

under the provisions of two guarantees dated 9th February 1987 and 15th May 1987 respectively. These guarantees are for \$450,000.00 and \$135,000.00 respectively, and relate to the indebtedness of Abercromby Holdings Limited to the Plaintiff.

Judgment was entered on behalf of the Plaintiff on the first two of these claims on 4th May 1989, together with interest thereon at 14.5% from 16th April 1988 to judgment. Execution of this judgment was stayed pending the outcome of the Plaintiff's third claim against the Defendant under the guarantees and the Defendant's counterclaims against the Plaintiff.

It is the Plaintiff's claim under the guarantees and the counterclaim which came on for trial before me. The Plaintiff's claim under the guarantees is for \$614,923.16 together with interest at 11% on the amount of \$585,000.00 from 29th March 1988 to the date of payment or judgment.

The Defendant defends this claim on the basis that he was induced to enter into the guarantees by duress or undue influence on the part of the Plaintiff and also counterclaims for an account and damages for the fraudulent and/or negligent sale of certain properties by the Plaintiff. These are a property at 11 Golf Course Road, Fairways, Maraval, owned by Bregon Investment Trust Company Limited ("Bregon") which Bregon had mortgaged to Republic Finance Corporation Limited ("FINCOR") to secure an amount of \$800,000.00 and over which Bregon had also created a second mortgage in favour of the Plaintiff to secure an amount of \$400,000.00. The second

property allegedly so sold was one at Cocorite, upon which Abercromby Holdings Limited ("Abercromby") had partially completed construction of the 24-unit apartment building and in respect of which the Plaintiff was mortgagee under a deed of mortgage dated 15th June 1984, registered as No. 20516 of 1984. It is in respect of Abercromby's indebtedness to the Plaintiff that the two guarantees were provided by the Defendant.

The Defendant also counterclaims in his capacity as creditor and/or shareholder of Bregon and, it would appear from the Pleadings, as a creditor and/or shareholder of Abercromby. At a point almost at the end of the examination-in-chief his Attorney sought leave to show to him, and put into evidence, certain documents supposedly to support this contention. The Defendant had just given evidence that his right to so claim was based upon certain resolutions of a Board of Directors dated 28th August 1989 and the Court was told by Ms. Moore that the existence of these documents had only come to her attention the day before when they were discovered in a bundle marked "correspondence". Mr. Armour for the Plaintiff took the position that he could not consent for them being put into evidence and that he certainly could not do so without first obtaining his client's instructions thereon. The documents were handed to me and I came to the conclusion that on their face they did not support any matter pleaded nor did they go to the issue of the Defendant's *locus standi* in so far as the Pleadings in relation to the sales at an under value were concerned. They did not support any plea of the Defendant counter-claiming as Executive Chairman, "ultimate shareholder" or creditor. I ruled them inadmissible on the Defendant's case as pleaded and that if they were to be admitted, then there would first have to be an appropriate amendment to the Defence and

Counterclaim which Ms. Moore ultimately did not pursue, although she initially took the position of wishing to seek leave so to do. The documents which Ms. Moore wished to put into evidence were copies of resolutions purportedly passed at the meeting of the Board of Directors of Super Service Printing Company Limited.

At the outset of the trial, Advocates for the parties agreed that the issues to be determined were first, that the guarantees were obtained under duress; second, that the guarantees were obtained by undue influence; and third, that there was a sale of the properties at an undervalue. The closing addresses on behalf of the parties were based solely upon the Defendant defending and counter-claiming in his capacity as guarantor.

Turning to the facts, the Plaintiff is a bank carrying on business in Trinidad and Tobago and, particularly, with a branch at 59 Independence Square, Port-of-Spain. The Defendant was at all material times after 1985 the Executive Chairman and a shareholder in various companies which taken together comprise the SWAIT group of companies ("The SWAIT Group") and which are, or were: SWAIT Finance Limited; Holiday Foods Limited; Abercromby Holdings Limited; Sandy Point Limited; Super Service Printing Company Limited; Innovator (Trinidad) Limited; Bregon Park Limited; and Bregon Investment Trust Company Limited. There was no evidence before me to support the plea of the Defendant also being a creditor of any of these companies.

The Defendant was for some time prior to 1985 Managing Director of each of these companies. He was what might be called in relation to each of them its Chief Executive

Officer or Chief Operating Officer, having actual day to day administrative or hands-on control of their various operations. It was in this capacity that he dealt with the Plaintiff, quite apart from the fact that he was personally a customer of the bank.

Some time in late 1985 the Defendant met with Ronald Huggins who then held a position in the Plaintiff's Corporate Division. This meeting was at the request of Mr. Huggins and took place at a time when Trinidad and Tobago in general was experiencing an economic downturn, or decline, which had begun perhaps as far back as 1983. It was also at a time when the financial affairs of the companies in the SWAIT Group were not what could be called "satisfactory". Mr. Huggins describes the various accounts of these companies as being in a state of disorder and not operating in a satisfactory state. The Defendant's personal accounts were also discussed. This is not disputed.

The initial meeting was to discuss the affairs of the SWAIT Group generally and its overall position or, as the Defendant expressed it, its general state of health. In particular, there were discussions in relation to each of the companies and their prior history up to that time. The initial meeting was cordial. There followed on an almost weekly basis meetings between Mr. Huggins and the Defendant. These meetings can be described, as the Defendant did, as being discussions with a "certain amount of flexibility in the impact of loans owed by the SWAIT Group to the Plaintiff". These meetings were held because of the ongoing concern of both parties as to the finances of the SWAIT Group. The Defendant was "concerned to have the bank exercise a degree of patience, a degree of flexibility in respect of some of the loans which were not performing. In

respect of other loans, the company was defunct. There was no capacity to service these loans." In using the word "defunct" he was referring to the state of financial affairs or status of Innovator (Trinidad) Limited and Abercromby.

By late 1986 or early 1987 the position had obviously not improved, at least not to the extent which might have been hoped for by either or both the Plaintiff or the Defendant. There were two companies within the SWAIT Group which were from the first of these meetings a particular source of concern and the subject of discussion: Holiday Foods Limited and Abercromby. These two companies, according to Mr. Huggins, had created a "significant cash strain on the group" and by late 1985 were together indebted to the Plaintiff to an extent of some \$9,000,000.00. Holiday Foods Limited had been shut down and had not been operating at that time for a number of months, while its operations were being refurbished. Abercromby's 24-unit apartment project at Cocorite known as "Seascape" had already been advanced some \$4,000,000.00 and only one (model) unit had been completed. This project had also been shut down. Mr. Huggins for the Plaintiff says that the Defendant initially undertook in 1985 to complete the project using his own resources, but the Defendant says that the Plaintiff provided an additional \$140,000.00, in respect of which he provided additional security. Ultimately, I do not think that it makes a great deal of difference because the fact of the matter is that the project had been shut down. Insofar as Holiday Foods Limited was concerned, efforts were being made to refurbish its operations and recommence production since this company was seen to be the most likely to produce an income stream.

These weekly meetings between Mr. Huggins and the Defendant which had continued up to the end of 1986 or into early 1987 continued to monitor and discuss the ongoing financial position of the various companies in the SWAIT Group in an attempt to bring about some overall improvement in the Group's position, if not in respect of each or any individual company.

By this time, however, it would appear that the financial position had not improved, or had not improved sufficiently, to the Plaintiff's satisfaction. The Plaintiff came to the view that, whatever else may have been its assessment of the position of the SWAIT Group and the individual companies, the Seascope project which, at best, had not progressed satisfactorily and was behind hand and which, at worst, had been dormant for some time, defunct as the Defendant described it, should be revived and completed. It was a project which started in 1982 with a projected completion time of twelve months, i.e. some time in 1983, but which had not been completed in 1985 when the weekly meetings started, and no repayments had been made towards either principal or interest of the original loan of \$3,000,000.00. The Plaintiff, having decided that the Seascope project should be completed, obtained from Messrs. Raymond & Pierre an estimate of what it would cost to do so. That estimate was in the order of some \$800,000.00 but the Defendant, when he met with Ronald Huggins at one of their weekly meetings and discussed this, said that he thought completion could be achieved at a lower cost. He produced an estimate, in the preparation of which he participated, of some \$450,000.00 three or four days after this meeting and which estimate he was certain the Plaintiff would accept and advance the moneys to enable completion. He was of this view simply

because his estimate was for just over half of the amount which Raymond & Pierre estimated was required. The Plaintiff accepted this estimate and, further, it advanced to Abercromby the further sum of \$450,000.00 so as to enable completion of the project.

In consideration of, and so as to secure repayment of, this further advance, the Plaintiff required the Defendant to give his personal guarantee. This guarantee was for \$450,000.00 and it was signed on the 9th February 1987 ("the February Guarantee").

The Plaintiff appointed a project manager, John Camacho, to oversee completion of the project and further work was done. During the course of this Mr. Camacho recommended that certain other, yet further, work be done which had not been included in the project as originally envisaged or costed, nor the additional \$450,000.00 to effect completion. This further work was regarded as necessary to make the apartments more marketable and thus realise a better price. The estimated further additional cost was \$135,000.00. It was agreed by the parties that this additional work would be done. The Plaintiff advanced these further moneys and the Defendant signed a second personal guarantee on 15th May 1987 ("the May Guarantee") for \$135,000.00 to secure this additional amount.

Save for the defences of duress and/or undue influence there is no contention that either of these guarantees was, or is, invalid or void for any reason. Nor is there any pleading or evidence that the amounts claimed under the guarantees are excessive. The Plaintiff pleads that Abercromby owed it \$10,328,051.81 at the time when it demanded payment

from the Defendant under the guarantees. There was no specific denial of this in the Defence, nor was it in contention at the trial. Further, it was not a matter dealt with during the course of closing addresses. I therefore accept that the Abercromby was so indebted as at 28th March 1988 when the Plaintiff made the demand under the guarantees. The Defendant's sole assertion as to their force and validity is that they are voidable for duress and/or undue influence given the circumstances in which they were signed and to which I will return.

The Seascope project was completed and at least some of the apartments were rented out at some time, either before or after completion of construction. The Plaintiff appointed one of its employees, Brian Samlalsingh, as receiver of the rents in or around June 1988. In the event, the financial position of Abercromby did not improve, or improve sufficiently, so as to enable repayment of its indebtedness to the Plaintiff and the Seascope project was eventually sold by the Plaintiff as mortgagee in its entirety, as a whole and not as individual apartments, for \$860,000.00.

The Plaintiff demanded payment from the Defendant under both guarantees by letter of 28th March 1988 (Exhibit M.B.1.) in the aggregate sum of \$614,923.16, including interest of \$29,923.16 in accordance with the terms of Clause 2 (i) of the guarantees. Interest was charged from 29th September 1987 to the date of that letter. There is no contention as to the validity or effectiveness of this demand.

On the same day, the Plaintiff appointed a Receiver of Super Service Printing Company Limited.

The property at 11 Golf Course Road, Fairways, Maraval, owned by Bregon was sold for \$650,000.00 by FINCOR under the terms of its mortgagee's power of sale in late 1988 or early 1989.

Returning to the events of early 1987, the financial position of the various companies in February of that year can be summarised as follows:

1. SWAIT Finance Limited had been placed in receivership and was indebted to the Plaintiff to the extent of some \$1,500,000.00.
2. Holiday Foods Limited was indebted to the Plaintiff to the extent of some \$5,900,000.00.
3. Abercromby Holdings Limited was indebted to the Plaintiff to the extent of some \$4,500,000.00.
4. Sandy Point Limited was indebted to the Plaintiff to the extent of some \$420,000.00. In the view of the Plaintiff it was not in a position to service the principal amount due, a contention with which the Defendant does not agree.
5. Super Service Company Limited was indebted to the Plaintiff to the extent of some \$500,000.00.
6. Innovator (Trinidad) Limited was indebted to the Plaintiff to the extent of some \$405,000.00. The Defendant was of the view that this company was defunct and agreed that the Company was unable to service its debt.

7. Bregon Park Limited was indebted to the Plaintiff to the extent of some \$66,000.00. The Plaintiff was of the view that it was unable to service its debt, a contention with which the Defendant did not agree.

At that time the Defendant was himself personally indebted to the Bank to the extent of some \$364,000.00.

All of the amounts owed by the various companies and the Defendant personally, whether in this form of loan or overdraft facility, were repayable on demand.

It is in my view only reasonable to conclude from the above that the Plaintiff was taking steps which in its view were necessary to do whatever it could to limit its exposure to losses in the event that financial viability could not be restored to the SWAIT Group generally, or to the individual companies within that group. It is evident that by early 1987 the attempts to restore viability had not met with success, nor the anticipated or hoped for degree of success, which either party may have wished to achieve. This was a salvage operation relative to the SWAIT Group in which all the parties participated. The Plaintiff, for example, had reduced the rate of interest charged on various facilities enjoyed by various of the companies in the SWAIT Group.

It is also reasonable to conclude that the relationship between the Plaintiff and the Defendant continued to be good; cordial, as it was described. The Defendant says that he was furious with Mr. Huggins when he signed the February Guarantee. He claims that he

was given no choice in the matter of whether the February Guarantee should be signed, claiming that Mr. Huggins told him if he did not do so then the Plaintiff would immediately call for repayment of all monies owed to it by the SWAIT Group and the Defendant personally. He says that he thought it ridiculous for Mr. Huggins to ask for the guarantee, that it was throwing good money after bad, and that he signed the February Guarantee only because if he did not do so it would mean his personal financial ruin. The evidence on behalf of the Plaintiff, however, is that no such threats were made, that the matter of this guarantee had been brought up previously, that the Defendant had time to think about it, and that he was not in any way forced to provide this security.

The Defendant concedes that this was not the first occasion in which the question of him giving his personal guarantee was discussed, only that previously it had been expressed by the Plaintiff "in softer terms." Indeed, there is evidence to suggest that he had previously given personal guarantees in respect of companies in the SWAIT Group. He expected to be called upon to provide security, but he expected it to be "cosmetic security". While I accept that he expected to be called on to do so, I do not accept that he could reasonably have come to the conclusion that whatever security he was asked to provide would be cosmetic and therefore, in other words, valueless. The Defendant is not a mere middle-aged housewife or housemaker living in a cloistered, non-financial, non-commercial world. Nor was he a fledgling wet-behind-the-ears freshman to the world of business. At the material time he was, and had been for some years previously, effectively at the helm of a wide-ranging group of companies with many different business interests and varied operations. These included finance, property development,

building construction, real estate and printing. He was actively involved in the day-to-day operations of these businesses. He was a hands-on operator and prior to becoming Executive Chairman of the companies in the SWAIT Group in 1985, he had for sometime before that been the Managing Director of those companies. He was familiar with financing strategies and the securities for financing, such as mortgages and guarantees. As to the latter, he knew their terms generally, he knew the February Guarantee was a standard form and he knew full well the consequences of signing guarantees, including the recourse to his personal finances if Abercromby failed to meet its obligations to the Plaintiff. He had the opportunity to obtain legal advice on the guarantees in question but did not do so. He was, in a phrase, a seasoned businessman with a wide range of experience but of more particularity and importance, he was experienced in finance and real estate development. He knows and appreciates the need and the desirability to have security for lending and, as I have said, he is familiar with methods of financing. There is no evidence as to how his personal financial ruin would come about as a result of his not providing either or both of the guarantees in question.

Given his wide ranging and depth of experience, his very close involvement with the operations of each of the companies within the SWAIT Group, his almost weekly meetings with Mr. Huggins over a period of some twelve to fifteen or sixteen months, the atmosphere of those discussions and the matters which those discussions were geared towards resolving, I find myself unable to accept the Defendant's evidence that he signed the February Guarantee for the reasons he gave. Further, he thereafter countersigned the Plaintiff's letter to him of 27th February 1987, and thereafter the May Guarantee, some

three months after the February Guarantee. He therefore had three months to reconsider his position if he thought it required reconsideration, or to take steps to impeach the February Guarantee. He did not do so. There is no evidence that he sought any professional advice, whether legal or otherwise, or that he thought it necessary to do so. Instead, the agreed further work takes place on the Seascope project, yet further work is suggested by Mr. Camacho at a further cost of \$135,000.00, the Defendant agrees to this and signs the May Guarantee to secure this further advance.

It would seem to me that the Defendant having prepared an estimate or participated in the preparation of that estimate of \$450,000.00 for completion of the Seascope project, must have had reasonable confidence or assurance in the project being brought to completion and, that is indeed at least to some extent his evidence, which was that on completion the units were to be rented out until such time as the real estate market improved sufficiently so as to realise a better price for each of the units.

I have therefore come to the conclusion that the Defendant provided both the February Guarantee and the May Guarantee because he thought at that time, particularly given the good ongoing relationship of the Plaintiff which he had been enjoying, at least up to that time, that completion of the Seascope project was still worthwhile. Abercromby's indebtedness to the Plaintiff was then some \$4,000,000.00. The Defendant's earlier view was that each of the 24 units could be sold for \$250,000.00, thus yielding a total of \$6,000,000.00. His further view at the time the February Guarantee was signed was that the units would each fetch \$125,000.00 when completed, thus yielding a total of some

\$3,000,000.00. This obviously would not permit Abercromby to satisfy its indebtedness to the Plaintiff but there was agreement that the units would be rented after they had been completed. This was in fact done and Brian Samlalsingh appointed receiver of the rents, and I do not doubt that these rentals were to be an interim position until the market improved enabling the sale of the units at a better price. As it transpired, the market did not improve and the project was sold as a whole. But what is of importance is that in my view, and despite all his protestation to the contrary, the Defendant must have entered into the guarantees in anticipation of the market improving. Why else would he agree to further construction, provide guarantees and agree that the units be rented after completion.

There is no evidence before me as to the financial ruin which the Defendant said would befall him if he refused to sign the guarantees. All that is before me is the Defendant's personal indebtedness to the Plaintiff of some \$364,000.00 and there is no assertion or evidence that he could not pay this if called upon to do so. On his evidence, and insofar as Abercromby was concerned, any loss was a loss to the Plaintiff as to which the Defendant felt no remorse. Abercromby's liability to the Plaintiff in February 1987 was some \$4,000,000.00 and the Defendant was quite prepared to see the Plaintiff take the loss, knowing full well that there was no recourse to him personally. Finally, his evidence as to being presented with the guarantee, the demand for his signature and the threats in the alternative does not outweigh the evidence given on behalf of the Plaintiff insofar as those events are concerned. His claims of being furious, and the requirement by the Plaintiff to have these guarantees provided being ridiculous, cannot be sustained.

As to the issue of duress, the question must be asked whether the Defendant intended to give the guarantees but did so unwillingly. He must show that his doing so was not a voluntary act on his part, that the alleged duress was a coercion of his will that vitiated his consent. But even a contract entered into under duress will stand if it can be shown that the duress was not a causal inducement acting on a party's mind, and that the party would have entered into the contract in any event. And perhaps particularly in the context of a plea of economic duress, it is not all pressure which may be brought to bear on a party with a view to having him enter into a contract which is illegitimate, nor are all threats illegitimate. In the usual course of commercial activity, pressure and even threats are not unknown. They are both commonplace and in appropriate circumstances quite proper, so it is important to distinguish between legitimate and illegitimate forms of pressure.

The decisions in *Barton v. Armstrong* (1976) A.C. 104; *North Ocean Shipping Company Limited v. Hyundai Construction Company Limited* (1979) 2 Q.B. 705; *Pao On v. Lau Yiu Long* (1980) A.C. 614 are all helpful in determining what is or can be regarded as legitimate pressure or threats.

I have come to the conclusions that, first, the defendant in the instant case intended to provide both of these guarantees to the Plaintiff for the purpose of securing Abercromby's indebtedness to the Plaintiff. Prior to February 1987, there had been discussions about financing completion of the project. The question of him providing guarantees had

arisen previously and he did not object. He knew that he would be called on to provide security and even if he did not provide these guarantees of his own free will, the threat made by Mr. Huggins to call in all the other loans of companies within the SWAIT Group has not been shown to me to be an effective threat if, indeed, it was made at all. There is no evidence to support a contention that it would cause the Defendant financial ruin, as he pleaded. If Mr. Huggins did in fact make this threat, which I have found he did not, then it was an empty threat in this regard or, at best, one lacking sufficient force to compel the Defendant to provide the guarantees. Second, I do not see in all circumstances how such a threat could be or should be regarded as illegitimate rather than legitimate. The Defendant intended to give the guarantees and agreed to do so. There was no vitiating of his intention and agreement. The defence of duress must fail.

As to undue influence, a presumption of its existence arises from a guarantee given to a bank by one of its customers to secure the debt of another. See for example *Lloyds Bank v. Bundy* (1975) Q.B 326. Proving that the party raising the presumption, or the plea, had competent and independent legal advice is not the only manner in which the presumption can be rebutted. This can be done if the circumstances establish that the will of the party raising the plea was freely exercised although no independent advice was given. See for example *Inche Noriah v. Shaik Allie Bin Omar* (1979) A.C. 127: Further, the right to rescind may be lost by express affirmation of the transaction, see *Mitchell v. Homfray* (1881) 8 Q.B.D 587, if the affirmation occurs after the influence has ceased. The right to rescind may also be lost by delay amounting to proof of acquiescence: See, for example, *Allcard v. Skinner* (1887) 36 Ch. D. 145.

The Defendant in the instant case had more than ample opportunity to consult any independent professional advisor he wished, including Attorneys. He had been meeting with Mr. Huggins for well over a year on a weekly basis. He knew full well guarantees would or might be required of him. His evidence was that at SWAIT Finance Limited he had access to Attorneys but did not use them to prepare guarantees because they were a standard form. When Ronald Huggins showed him the guarantees he wanted signed, the Defendant said that they were the standard printed form the terms of which “are pretty much always the same.” The Defendant knew the terms in general and was well aware of the consequences of signing them. Again, the Defendant has been in the world of business, or had been at that time, for some 15 years. He has a wide ranging and depth of experience which few others attain, and which many would envy. He is a man of the world. In all the circumstances I find that the presumption has been rebutted.

Further, having provided the February Guarantee, further work was carried out on the Seascope project. Additionally, when the Project Manager proposed that a further sum of a \$135,00.00 be spent to improve the marketability of the individual units, the Defendant did not disagree. He then provided the May Guarantee. Certain of the units were rented while the project was in its later stages of construction, and units were rented after construction had been completed. This accords with the Defendant’s evidence as to what had been agreed between the parties. The Seascope project was subsequently sold as a whole but there is no evidence of the Defendant having raised any objection to the proposed sale. In my view, if the Defendant did not expressly affirm the guarantees

then his acquiescence in the events which took place subsequently amount in my view to delay depriving him of the right to rescind. The defence of undue influence must also fail.

The guarantees are therefore valid and enforceable.

Turning to the Defendants counterclaims, these are predicated in the main upon his being the guarantor of Abercromby's indebtedness to the Plaintiff and clearly he can claim in that capacity. See *Standard Chartered Bank v. Walker and Another* (1982) 1 W.L.R. 1410; (1982) 3 A.E.R. 938.

He also counterclaims based upon his shareholding in the various companies in the SWAIT Group, particularly in Abercromby, and upon his being a creditor of Abercromby and other companies in the SWAIT Group. He also appears to counterclaim based upon his occupying the office of Director or Executive Chairman of the companies.

The issue of his being able to counterclaim in any of these other capacities was not a matter dealt with in closing addresses for the Defendant and, indeed, I understood Ms. Moore to say that his counterclaims were based solely upon his providing the February Guarantee and the May Guarantee. There was no evidence before me as to any of the companies being indebted to the Defendant. Similarly, although the evidence is that he is a shareholder in all of these companies his ability to counterclaim in that capacity was not argued by Ms. Moore. I know of no authority to support these contentions on his behalf

and his claims based on his being a creditor and/or shareholder and/or director or officer of the companies must fail. In addition, it should be noted that no company within the SWAIT Group has brought any proceedings against the Plaintiff, or FINCOR, or any of the receivers arising out of the events which the Defendant alleges took place. There is no evidence whatever that any of these companies have in any way any fault to find with the Plaintiff, with what the Plaintiff may have done, or what the Plaintiff may not have done.

Further, the Fairways property was sold by FINCOR under the provisions of the first mortgage which it held. There is no claim by the Defendant against FINCOR nor is there any claim against FINCOR by Bregon. FINCOR is not a party to these proceedings nor, on the evidence, to any other proceedings past or present based upon the mortgage in question or the sale of the property. The Defendant sought to somehow link the Plaintiff and FINCOR for the purposes of this counterclaim, but he has not demonstrated how, at all, FINCOR was at fault or, if it was at fault, how it owed a duty to him in any capacity, whether it be shareholder of Bregon, creditor of Bregon, or otherwise. Consequently, his claim in respect of the sale of the Fairways property must fail.

As to the sale of the Super Service Printery Limited equipment, the Defendant obviously again founds his counterclaim on the basis of being a shareholder and/or creditor and or officer of that company, and for the reasons I have already set out, any such claim must also fail. But more than that, the sale of the Super Service Printery Limited equipment is not pleaded, much less that any such sale was at an undervalue. Nor was there any claim

pleaded against the Plaintiff in so far as this company and the sale are concerned. The evidence given relative to this equipment and the sale of it can at best be considered on the basis that Defendant was perhaps attempting to establish some pattern of dealings on the part of the Plaintiff with him or the SWAIT Group. Not more than that. Consequently, any claim founded on any such sale being at an undervalue must also fail.

The consequence of all this is that the Defendant's counterclaims against the Plaintiff must therefore be founded necessarily on the basis of his having provided these guarantees for Abercromby's indebtedness to the Plaintiff. To succeed in these claims, he must first prove the existence of fraud or that the Plaintiff was negligent in selling at an undervalue, as he pleaded. Thereafter he must prove loss or damage. The Defendant's evidence was that each of the 24 units could fetch \$250,000.00 on a sale. This would yield a total of \$6,000,000.00. A valuation by Messrs. Raymond & Pierre commissioned by the Plaintiff puts or places various values on this property in November 1988. These valuations are based on various methodologies but, in short, they are at best \$1,125,000.00 and, at worst, \$700,000.00 to \$800,000.00. I do not think there can be any great contention that this property was sold at a time when real estate prices in Trinidad and Tobago were bad. It may well be that there was an agreement between the parties that individual units in the project would be rented until such time as the market recovers but, at the same time, there is no evidence to suggest that this was to continue indefinitely. Given the evidence before me and all of the circumstances, I am not satisfied that the Plaintiff sold this property negligently or at an undervalue and on that

basis the Defendant's counterclaim must fail. I might add that on the evidence before me the Defendant could not possibly be said to have proved fraud.

But there is another aspect to this matter. Even if I were to accept the Defendant's evidence that this property was worth, and could be sold for, \$6,000,000.00 then I am unable to see how the Defendant has come to suffer any loss. It must be remembered that at the time the demand was made of the Defendant under the guarantees on 28th March 1988 Abercromby was indebted to the Plaintiff in an amount exceeding \$10,000,000.00. If the Seascope project, whether as a whole by way of individual units, could have grossed \$6,000,000.00 on a sale, then there would still be a balance due by Abercromby to the Plaintiff of in excess of \$4,000,000.00. The guarantees provided by the Defendant limited his liability, in so far as principal was concerned, to \$585,000.00 and interest thereon. The demand made of him was for \$614,923.16 and no issue was raised as to the calculation of this amount. In short, the Defendant has failed in any event to prove that he suffered any loss as a consequence of any negligence or fraud on the part of the Plaintiff.

The Defendant also counterclaims for an account of what is due to Abercromby in respect of moneys received by the Plaintiff or by Brian Samlalsingh "for and on account of Abercromby Holdings or which might have been so received from rental of the Sea Scape project and from its subsequent sale by the Plaintiff as Mortgagee but for the Plaintiff's

willful default or neglect.” There is no doubt that a mortgagee in possession, as was the Plaintiff here, can be required as a general rule to account to a mortgagor and, in my

view, also to a guarantor. I am not of the view, however, that on the evidence before me the Defendant here is entitled to an account but even if I were satisfied that he is so entitled, then it would ultimately make absolutely no difference to the determination of the counterclaims. All the accounting in the world will not remove the fact that the Defendant, as guarantor, has not proven that he has suffered any loss, nor that he could have suffered any loss. Indeed, the evidence is to the contrary namely, that even if his evidence were accepted without reservation he could not have suffered any loss.

As I have said, the Plaintiff has already obtained judgment against the Defendant based upon his personal indebtedness as one of its customers. It is therefore only for me now to say that there will be judgment for the Plaintiff on the guarantees in the amount of \$614,923.16 together with interest at the rate of 11% on the sum of \$585,000.00 from 29th March 1988 to judgment.

The Defendant will pay the Plaintiff's costs of the claim.

The Defendant's counterclaim is dismissed and the Defendant will pay the Plaintiff's cost of the counterclaim.

There will be a stay of execution on this judgment for 28 days and a further stay of the execution granted on 4th May 1989 for a further 28 days from today.

DATED this 17th day of March, 2000

C.V.H. STOLLMEYER
JUDGE