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

BANQUE POPULAIRE DE LIMASSOL LTD.,
Appellants-Plaintiffs,

v.

STAVROS THEODOTOU,
Respondent-Defendant.

(*Civil Appeal No.* 4873).

Contract of guarantee of a bank usual current account—Whether the grant of excess credit to the debtor discharges the guarantor from liability under the relevant contract—A question turning on the provisions of the contract—Which must be read and interpreted so as to give effect to the intention of the parties thereto, as expressed in their contract—The Contract Law, Cap. 149, *sections* 82 *to* 105*—Defence of variance to contract under section* 91*—Contract in the present case neither intended nor did it have the effect of prohibiting credit in excess of other credit transactions outside the credit guaranteed under the contract.*

Contract—Appropriation of payments in current account made by debtor to the Creditor Bank after the expiry of contract of guarantee—In the absence of appropriation by the debtor, the creditor is entitled to appropriate the amounts received in the way he might think fit—Section 60 *of the Contract Law, Cap.* 149, *applicable.*

Banking—Current account—Contract of guarantee—Excess credit—Effect of—Appropriation of payments—See supra.

Appropriation of payments—See supra.

In this case the Court of Appeal, reversing the judgment appealed from, held that credit allowed in excess of the stipulated limit to the debtor under a usual current account does not discharge the guarantor from liability under the relevant contract ; it held, also, that payments received by the Bank after expiry of the contract of guarantee are governed by section 60 of the Contract Law, Cap. 149.

By an agreement in writing, entered into in June, 1953, it was agreed that the appellant Bank would grant to the first defendant (referred to hereafter as " debtor ") credit up to £500 in the usual form of a current account, guaranteed

by the second defendant (hereafter referred to as " guarantor "). The main provisions of the contract are set out *post* in the judgment of the Court. The period of this credit account, due to expire on December 31, 1957, was duly renewed for a further period of three years *i.e.* up to December 31, 1960, on which date the account presented a debit balance of £485.330 mils. There was no further renewal because the guarantor declined to renew his guarantee. It was never disputed that on a number of occasions the Bank permitted to the debtor credit in excess of stipulated limit of £500. Thus, on November 12, 1960 the debit balance was £748.

Be that as it may, the Bank did not press the matter immediately after the aforesaid closing date of December 31, 1960. In January, 1961, the Bank even accepted cheques which came in totalling £68 and debited accordingly the debtor's account. Then there follow various deposits with the result that with debit entries for interest and charges every six months the account presented on December 31, 1967, a debit balance of £242.950. This is the amount plus interest which the Bank claimed by their action instituted in the District Court of Limassol against the debtor and the guarantor jointly and severally.

The debtor did not defend the action, but the guarantor did, denying liability on the ground that " during the relevant period, the plaintiff Bank acting contrary to or at variance with the provisions of the said written agreement, advanced to the defendant No. 1 (the debtor) monies much in excess of £500 or permitted the relevant current account to be overdrawn to an amount exceeding £500 ".

Alternatively, the guarantor's pleading contends that inasmuch as the debit balance on December 31, 1960, was £485.330 mils, the sums paid by the debtor after that date, amounting to a total of £485 should be deducted from such debit, leaving as balance payable by the guarantor the sum of 330 mils only.

The Bank never disputed that on a number of occasions during the period up to December 31, 1960, they permitted to the debtor credit in excess of £500 ; thus on November 12, 1960, the debit balance was £748. But it was their contention that they were not prevented by the contract from allowing credit in excess of £500 ; and that having done so, they did not lose their rights under the contract against the guarantor for a claim within the contract said limit.

The trial Court did not accept the Bank's submission and held that due to the credit in excess allowed by the Bank to the debtor as aforesaid, the guarantor was entitled to repudiate liability ; and the trial Court dismissed the action with costs. Regarding the question of amount—in case of existence of liability—the trial Judge held that the Bank would be entitled to the amount claimed less the £68 withdrawn by the debtor " in the post-guarantee period " (*supra*). In this connection the trial Court referred to a number of English cases and to section 60 of our Contract Law, Cap. 149.

From this judgment the Bank took the present appeal ; and the guarantor cross-appealed against that part of the judgment concerning the appropriation of payments made by the debtor after expiry of the contract (*i.e.* after December 31, 1960, *supra*).

Allowing the appeal and dismissing the cross-appeal, the Supreme Court :—

Held, (1). The issue whether such excess credit had the effect of discharging the guarantor from liability under the contract, turns mainly on the provisions of the contract, which must be read and interpreted so as to give effect to the intention of the parties thereto, as expressed in their contract (see the main provisions of the contract *post* in the judgment of the Court).

(2) (*a*) We do not think that the contract can be read as meaning that the parties intended that if the Bank allowed credit to the principal debtor beyond the limit of £500 such conduct would amount to a breach of the contract likely to cause loss or damage to any of the other parties ; or to give them the right to repudiate the contract.

(*b*) What the parties obviously intended was that the Bank would agree and undertake to allow credit to the principal debtor up to £500 ; for which the guarantor would be answerable to the Bank. But surely it was not intended to limit the Bank's right, outside the contract, to give credit to a customer as the Bank might decide to do from time to time. The £500 limit was obviously intended to be the limit of the Bank's obligation to the other parties during the validity of the contract ; and the limit, also, of the guarantor's liability.

(c) Reading the contract as a whole we can have no doubt that this was the intention of the parties in entering into the contract ; and that this was the effect of the language used in expressing it. The Bank would not be bound to give to the debtor credit beyond £500 ; and in any case the guarantor would not be liable beyond that amount, plus interest and other charges.

(3) The defence of the guarantor's discharge by reason of variance in the terms of the contract is provided for in section 91 of our Contract Law, Cap. 149. But such defence is only available to the guarantor when the variance made to the contract by the other parties thereto, without his consent, puts him at a disadvantage compared with his position under the contract. Here, as already indicated, the contract was neither intended nor did it have the effect of prohibiting other credit transactions between these parties outside the guaranteed credit under the contract.

(4) *As to question of the appropriation of payments made by the debtor to the Bank after expiry of the contract on December* 31, 1960, *and as to the cross-appeal :*

The matter is admittedly governed by section 60 of the Contract Law, Cap. 149. In the circumstances of this case the debtor left it to the creditor Bank to appropriate the payments made, as he might think fit, considering that the latter was patiently waiting for such payments ; and thus facilitating all concerned. Be that as it may, however, in the absence of appropriation by the debtor, the Bank were entitled to appropriate the amounts received against the debt, in the way in which they did. We find no merit in the cross-appeal.

(5) For the above reasons we allow the appeal and set aside the judgment of the trial Court and we direct that judgment be entered for the plaintiffs (appellant Bank) against the defendants for the amount claimed with £20 costs up to and including the hearing on February 18, 1969. Costs thereafter to be taxed against the second defendant only (respondent-guarantor). Cross-appeal dismissed without additional costs.

Appeal allowed. Cross-appeal dismissed. Order for costs as above.

Appeal and cross-appeal.

Appeal and cross-appeal against the judgment of the District Court of Limassol (Vassiliades, D.J.) dated the 8th January, 1970, (Action No. 1332/68) by virtue of which the plaintiffs' claim for the sum of £242.950 mils, balance due on a current account was dismissed.

J. Potamitis, for the appellant.

Gl. Talianos, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, P. : On March 30, 1971, the Court gave judgment in this case allowing the appeal with costs and dismissing the cross-appeal. The judgment delivered reads :

> " VASSILIADES, P. : The Court having considered the subject matter of the appeal and cross-appeal herein, has, unanimously reached the decision to allow the appeal with costs and dismiss the cross-appeal.
>
> The judgment of the District Court dismissing the action is set aside ; and judgment shall be entered for the plaintiffs against both defendants for the amount claimed with £20 costs up to and including the hearing on 18th February, 1969. Costs thereafter to be taxed against the second defendant only.
>
> Reasons for this judgment will be given later."

The reasons for the Court's judgment, which have been prepared by Mr. Justice Vassiliades, and with which Mr. Justice Josephides and myself agree, are as follows :—

VASSILIADES, P. : The Bank Populaire de Limassol, Ltd., is a registered local bank carrying on business mainly in Limassol for many years past. They are the appellants before us and the plaintiffs in an action for the balance due on a current account. For convenience we shall refer to them hereafter as " the Bank ". They filed their action against two defendants—as explained hereinafter—but only one of them, the respondent in the appeal, disputed the claim of the Bank.

The two defendants are shopkeepers of Limassol. Their shops were in the same street ; some ten yards from one another, according to respondent's own evidence.

In June, 1953 (*i.e.* about 18 years ago) the first defendant, apparently finding himself in need of a bank credit applied to the Bank, who eventually agreed to grant to him credit up to £500 in the usual form of a current account, guaranteed by the second defendant. We shall refer to them hereafter as "debtor" and "guarantor", respectively.

The agreement between the parties was then embodied in a formal document, signed by the defendants on June 19, 1953, on the Bank's printed form, duly filled in and witnessed. It is in evidence before the Court admittedly containing the contract governing the parties' legal rights and obligations in the matter before us. It is expressed in the parties' language, in the form of a request for credit, on the terms agreed between the parties. We shall refer to this document as "the contract". The case turns on its construction and operation.

The contract must, of course, be read as a whole; but its main provisions for the purposes of this case are :—

(*a*) the Bank to give credit to the debtor up to the amount of £500 in the form of a current account;

(*b*) such credit to be under the continuing guarantee of the guarantor (the respondent herein) whose liability is to be joint and several with that of the debtor;

(*c*) such liability not to exceed the amount of £500 capital-debt plus interest at the rate of eight per cent (8%) per annum, plus commission, other charges and costs as usually charged by the Bank;

(*d*) the interest to be calculated and debited in the account with other usual charges, every six months *i.e.* at the end of June and the end of December in each year;

(*e*) the period of the credit to be up to the 31st December, 1957 (*i.e.* about four and half years);

(*f*) the Bank to have the right to discontinue the credit, close the account and claim the amount due, at any time during the said period, exercising such right by a letter to the debtor to that effect;

(*g*) the guarantee to be a continuing guarantee for all the obligations of the debtor incurred during the said period, the liability of the guarantor not exceeding the agreed limits;

(*h*) the Bank to have the right to claim payment from the guarantor without having first to take any steps against the debtor ;

(*i*) the obligation of the guarantor to continue until full payment of the debt ;

(*j*) any acknowledgment by the debtor or his authorised representative regarding the amount due, as well as any judgment against the debtor regarding the guaranteed debt and every statement of account which the Bank may send to the debtor from time to time in verification of the amount due on the account, to be binding on the guarantor ;

(*k*) the Bank to have the right to withhold until full payment of the debtor's debt any money or deposits belonging to the guarantor, found at any time in the hands of the Bank.

Such is the contract between the parties, showing clearly, we think, what the parties intended to agree, as well as the terms and conditions under which the Bank agreed to grant the credit in question ; and the other parties thereto, agreed to take it.

The account was operated under the contract for over four years until December 16, 1957, when the Bank wrote to the parties a letter referred to in another letter which is the defendants' reply to the Bank's said letter ; this other letter is dated December 27, 1957 ; it is addressed to the bank by both the debtor and the guarantor, who describing themselves as such, requested " renewal " of the credit account on the same terms and conditions as stated in the contract, for a further period of three years, *i.e.* up to 31st December, 1960.

In fact the account was operated, presumably in the same manner, during the whole of the new period *viz.* until the end of December, 1960. The conduct of all parties concerned, during this period of seven and a half years (June, 1953 to December, 1960), during which the contract was in force and was being performed by the parties, indicates unequivocably, in our view, how the parties understood and accepted their respective rights and obligations under the contract.

At the end of the period, *i.e.* December 31, 1960, the debtor's account presented, according to the statement of account pleaded (and the Bank's accounts produced at the trial), a debit balance of £485.330 mils.

There was no further renewal of the contract as—according to his own evidence—the guarantor declined to renew his guarantee. His evidence in this connection reads :

> " I remember that the then manager, Joannides John asked me to renew. I know that when my guarantee expired in 1960, defendant No. 1—(the debtor)—was indebted to the plaintiffs for a certain sum I do not know how much exactly. The bank told me about it on my visit then. They told me the amount but I do not remember how much it was. I informed the bank to take steps to collect from defendant No. 1 that amount and that I could not accept any responsibility for any further advances."

In the usual course of business one may think that in such circumstances, the Bank would have asked for payment ; but apparently they did not press matters to that extent.

Very early in January, 1961, the debtor deposited £85, bringing the debit balance of the account down to £400.300 mils. But a few days later, on January 9, 1961, a cheque came in (No. 79532) for £23 issued by the debtor. The Bank paid it ; and debited the debtor's account. The following day, January 10, another cheque (No. 79533) for £15 issued by the debtor reached the Bank. This was also paid ; and debited to the account. And about a week later, on January 17, a third cheque (No. 79543) for £30 came in which was also paid. That was apparently the last. It brought the debit balance payable by the debtor to £468.330 mils.

The next two items on the account are both dated 30.6.1961 and they are for interest and charges amounting to a total of £19. About six months later, on 29.10.1961, *i.e.* two days before the closing of the Bank's accounts for the year there was a deposit of £200 ; and then two items of interest and charges at the end of the year. No deposits or withdrawals during the following year, 1962 ; but interest and charges added at the end of June and the end of December as had been the practice hitherto.

Then there follow (as shown on the statement of account attached to the amended statement of claim) deposits of £50 ; £30 ; £50 ; £50 ; and £20, on 3.1.63 ; 29.6.64 ; 29.12.64 ; 31.12.65 and 30.6.67. With debit entries for interest and charges every six months ; and a debit balance

of **£242.950 mils** as at the 31.12.1967, which is the amount of the claim plus interest at 7% per annum from 1.1.1968.

This statement of the debtor's account speaks, we think, clearly for itself. Read together with the guarantor's evidence referred to earlier, indicates that the Bank, collecting the deposits which reduced the debt and charging the agreed interest and usual charges, waited for payment ; but did not press for it.

Apparently the debtor's business was not doing well as he eventually closed his shop ; and a little later he left Cyprus for England. Unfortunately the evidence in this connection is very flimsy. The guarantor stated from the witness-box that he knew that the debtor " was trying to sell his business in order to leave "; but he did not know, he said, that the debtor owed money to the Bank until he was requested by a letter from the Bank's lawyer dated 11.6.1968 to pay the balance still due as guarantor. He could not remember, he said in cross-examination, whether that was before or after the debtor left his shop.

The Bank filed their action on 12.6.1968 which is the day following their formal request for payment through their lawyer. Both defendants were duly served. The debtor was served, according to the record, on July 11, 1968 ; and entered an appearance on August 21, 1968. But he did not defend the action. And on February 18, 1969, the Bank proved their claim and obtained judgment against the debtor, by default, for the amount of £242.950 mils with interest at 7% per annum from 1.1.68 as claimed ; and £20 costs.

The guarantor defended the action. His amended defence, filed on 10.3.1969, admits the contract as well as the renewal in 1957, which extended the validity of the contract until 31.12.1960 ; but denies liability, on the ground that —

> " During the relevant period (plaintiff) acting contrary to or at variance with the provisions of the said written agreement, advanced to defendant No. 1 monies much in excess of £500 or permitted the relevant current account to be overdrawn to an amount exceeding £500."

Alternatively, the guarantor's pleading contends that should the Court find that the debit balance of the debtor's account on 31.12.1960, was £485.330 mils, the sums paid

by the debtor after that date, amounting to a total of £485, should be deducted from such debit, leaving as balance payable by the guarantor the sum of 330 mils only.

The issues arising from the parties' pleadings are, therefore :—

(*a*) Whether the bank permitted credit to the debtor in excess of £500 ; and if so, to what extent ;

(*b*) whether such excess credit had the effect of discharging the guarantor from liability under the contract ; and

(*c*) whether the payments made after the 31.12.60 should be appropriated as done by the Bank ; or, as claimed by the guarantor.

The first is a question of fact ; the other two are matters which depend on the parties' contract and the application thereto of the relevant provisions of our Contract Law, (Cap. 149) ; there can be no doubt that the law governing the matter is our Contract Law.

The trial Court received in evidence the contents of the Bank's relevant ledger which—according to the trial Court's judgment—showed that

> "on 13.6.1960 the account was in credit but after June, 1960, it fell into debit and the debit balance exceeded £500 on a number of occasions. From November, 1960, to 21.12.1960 the account was debited with amounts between £500 and £700. On 12.11.1960 the debit balance was £748."

Indeed these figures represent the total of the debt on different dates during that period ; and not items of that size debited on the account. It is moreover significant that on 13.6.1960 the account showed a credit balance which indicates occasionally considerable fluctuation in the account.

After their accountant's evidence and when the relevant books of account and other documents were put before the Court, the Bank closed their case. The guarantor was then called by his advocate. He stated on oath that he did not know that the debtor owed money to the Bank. But in cross-examination, he admitted that when his guarantee expired in 1960 he knew that the debtor was indebted to the Bank ; but he did not know, he said, for how much. The Bank told him the amount "on my visit then"—he added—but he did not remember.

The guarantor did not state to the Court what was the Bank's reaction when he declined to renew his guarantee. Nor whether the debtor approached him in that connection ; and what arrangements were made for the payment of the outstanding debt. Nor did the guarantor state what steps did he take towards payment between December, 1960, and June, 1968, when the Bank pressed for payment. Nor did he say what did he do with the debtor when they were both served with the writ in this case in July, 1968. Their shops were in the same street and within about 10 yards of one another ; they must have discussed the matter. The guarantor knew that the debtor was liquidating his shop in order to leave Cyprus for England. According to his own evidence that did not happen until mid-November, 1968, about four months after service of the writ.

On this material before him, the learned trial Judge proceeded to consider his judgment. He posed the question " whether on the true construction of the guarantee-agreement, the guarantor can be held liable?" Quoting the opening paragraph and other parts of the contract—which we find it unnecessary to repeat here as they must be read in the text of the whole document—the Judge reached the conclusion that the credit to be advanced by way of current account was " up to the amount of £500 and no more ".

Taking the view that " a surety is entitled to insist on a rigid adherence to the terms of his obligation by the creditor and cannot be made liable for more than he has undertaken " the trial Judge went into several English cases citing from judgments and textbooks and, in the end, he reached the conclusion that if " the surety has entered into a specific contract with the creditor no question of alteration can arise without consent " ; and that " any such alteration constitutes a departure and therefore a breach ".

Upon that view of the matter, the learned trial Judge was of the opinion that " such cases of breach are not covered by our law ". " A perusal " he adds " of the relevant sections of our law (Cap. 149 sections 91 to 97) reveals that they are concerned with the protection of the surety in general and not specific contracts of guarantee from dealings between creditor and debtor behind his, the surety's back ".

Pausing here for a moment and with all respect to the learned trial Judge, we find it difficult to understand this

view of our Contract Law. It was, we believe, undoubtedly intended to codify the law governing contracts (including contracts of guarantee) and it governs, we think, the contract herein.

Considering the instant case as one of " a specific agreement between the defendant "—the guarantor—" and the plaintiff "—the Bank—" by which the plaintiff could allow credit up to the sum of £500 and no more " the trial Judge held that " in the absence of evidence to the effect that defendant No. 2 the guarantor consented to the advancement in excess of the agreed amount of £500 " he, the guarantor, was entitled to repudiate liability.

Taking next the question of amount—in case of the existence of liability—the Judge held that the Bank would be entitled to the amount claimed less the £68 withdrawn by the debtor " in the post guarantee period ". In this connection he referred again to English cases and to " the relevant provision in our Contract Law, Cap. 149, section 60 " which he cited *verbatim* to show that it " is not in any way in conflict " with the " statement of the law " as found in the cases referred to. Having reached, however, the conclusion that on the contract, in the instant case, the guarantor was entitled to repudiate liability, the Judge dismissed the Bank's action with costs.

From this judgment the Bank took the present appeal mainly on the ground that the trial Court erroneously decided that the Bank could not allow the debtor credit in excess of £500 ; and erroneously held that having allowed such excess credit the Bank lost their rights under the contract against the guarantor for a claim within the contract limit.

In support of the trial Court's judgment, counsel for the guarantor submitted that the agreed limit of £500 was an essential part of the contract, breach of which by the Bank entitled the guarantor to repudiate liability. Counsel conceded, however, that the case turns on the construction of the contract ; and submitted that this was correctly understood by the trial Judge who rightly decided that, on the terms of the parties' contract, allowing the debtor to draw on the Bank in excess of the credit limit discharged the guarantor of all liability under the contract.

Counsel referred to several English cases but conceded that none of them was decided on a similar contract ; or on similar facts.

Regarding the cross-appeal which concerns the appropriation of payments made by the debtor after expiry of the contract, counsel submitted that these should be applied first in payment of the guaranteed liability as contended in the defence, even in the absence of express appropriation by the debtor. Counsel, however, agreed that this matter was governed by the relevant provisions of the Contract Law ; particularly section 60.

We gave to this case all due consideration in view of the nature of the transaction and of the effect which it may have on the wide business field of guaranteed bank credits. The case, however, must be decided on its own particular facts ; and on the issues arising from the pleadings as set out earlier in this judgment.

The first issue, whether the Bank allowed the debtor to draw in excess of the £500 contract limit, presents no difficulty : The Bank admittedly did so. We do not know whether any such excess credit was, or was not, allowed prior to the renewal. This is a relevant matter which should have been placed before the Court. But the Bank admits to have allowed the debtor to draw beyond the £500 limit during the last months of 1960. According to the trial Court's judgment, the debtor's account "from November, 1960 to 21st December, 1960,... was debited with amounts between £500 and £700. On 12th November, 1960, the debit balance was £748".

The second issue, whether such excess credit had the effect of discharging the guarantor from liability under the contract, turns mainly on the provisions of the contract ; which must be read and interpreted so as to give effect to the intention of all parties thereto, as expressed in their contract. We have already described the contract earlier in this judgment. We do not think that it can be read as meaning that the parties intended that if the Bank allowed credit to the principal debtor beyond the limit of £500 such conduct would amount to a breach of the contract likely to cause loss or damage to any of the other parties ; or to give them the right to repudiate the contract. What the parties obviously intended was that the Bank would agree and undertake to allow credit to the principal debtor up to £500 ; for which the guarantor would be answerable to the Bank. That was obviously intended to be the limit of the Bank's obligation to the other parties during the validity of the contract ; and the limit of the guarantor's liability. But surely it was not intended to limit the Bank's

right, outside the contract, to give credit to a customer as the Bank might decide to do from time to time, at the Bank's own risk. Such credit would offer facility and advantage to the debtor ; with no risk to the guarantor ; and in the ordinary course of the parties' business, it would be useful to the debtor whom the guarantor had agreed to help up to the limit of his guarantee.

Reading the contract as a whole, we can have no doubt in our mind that this was the intention of the parties in entering into the contract in question ; and that this is the effect of the language used in expressing it. The Bank would not be bound to give to the debtor credit beyond £500 ; and in any case the guarantor would not be liable beyond that amount, plus interest and other usual charges. In fact at the end of the renewed period (31.12.1960) the debt amounted to £485.330 mils ; which was gradually reduced by payments made by the debtor as stated earlier, to the amount of the claim, £242.950 mils plus interest.

The law applicable to the parties' contract is the relevant part of our Contract Law, Cap. 149 (Part XI sections 82–105). The defence of the guarantor's discharge by reason of variance in the terms of the contract is provided for in section 91. Such defence is only available to the guarantor when the variance made to the contract by the other parties thereto, without his consent, puts him at a disadvantage compared with his position under the contract. Here, as already indicated, the parties' contract was neither intended nor did it have the effect of prohibiting other credit transactions between these parties outside the guaranteed credit under the contract.

Coming now to the question of the appropriation of the payments made by the debtor to the creditor after expiry of the contract, raised by the cross-appeal, the matter is admittedly governed by section 60 of the Contract Law. Learned counsel for the guarantor rightly conceded that much. In the circumstances of this case it could well be said that the debtor left it to the creditor to appropriate the payments made, as he might think fit, considering that the latter was patiently waiting for such payments ; and thus facilitating all concerned. Be that as it may, however, in the absence of appropriation by the debtor, the Bank were entitled, we hold, to appropriate the amounts received against the debt, in the way in which they did. We find no merit in the cross-appeal.

For these reasons we allowed the appeal and setting aside the judgment dismissing the action, we directed that judgment be entered for the plaintiffs against the defendants for the amount claimed with £20 costs up to and including the hearing on the 18th February, 1969. Costs thereafter to be taxed against the second defendant only. Cross-appeal dismissed without additional costs.

Appeal allowed ; cross-appeal dismissed ; order for costs as above.