box 143,
Famagusta.

Dear Sir,

YOUR OVERDRAFT ACCOUNT No. 118

With reference to our letter of the 4th August last, we regret that in view of your failure to make repayment arrangements in respect of your above Overdraft account we have no option but to place the matter in the hands of our lawyers.

Yours faithfully,
for THE CHARTERED BANK

(Sgd)..... .....
Accountant Manager

Copy to Guarantor :

Mrs. Ianthi Nt. Nicolaides,
11, Kartessiou Street,
Famagusta. "

The trial Court found as a fact that on the 25th January, 1963, the bank held on behalf of the principal debtor bills of exchange of the face value of £12,428 and that in April, 1963, the bills lodged with the bank were of the face value of £21,673. These bills were held as collateral security under an agreement between the creditor-bank and the debtor which reads as follows (exhibit 6) :

" Name of Client: *Mr. Ntinos Ars. Nicolaides*, Famagusta.

TO THE CHARTERED BANK,
Famagusta.

In consideration of your allowing me/us facilities in Current Account, or Overdraft Account from time to

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time and or making advances or facilities to me/us in any manner whatever, I/We hereby acknowledge and confirm that you have a valid and irrevocable lien on all clean and documentary bills which I/We have entrusted or may hereafter entrust to you for collection I/We irrevocably authorise you upon collection of any such bills to utilise the proceeds at your entire discretion towards the payment or part payment of any sums now owing or which may hereafter be owing to you by me/us or to hold such proceeds as security for any other liabilities direct or contingent I/We may have at any time towards your Bank

(Sgd) *Ntinos Arsenou Nicolaides*

Date 17 1 1963 "

At the request of the debtor the said bills on the 21st November, 1963, were returned unpaid to him It appears that the respondent bank did not proceed to collect these bills at the request of the debtor and therefore it cannot be said they were returned to the debtor because they were uncollectible

The appellant wife on the other hand, to a limited extent became involved in the business of the husband She was constituted as his attorney by a power of attorney dated 3rd March 1962, by virtue of this document she signed some cheques on behalf of her husband the nature of which was not disclosed She also negotiated certain shipping documents relating to potatoes shipped for London These were documentary bills representing a total amount of £13,541 which bills were discounted by the respondent bank It is also in evidence that in August, 1962, the husband and wife formed a private limited company under the style Ntinos Arsenou Nicolaides Ltd each subscribed one pound for one share Later in January, 1963, they, together with two others formed the 'Pioneer Farm Ltd" in which the husband had 26 shares and the appellant-wife 1,500 shares Nothing appears on the record as to the business activities of these two companies

Another relevant fact which emerged from the evidence of the bank manager is that the statement of accounts on the Overdraft Account No 1,8 was sent twice yearly only to the principal debtor, the husband and not to the guarantor, this being the bank's practice

The responsible bank's manager did not interview or meet the appellant in connection with the guarantees that she signed. Both supplementary agreements were drawn up and typed at the respondent-bank; apparently, these agreements were signed later, not in the presence of any bank's representative.

On the facts as summarized above it was submitted on behalf of the appellant that the supplementary guarantees are void *ab initio* because of:

A. Misrepresentation and non-disclosure of a material circumstance, that is, the fact that on the dates of the execution of the guarantees the debtor was already indebted over and above the full amount guaranteed.

B. There was no consideration to support either of the supplementary guarantees.

C. In any case the guarantor was discharged because the creditor bank has parted with collateral securities deposited with the said bank by the debtor without the consent of the guarantor.

Let us deal first with ground A of the appeal. Sections 100 and 101 of the Contract Law Cap. 149 are material for the determination of ground A. Sections 100 and 101 read as follows:

100. "Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid".

101. "Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid".

The application of these sections or either of them to the facts of the case resolves the answers to be given to the first submission. Section 2 (1) of the Contract Law enacts that the said Law should be interpreted in accordance with the principles of legal interpretation obtaining in England unless of course it is otherwise expressly provided.

The trial Court has taken the following view of the law and its application to the facts of the case on ground A:

> "We do not agree with this submission. Our section is identical with section 143 of the Indian Contract Law and the comments of the authors of the books 'Indian

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Contract and Specific Relief Acts, etc,' by Pollock and Mulla, 6th Edition, pp 502-505, do not support the submission of Mr Pavlides In their view keeping silence means intentional concealment as distinguished from mere non-disclosure In this case there is nothing in the evidence that there was a wilful concealment It is true that there is no evidence that the bank disclosed to defendant 2 the fact that the account of defendant 1 was already overdrawn, but on the other hand, there is nothing in the evidence to show that the non-disclosure was made on purpose so as to mislead defendant 2 and no evidence whatsoever that the guarantee was obtained because of such non-disclosure And we might also cite from p 503 second paragraph, where it is stated:

> 'But it is not every disclosure that a surety can require Where a customer's credit with his bankers is guaranteed the fact that a new credit is to be applied to paying off an existing debt of the customer to the Bank, is not such as need be disclosed For this is nothing out of ordinary course of business but rather to be expected'

We find that there was no wilful concealment and, therefore, in our view, this argument fails"

It is obvious from what we have quoted that the learned Judges, in considering whether there was a concealment within the meaning of section 101 of the Contract Law they took only into account the fact that the Overdraft Account No 118 of the principal debtor was already overdrawn when the supplementary agreements of guarantee were signed by the appellant-guarantor and nothing else Had the case of the appellant rested on this point alone the trial Court might have been justified in dismissing the action on this ground because in doing so it might very well rely on *J Hamilton v J Watson* (English Reports) volume 8, 1339 Certain vital points were apparently however left out of consideration One is that the accounts under the original contract of guarantee as well as under the supplementary letters of guarantee were kept in one and the same overdraft account No 118. Drawings beyond the guarantee limit were also debited to this account All these documents of guarantee were prepared by the respondent-bank and signed by the debtor and the guarantor.

Another important point was the way the supplementary letters of guarantee were drafted Both supplementary guarantees

provided for future temporary excess drawings over and above the original guarantee of £5,000 for periods of 5-6 months each respectively. These kind of advances are normally made for business transactions expected to be terminated within the periods stated. Such short term credits are usually open to merchants who export agricultural products or import manufactured goods to this country. Merchants securing such credits are expected to pay off their debts within a reasonable time after such business transactions are over. From the wording of both supplementary letters of guarantee it is clear that temporary excess advances were to be made after the signing of the letters, in other words, future credit advances were contemplated.

The letters of the debtor requesting the respondent-bank for temporary excess advances appearing in both supplementary agreements of guarantee—both of which, as already mentioned, were drafted by the respondent-bank—may easily lead one to assume that the debtor's overdraft account No. 118 reached the limit of £5,000 only, at the time the letters of request were written by the debtor and that he wanted over and above this figure further temporary credit facilities of £13,000 by the first and £15,000 by the second letter of request. Both letters were addressed to the respondent-bank seeking increases of credit limits, prepared as described above and headed "Overdraft Account No. 118". The letters referred to the original agreement of opening credit to the husband with a limit of £5,000 account as Overdraft Account No. 118 and request was made to increase the credit limit in the said overdraft account from £5,000 to £18,000 by the husband's first letter and from £5,000 to £20,000 by his second letter for the purpose of future temporary excess drawings. After the figures £18,000 and £20,000 it is stated clearly on both letters that an excess credit of £13,000 and of £15,000 respectively over and above the originally agreed limit of £5,000 was being applied for.

Having read carefully these supplementary letters of guarantee we are of the opinion that the ordinary import to be attributed to them is that the debtor having made use of his original credit limit of £5,000 or this amount not being sufficient for him to transact some future business of temporary character he contemplated, he applied for futher future advances specified therein. This amounts to misrepresentation in view of the fact that at the date of the signing of the

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first supplementary agreement the debtor was already indebted in the sum of £17,000 and at the date of the signing of the second supplementary letter for credit he was indebted in the sum of 38,000 Unless the guarantor who subscribed these letters of request as guarantor can be said that she knew of the indebtedness of the principal debtor to the extent indicated, at the time she signed the letters as guarantor, she was bound to be misled as to the actual state of affairs and as to the financial position of her husband The amount involved being almost twice as big compared with the credit limit granted on the last occasion it was no doubt a very material circumstance for the guarantor to be informed of it.

The periodical statements of account were only sent to the debtor, the husband , it is true she acted as his attorney on certain occasions when he was abroad She signed cheques and shipping documents on his behalf. From this we cannot infer that she was aware of her husband's debit balances with the bank at the material dates By the formation of the two companies mentioned earlier in the judgment we do not know whether any kind of business was transacted or that if business was transacted at all had any connection with the overdraft account No 118 kept with the respondent-bank It is also true, on the other hand, that the appellant did not give evidence before the trial Court The Court, however, has to determine the issues raised on the evidence available and, being a civil case, may act on the preponderance of evidence and on balance of probabilities

The fact that the guarantor is the wife of the principal debtor does not detract anything from the duty of a creditor not to mislead the guarantor on any material circumstance touching the solvency or financial standing of her husband, the debtor On the contrary owing to the fiduciary relations existing between a husband and wife it behoves a creditor or banker to be more strict and careful when accepting as guarantor a wife for a husband's debt In practice independent advice to a wife who intends to become a guarantor to her husband, as a matter of precaution, is usually given Many wives might readily sign any document presented to them by their husbands without much enquiring into its nature and scope and also likewise they might act under the undue influence of their husbands

It might not be altogether out of place if we refer here to *Chaplin & Co Ltd v. Brammall* [1908] 1 K B 233 The facts were

"The plaintiffs, having agreed to supply goods to the defendant's husband on credit if his wife would guarantee payment by him of their price, sent to the husband a form of guarantee, in order that he might obtain his wife's signature to it, leaving the matter entirely to him. The husband obtained his wife's signature to the guarantee, without sufficiently explaining to her the nature of the document, which she did not understand when she signed it. Goods having been supplied by the plaintiffs to the defendant's husband, the price of which was not paid, the plaintiffs sued the defendant on the guarantee :

"*Held*, that the action was not maintainable".

At page 237 Vaughan Williams, L.J., delivering the judgment of the Court of Appeal stated :

"In my judgment this appeal should be dismissed. Those, who, as representing the plaintiffs, prepared and sent to the defendant's husband the document sued upon, in order that he might procure his wife's signature to it, so that the plaintiffs might have security in respect of the business transactions into which they were about to enter with him, were, when they did so, clearly cognizant of the fact that the influence of a husband was being employed to obtain the signature of his wife to that document. That being so, I am sorry for the plaintiffs that they turn out not to be in a position to prove that any proper explanation of the instrument which she was about to sign was given to the defendant before she signed it.

On the contrary, Ridley J. has come to the conclusion that in fact no sufficient explanation of it was given to her, and that she did not understand it. It is unfortunate that the plaintiffs did not take care to see that the defendant had independent advice in the matter. But the result is that the plaintiffs, who, through their agents, were undoubtedly aware that the execution of this guarantee was to be procured through the guarantor's husband who was living with his wife at the time, and would presumably have the influence of a husband over her, fail to show that the document was properly explained to her".

Let us now turn to the legal aspect of the case in the light of the facts and inferences as indicated above.

In the case of *Pidcock* v. *Bishop* (27 E.R.) at p. 433 it w emphasized that the guarantor "should know" so mu as will tell him what is the transaction for which he is maki himself answerable and he will be discharged if there is eith active misrepresentation of the matter by the creditor or lence amounting in the circumstances to misrepresentatio

In *J. Hamilton* v. *J. Watson* (*supra*) it was held that

> "An obligation to a banker by a third party to be sponsible for a cash credit to be given to one of the ba ker's customers, is not avoided by the fact, that, imm diately after the execution of the obligation, the cash cre is employed to pay off an old debt due to the banker"

Lord Campbell in his judgment in the above case indic ted the criterion to be applied when a banker is to disclo material circumstance to a prospective guarantor in the fo lowing words :

> "The criterion whether the disclosure ought to made voluntarily, namely, whether there is anythi that might not naturally be expected to take pla between the parties who are concerned in the transacti that is, whether there be a contract between the debt and the creditor, to the effect that his position shall different from that which the surety might natural expect ; and, if so, the surety is to see whether that disclosed to him. But if there be nothing which mig not naturally take place between these parties, then, the surety would guard against particular perils, he mu put the question, and he must gain the informati which he requires".

In the case of *Edward Railton Thomas Gadd and Robe Leonard and Another*, English Reports, Volume 8, p. 99 The House of Lords made the following statement of law

> "Mere non-communication of circumstances affecti the situation of the parties, material for the surety be acquainted with, and within the knowledge of t person obtaining a surety bond, is undue concealmer though not wilful or intentional, or with a view to a advantage to himself".

In the case of *London General Omnibus Company Lt* v. *Holloway* [1912] 2 K B., 72 although the subject matter the appeal was a fidelity guarantee yet distinction betwe

suretyship for the fidelity of a servant and a guarantee in respect of banking account was widely discussed. Vaughan Williams, L.J., with reference to the facts to be disclosed to a guarantor states :

> " I do not think that the importance of the non-disclosed fact in regard to the duties the subject of the suretyship is necessarily a mere question of law ; it may be a question of fact to be decided by a jury or Judge sitting alone. The question for Judge or jury to put to himself or themselves seems to be :
>
> > *Would the surety have entered into this contract of suretyship if the non-disclosed fact had been disclosed to him?* ".

The same Judge, after quoting Lord Campbell and the criterion he suggested in *Hamilton's* case, continues :

> " But I take it this is only an example of the general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist, for the omission to mention that such a fact does exist is an implied representation that it does not. Such a concealment is frequently described as 'undue concealment' ".

Further down in his judgment he quoted Lord Cottenham in *Railton* v. *Mathews* (*supra*) stating :

> " In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive ".

Kennedy, L.J., in his judgment referred also to *Hamilton's* case and made the following remarks :

> " The House of Lords (the Lord Chancellor Lord Brougham and Lord Campbell) held that, neither fraud nor misrepresentation being even alleged, the mere non-disclosure to the surety of these dealings constituted no ground of defence to the action brought by the banker against the surety. The difference between this last cited case and the case of *Railton* v. *Mathews* is, I think, reasonably clear ".

Further down in his judgment Lord Justice Kennedy continues:

> "On the other hand, in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances such as might affect the judgment of the person who is asked to be surety. But, in the language of Sir Frederik Pollock (Principles of Contract, 8th Edition, p. 568), 'the creditor is not bound to volunteer information as to the general credit of the debtor or anything else *which is not part of the transaction itself to which the suretyship relates*' and on this point there is no difference between law and equity'."

The point in the present case, however, is not the general credit of the debtor but what is embodied in the recital of the document forming the guarantee, an intrinsic matter to be considered.

In *Lee and Another* v. *Jones* (1864) English Reports 144, at page 194, the facts were as follows:

> "One P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. *having fallen in arrear to the extent of* 1272*l.*, *the plaintiffs* required him to find security to the amount of 300*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties in an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact."

It was held, by Crompton, J., Channel, B., Blackburn, J., and Shee, J., in the Exchequer Chamber, affirming the judgment of the Court below:

> "that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea.—Pollock, C.B., and Bramwell, B., dissenting."

At page 204, Blackburn, J. in his judgment states :

" I think that it must in every case depend upon the nature of the transaction, *whether the fact not disclosed is such that it is impliedly represented not to exist* and that must generally be a question of fact proper for a jury. If in this case the amount of the balance already due had been small or the period during which the accounts were left unsettled short, there would in my opinion have been such a mere scintilla of evidence as would not have warranted the jury in finding the verdict of fraud ; and the Judge would have been justified in withdrawing the question from their consideration. But, as it is, the amount of the balance already due being, relatively to the amount of the security so large, and the period during which no settlement had taken place being so considerable, I think the Judge could not have withdrawn the case from the consideration of the jury, who might well come to the conclusion that the sending of the agreement in these terms amounted to an inaccurate representation. This would not be enough to support the verdict on the plea of fraud, unless it was further established that the plaintiffs made the inaccurate representation, intending to deceive the defendant and induce him to enter into contract, in the belief that what was represented did exist, whilst the plaintiffs knew it did not exist. But of that also I think there was sufficient evidence ".

" The improbability that any one could suppose that sureties would have entered into such an agreement if they had known the truth, is so great that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it ; and, if the jury so thought, they might from that alone draw the inference that the representation was fraudulently intended to deceive ".

Crompton, L.J., and Channel, B., in their judgment at page 205 stated :

" It seems to me that the defendant in the present case would be naturally led by the guarantee, and the original agreement with Packer annexed thereto, and the reference to the agreement with Mrs. Tinson referred to in the guarantee, which is said to be supplemental to that agreement, to suppose that a different state of things existed from the real state of things known to the plaintiffs.

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It was known to the plaintiffs that Packer, the principal, had not carried out his original agreement with them, and that there was a large sum due from him on his floating bills By his agreement with them, the moneys to be received by him from the customers from time to time were to be paid over and accounted for within six days, and were to be applied to the floating bills Surely, on perusing such documents as were sent, the proposed sureties would be led to suppose that the moneys to be received from time to time would be applicable in the first instance to the bills to be given from time to time and not to a large deficit on the old bills In truth, none of the money to be received would be applicable to the new transactions till the large balance was wiped off, and it is very unlikely that the surety would have joined in the new guarantee, had he been aware of the existence of the old debt

I think also that the new sureties would naturally be led to suppose from the draft guarantee, and from its being stated that their engagement was to be supplemental and in addition to Mrs. Timson's, that her guarantee was practically applicable to the new dealings, whereas, whether the defendant's suretyship was applicable retrospectively or not, hers would really be in effect absorbed by the large balance

I think, therefore, that there was evidence that the defendant was led by the sending of the documents in question to the belief in an untrue state of facts, where the knowledge of the true state of facts would have prevented him from joining in the contract of suretyship

It was said indeed, that the plaintiffs sending the documents in this shape may have been without any intentional fraud on their part, and that they may merely have got the documents drawn by their professional advisors in a proper state, and forwarded them without moral fraud This seems, however, to me to be a question which the jury were to determine and it is not necessary for me to consider whether in their place I should have found the fraud. We are only to decide whether there was evidence to go to the jury"

This was a case of fraud which might not have a bearing on the present case but it possesses so many similar features with the instant case that is worth of noting".

In a more recent case in *Jean Mackenzie* v. *Royal Bank of Canada* [1934] A.C., p. 468, it was held by the Privy Council that

> "a contract of guarantee, like any other contract, is liable to be avoided if induced (as it was in the present case) by material misrepresentation, even if made innocently. There was no difficulty about *restitutio in integrum*. The fact that the bank had acted upon the contract did not preclude relief; nor had the plaintiff received under the contract anything which she was unable to restore".

This was stated in an action brought by

> " a married woman against a bank to set aside, on the ground of the undue influence of her husband and of misrepresentation, a guarantee (with pledge of securities) given by her for the indebtedness of a company in which her husband was the principal shareholder, there is not an onus upon the bank to prove that she had independent advice; in the absence of substantive proof of the undue influence (particulars of which should be pleaded) the action fails so far as it is based upon that ground".

Having gone at sufficient length into some of the leading cases relevant to the subject we revert to the facts of this appeal. As we have intimated earlier, in our view, both supplementary agreements for extension of credit facilities, quoted already in extenso in earlier part of this judgment were framed in such a way as to mislead the guarantor on the fact that her husband, the debtor, was, at the time of signing of the guarantee, not already indebted to the bank in a considerable amount exceeding the future credit limit sought to be granted by the letters in question. This amounts, in our opinion, to a misrepresentation within the meaning of section 18 (b) of the Contract Law which reads :

> " Any breach of duty which, without an intent to deceive gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him."

We take it to be the duty of the creditor not to mislead any prospective guarantor on a material circumstance. The very

fact that the husband was indebted in the sum of £38,000 at the time the second guarantee was obtained from the appellant was indeed a material circumstance for the guarantor. This was conceded to by the learned counsel of the respondent but he maintained that it was not the duty of the bank to disclose to the guarantor the amount of indebtedness of her husband. Granted that it was not the banker's duty to disclose such a debit balance to the guarantor, the wife, it was, however, the bank's duty not to frame a letter of request coupled with a form of guarantee which the plain import of it to the guarantor would have been nothing else but that her husband, under Overdraft Account No. 118, was only indebted in the sum guaranteed by the original agreement of credit.

In the circumstances, the bank either ought to have put the facts to the guarantor as they actually stood or to avoid making use of language which amounted to an actual misrepresentation as to the solvency or financial position of the principal debtor.

It is to be observed that in the original contract of guarantee the following provision was inserted :

> " I moreover agree that my Guarantee shall be a continuing Guarantee, and with a view of giving full effect to our Guarantee, I by the present declare, that I waive any privileges or rights which I may have as Guarantor and I authorise you to take if necessary legal steps against me just as if I were your original DEBTOR ".

To this our attention was drawn by the learned counsel of the respondent. If, indeed, all the terms and conditions appearing in the original contract were to be taken as having been incorporated into the supplementary agreements, no doubt, we had to consider the effect to such provision as to what extent the bank guarded itself against an unintentional or innocent misrepresentation. Although in these supplementary agreements express reference is made to the original contract and credit limit opened thereby there is no provision in them to the effect that all terms and conditions of the original contract were incorporated into these agreements. In such a case we have to ascertain whether the provision we have just quoted could, by necessary implication, be taken as having been incorporated in the subsequent credit agreements.

Having considered the point we are unable to say that the aforesaid provision ought to be taken as having been incor-

porated into the aforesaid agreements. It is true in the latter agreements there is no provision also relating to interest and commission to be charged by the bank in respect of the new increased advances but other considerations may apply such as the usage in banking business of charging invariably interest and commission. Moreover, in the instant case this was *not a contentious point*.

There is no evidence whatsoever that the wife knew of the fact that her husband was heavily indebted at the time of the execution of the aforesaid guarantees and the Court cannot act by guessing on the matter. Having answered the question—as suggested by Vaughan Williams, L.J., in *Holloway's* case already referred to, namely, "Would the surety have entered into this contract of suretyship if the non-disclosed fact had been disclosed to him"—in the negative, we find that the appellant *is entitled to a relief either under* section 100 or section 101 of the Contract Law.

We have found that the way the guarantees under consideration were framed amounted to misrepresentation and, without it, on the balance of probabilities, the appellant would not have entered into such a guarantee and the misrepresentation concerns undoubtedly material part of the transaction; the guarantees in question are invalid under section 100 of the Contract Law. On the other hand, the creditor, by the form of guarantee as drafted, having misled the guarantor in a material circumstance, it was his duty to disclose the excessive debit balance standing in the credit account No. 118 of the husband. Having failed to do so, the guarantee is equally invalid under section 101 of the Contract law.

Having disposed of this appeal on ground A, we do not intend to go into the other grounds of the appeal. Although the third ground of appeal, relating to the release of collateral securities had to be decided in case it might reduce the amount of the liability of the appellant under the original agreement of guarantee, this however, does not arise in this case. Because the ultimate debit balance of the debtor in this case was £29,973 and the bills held as collateral security by the respondent-bank was of the face value of £21,673 only. Thus, even if these bills were to be found to be worth their face value again the difference between the judgment debt and the value of the bills would have been over £8,000 which amount exceeds the maximum liability of the appellant under the original contract of guarantee.

There remains, however, the claim of the respondent arising from the original contract of guarantee by which Overdraft Account No 118 was opened.

Appellant has admitted full liability under the said contract She paid against that liability, however, only the sum of £5,008 The respondent-bank, on the assumption that the appellant was answerable under the original contract only, prepared a statement of account which was put in evidence at the trial Court and reference was made to it also before this Court This statement of account, which includes calculations of interest up to 8 1 1965, shows a balance of £1,347 690 mils as being due by the principal debtor fully covered by the original guarantee of the wife 8% interest on this sum is also claimed as from 8 1 1965 to the date of payment The respondent-bank was not cross-examined on the accuracy of this account in the Court below and it was not disputed before us either

The result of this appeal is as follows The appeal is allowed and the judgment of the District Court against appellant (defendant 2) is set aside and judgment is entered in favour of the respondent bank (plaintiff) and against appellant (defendant 2) in the sum of £1,347 690 plus interest at 8% p a as from 8 1 1965 to the date of payment

In the circumstances of this case there will be no order for costs here and in the Court below Each party to bear its own costs

VASSILIADIS, J I have had the advantage of reading the judgment of my brother Zekia Bey, the President of this Court, and I agree with his approach to the matter, and with the result reached

I wish to add, however, that my judgment in this case, rests on the provisions of section 191 of our Contract Law, Cap 149

As it may well appear from the President's judgment, this section, together with other provisions in the same part, and indeed, in most of our Contract Law (same as a lot of our other laws in Cyprus) emanate from the common law and corresponding statutes of England which, in a way, our Cyprus statutes are intended to incorporate But one must not lose sight of the fact that in such circumstances, the law governing the matter in Cyprus, is the local statute, as preserved in force after independence by article 188 of the Constitution , and as interpreted and applied by our Courts

So, in this case, the appeal turns on the question whether the respondent Bank has obtained the guarantee of the appellant for the payment of the amount claimed, " by means of keeping silence as to material circumstance ". A pure question of fact. If the answer to this question, is in the affirmative, the guarantee is invalid, as provided in section 101 of Chapter 149 of the Statutes of Cyprus.

It is not in dispute—and indeed it could not be reasonably suggested—that the extent of the debtor's indebtedness to the Bank, at the time when the appellant signed the contract of guarantee, was not a material circumstance in this case.

Appellant's original guarantee in exhibit 1, was for " an amount not exceeding the limit of the credit " i.e. £5,000 plus interest and other relative charges. Her last and final guarantee in exhibit 3, upon which the Bank's claim rests, is up to a maximum of £20,000 to cover " temporary excess drawings" which the Bank agreed at their "discretion temporarily to allow " the debtor, in accordance with his request, to facilitate him in his export business, as the record shows.

But in fact when the appellant signed exhibit 3, dated 25th January, 1963, the debtor's debt to the respondent Bank was already £37,496. So that, not only the full amount up to the maximum limit of £20,000 had been withdrawn by the debtor, but a substantial excess of that amount (a further seventeen and a half thousand pounds) was then due and payable to the Bank. Regarding this " material circumstance ", silence was apparently kept in connection with the guarantee.

Learned counsel for the Bank contended that the debtor's wife, whose final guarantee was obtained upon exhibit 3, was so involved in her husband's affairs, that she must have known of his indebtedness to the Bank. In any case, counsel submitted, it has not been shown that the wife's guarantee was obtained by means of keeping silence as to this circumstance.

Both legs of this submission are, in my view, clearly untenable. There is no evidence to show that the wife knew of the extent of her husband's debts. Indeed, if she knew, and if all parties concerned thought that she knew, there would be no point in keeping silence about it ; and making no reference thereto, whatsoever. Nor would there be any point in giving to the transaction the appearance of a guarantee to enable the debtor to make " temporary excess drawings " as the Bank at their discretion would agree " temporarily

to allow ". Moreover the fact that the wife agreed to give a guarantee up to a maximum of twenty thousand pounds, clearly indicates, in my opinion, her mind in that connection. And establishes a very reasonable probability that if she knew of the full extent of her husband's financial difficulties, she might well have acted differently

In my view, this case turns on the simple questions of fact required to bring it within the provisions of section 101 : silence as to material circumstance ; and whether the guarantee was obtained by means of keeping such silence. As far as the record can show, there can be no doubt as to the first ; and the most reasonable inference from the surrounding circumstances, leads, in my judgment, to the second.

Upon these facts, appellant's case comes within the provisions of section 101 ; and must be decided accordingly. The relevant English cases referred to by learned counsel in the course of the argument, and discussed in the learned President's judgment, deal with the Common Law of England, as it stood at the material time, and before it crystallized into our statutory provisions for application in Cyprus.

As to the variation of the judgment of the District Court, required to cover interest and other charges on the original guarantee, amounting to the sum stated in the President's judgment, I fully share the views expressed in that connection. And I fully concur in the result as stated therein.

JOSEPHIDES, J. : I have had the privilege of reading the very exhaustive judgment which has just been delivered by the learned President of this Court. I agree with his conclusions and with the reasons he gives for allowing the appeal, and I have nothing to add.

Appeal allowed. Judgment in terms. Each party to bear own costs here and in the Court below.