

TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO. Cv.1142 OF 1998

B E T W E E N;

BEEBEE GOKOOL

PLAINTIFF

AND

SAMPLE IBEMERUM

FIRST DEFENDANT

And

BALMORAL MANAGEMENT  
(TRINIDAD) LIMITED

SECOND DEFENDANT

**BEFORE THE HON. MR. JUSTICE STOLLMAYER**

Appearances:

Ms. J. Koorn for the Plaintiff

Mr. G. Louison for the Defendants

## **REASONS**

In this action the Plaintiff claims \$300,000.00 from the Defendants being the amount due and owing on a Note dated 3<sup>rd</sup> October 1996 (to which I refer as “the Note”). Interest is

also claimed at the rate of 6% per annum from the date of the Writ to payment or Judgment.

On 10<sup>th</sup> August 1999 the Plaintiff applied for leave to amend substantially her Statement of Claim so as to plead a number of facts and matters and an alternative claim for monies had and received by the Defendants. This followed an application made on 9<sup>th</sup> August, after the taking of evidence had been completed, for leave to amend the Reply which was granted in part only at paragraph 3, so as to plead that the Note had been presented for payment notwithstanding the Defendant's waiver of presentment. The application was made after the Defendant's written submissions had been received but those for the Plaintiff remained outstanding. I refused leave to amend the Statement of Claim as sought in all the circumstances, particularly having regard to the stage of the trial, the history of the matter and that it appeared to me that the matters ventilated at the trial must have been reasonably apparent to the Plaintiff previously all through the proceedings. There had been ample time previously to make such an application and if it were granted the amendments would have had the consequential effect of delaying the completion of a trial which had been deemed urgent and to be heard during the Long Vacation. The delay would possibly be substantial. I also took into account that Ms. Koorn for the Plaintiff had indicated to the Court that if leave were not granted as sought, then the Plaintiff would be able to institute fresh proceedings for the alternative claim in any event.

The Defendants plead a variety of defences to this claim but it might be instructive to first set out the text of the Note.

The document in question comprises two pages. The first page reads as follows:

“TRINIDAD AND TOBAGO

NOTE

*FOR VALUE RECEIVED WE the undersigned jointly and severally promise to pay to Beebee Gokool or order at No. 44 Park Street, Port-of-Spain the sum of Three Hundred Thousand Dollars on or before the 30<sup>th</sup> November, 1996.*

*Dated this 3<sup>rd</sup> day of October, 1996*

*Director: x (signature)*

*Secretary: x (signature) \_\_\_\_\_  
For Balmoral Management  
(Trinidad) Limited*

*(signature) \_\_\_\_\_  
Sample Ibemerum”*

The second page reads as follows:

*“The consideration for this pro note overleaf is advances made in pounds sterling and US currency (as per disbursement instructions dated 1<sup>st</sup> October which forms part of this document) by the Lender for the purposes of establishing the various business ventures of Balmoral Management (Trinidad) Limited and it’s alter ago Sample Ibemerum and notwithstanding the currency in which the pro note is made the Borrowers aforementioned undertake to repay same in the currencies in which the same were advanced notwithstanding any fluctuations before repayment.*

*Presentment and notice of dishonour of this pronote is waived.*

*Director: x (Signature)*

Secretary: x(Signature)  
For Balmoral Management  
(Trinidad) Limited

x (Signature) \_\_\_\_\_  
Sample Ibemerum”

In essence the defences which the Defendants seek to establish are that:

1. The Defendants never entered into any agreement to borrow money from the Plaintiff.
2. The Defendants borrowed the money from one Carlyle Serrano.
3. If the moneys borrowed were lent by the Plaintiff then Mr. Serrano never disclosed to the Defendants that he was acting as the agent of the Plaintiff who was an undisclosed principal and who, consequently, cannot maintain this claim.
4. The Defendants are fully discharged and released from the loan represented by the Note by virtue of certain representations, events and agreements, the ultimate consequence of which was that the loan was converted into an investment in a limited liability company called Brit Motors Limited.

5. The Plaintiff and/or Mr. Serrano are estopped from denying that by these representations Mr. Serrano induced the Defendants to invest the proceeds of the Note in Brit Motors Limited. At the commencement of the trial Mr. Louison expressed this plea as being that Mr. Serrano induced the Defendants to invest this amount of \$300,000.00 in Brit Motors Limited for Mr. Serrano's use and benefit.

6. The Note did not incorporate the full terms of the contract entered into by the Defendants.

7. The Note was an extortionate bargain or an unconscionable bargain.

8. The Note is not a promissory note within the meaning of Section 83 of the Bills of Exchange Act, Ch. 82:31 by virtue of it being stated to be payable "on or before 30<sup>th</sup> November 1996."

During the course of his closing address Mr. Louison also submitted that the Note was not for a sum certain and therefore was not a Note within the meaning of S. 83.

9. The First Defendant made the Note only as surety for the Second Defendant.

10. The Note was not presented for payment as required by its terms.

11. The Plaintiff was a moneylender and the loan was contrary to the provisions of the Moneylenders Act Ch. 84:04 consequently rendering the Note or the loan illegal, void and/or unenforceable.

12. The Note was procured by the undue influence of the Plaintiff and/or Mr. Serrano over the Defendants.

Mr. Louison also indicated at the commencement of the trial that there was an issue as to whether the Note was assigned or negotiated but this question did not arise for consideration based on the evidence before me.

There is no counterclaim.

The facts are that the Plaintiff is a qualified microbiologist who does not practice her profession and who is also a land proprietress. Carlyle Serrano has been for some twenty years a practising Attorney-at-Law and is the Plaintiff's legal advisor. He manages her properties. The First Defendant is a Nigerian businessman dealing in the import and export of scrap metal and in motor vehicles. He has considerable experience as a financial advisor and consultant in England and Belgium and came to Trinidad and Tobago in or about 1995. In that year he incorporated the Second Defendant as the vehicle for his various business enterprises.

During the course of 1996 the Second Defendant, acting through the First Defendant, negotiated with certain parties in the United Kingdom for a franchise/distributorship of certain motor vehicles. At some time prior to 30<sup>th</sup> September 1996 the First Defendant visited Mr. Serrano with a view to obtaining legal advice but Mr. Serrano declined to act for him. In late September 1996 the First Defendant again went to Mr. Serrano and it was agreed that Douglas Associates Limited, with whom the Second Defendant had a business association, would assign an amount of \$41,840.00 to Mr. Serrano's firm, C. A. Serrano & Co. This sum was the amount of a purchase order which the Water and Sewerage Authority ("WASA") had issued to Douglas Associates Limited and which fell due for payment in early October 1996. In return, C. A. Serrano & Co. would pay to the First Defendant \$24,340.00 and a further \$10,000.00 to a third party, thus retaining an amount of \$7,500.00. The amount of \$34,340.00 was paid out on 30<sup>th</sup> September 1996 and the \$41,840.00 was received by C. A. Serrano & Co. from WASA a short time after. It is clear to me from the evidence that the nature of this transaction was one by which C. A. Serrano & Co. discounted an account receivable due by WASA to Douglas Associates Ltd.

On 30<sup>th</sup> September 1996 the First Defendant visited Mr. Serrano with a proposal by which the Second Defendant would borrow \$200,000.00 to finance the importation of certain motor vehicles under the franchise/distributorship agreement which the Second Defendant had obtained and this amount would be repaid together with a further amount of \$100,000.00. Mr. Serrano considered this proposal and asked that it be put into writing. The First Defendant did so and delivered the written proposal later that day.

See Document A2 of the Agreed Bundle. Mr. Serrano required that he be given written instructions by the Second Defendant as to how the \$200,000.00 was to be disbursed and this was done on 1<sup>st</sup> October 1996. See Document A3 of the Agreed Bundle. These instructions provide for the disbursement of the equivalent of approximately TT\$198,000.00 and I say “approximately” because one such disbursement was of US\$8,500.00 and there is no evidence before me as to the rate of exchange applicable at the time. If a rate of TT\$6.00 – US\$1.00 is used, the total disbursed would be approximately TT\$198,000.00 but the Second Defendant in Document A.2(d) of the Agreed Bundle had based his projections of the proposed transaction involving the importation of these vehicles on an exchange rate of TT\$6.20 – US\$1.00. The other disbursements were of pounds sterling 6,200.00 and 7,785.00 respectively, and a further amount of TT\$12,000.00 was to be retained for payment of certain other expenses.

Mr. Serrano says, first, that he spoke to his client the Plaintiff and she agreed to the proposal for the loan. Further, he says that when the First Defendant put the proposal to him he told the First Defendant he had a client or clients who might be interested in providing these moneys and in this he is supported by the evidence of Reynold Howard who accompanied the First Defendant to Mr. Serrano’s office with the proposal. It has long been a practice of Attorneys-at-Law (previously Solicitors) that they would invest their client’s moneys or advise their clients on such investments. It is a practice which has been diminishing for some years now because of the attendant risks on so advising and investing, and is now more probably to be found on rare occasions, but I do not doubt that Serrano did advise/invest for and on behalf of at least some of his clients. I

accept his evidence in this regard and I accept that he first consulted with his client prior to accepting the proposal on her behalf. There can be no other reason, given the evidence before me, for him preparing the Note in her name as he said he was instructed to do by her. I also accept his evidence that he indicated to the First Defendant that he would see if any of his clients were prepared to provide the funds and that the First Defendant was told that the funds would be made available by a client. On the evidence before me, however, I am unable to conclude that Mr. Serrano told the First Defendant of the identity of the client, but the fact remains that it is the Plaintiff's name which is incontrovertibly inserted as the payee on the Note.

Mr. Serrano prepared the Note and it was signed on 3<sup>rd</sup> October 1996. The First Defendant and Jillian Tulloch did so on behalf of the Second Defendant and the First Defendant did so in his personal capacity. Both the First Defendant and Tulloch read the Note prior to signing it. It is not in contention that the First Defendant signed in his personal capacity. What is in contention is whether he did so as co-principal or as surety.

The disbursement instructions (see Document A.3 of the Agreed Bundle) were complied with and I accept on a balance of probabilities that the moneys utilised for this purpose came from C.A. Serrano & Co.'s client account. I have examined the documents in evidence before me and while they may not point conclusively to this conclusion, I can see no basis for not accepting Mr. Serrano's evidence in this regard. There was no evidence to the contrary.

The vehicles in question which were to arrive in mid-October 1996 did not arrive in Trinidad and Tobago until the end of May and early June 1997, via two shipments.

In late November 1996 the First Defendant informed Mr. Serrano that the Note could not be paid by November 30<sup>th</sup> and an extension of time for payment to early January 1997 was agreed. No part of the \$300,000.00 has been paid to the Plaintiff despite requests or demands for same, and the Writ herein was issued on 1<sup>st</sup> June 1998.

In the meantime, in early November 1996, the Second Defendant again asked Mr. Serrano for assistance, this time by soliciting TT\$1,500,000.00 as an “investment” in the Second Defendant, for repayment in twelve months. (See Document A.7 dated 1<sup>st</sup> November 1996 of the Agreed Bundle.) Brit Motors Limited (“BML”) was incorporated by the First Defendant on 4<sup>th</sup> November 1996 and in a letter of 5<sup>th</sup> November 1996 (Document A.13 in the Agreed Bundle) the First Defendant makes clear his intention that BML is to be a wholly owned subsidiary of the Second Defendant. Mr. Serrano attended meetings of the Directors of BML during 1997 and was a signatory to at least two of the bank accounts operated by that company. Mr. Serrano advanced certain further moneys to BML during the course of time, amounting in the aggregate to perhaps as much as TT\$200,000.00. He also acted in his capacity as an Attorney-at-Law when obtaining a work permit in 1997 for the First Defendant on behalf of BML. There was no allotment to anyone of shares in BML although this was a matter which the Board of Directors considered at some time. No payment for shares was received from Mr. Serrano and from the evidence before me I am unable to conclude that there was ever any agreement

made by Mr. Serrano (whether in his own behalf or on behalf of the Plaintiff) that the amount of \$200,000.00 made available in October 1996 to the Second Defendant was ever converted into a loan to BML. There is no evidence of any assignment by the Second Defendant of such a debt, and there is no evidence of it ever appearing in the books of BML as a debt due, whether to Mr. Serrano or the Plaintiff. The only evidence in this regard is that of Jillian Tulloch who said that this “conversion” was agreed. But I regret that I do not accept this evidence as establishing the fact of such a conversion. BML was eventually placed in receivership by Bank of Commerce Trinidad & Tobago Limited in June 1998.

Turning to the law, it is well accepted that promissory notes are to be treated as cash and are to be paid unless there is good reason to the contrary. See e.g. *Fielding & Platt v. Najjar (1969) 2 ALL E.R. 150*.

Where a person signs a bill of exchange as guarantor he assumes liability towards all the parties to the bill. See *Chitty on Contracts, 25<sup>th</sup> Ed. Vol. 2 at para. 2522*.

By Section 3 (1) of the Bills of Exchange Act, Ch. 82:31 every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value. Also, a party suing on a promissory note need not prove consideration at the outset, there being a presumption in his favour that it was provided, although that presumption is rebuttable. See e.g. *Phipson on Evidence, 14<sup>th</sup> Ed. at para. 4:25*.

The defences available to an action based on a promissory note are therefore necessarily limited and the burden is very often on the maker of the note to satisfy a Court that he is not liable. Those defences are traditionally illegality, fraud, duress, absence or failure of consideration, whether whole or partial, satisfaction of the bill or note, material alteration, or non est factum.

The Note before me is on its face complete and regular, save perhaps for two matters to which I will return in due course; the date payable and what might be referred to as the additional terms relating to the use of the funds and the mode of repayment which both, according to Mr. Louison's submissions, go to the question of certainty. I will deal with this issue of certainty first.

Section 83 of the Bills of Exchange Act, Ch. 82:31 reads as follows:

*“83.(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.”*

Section 11 of the Bills of Exchange Act reads as follows:

*“11. A bill is payable at the determinable future time in the meaning of this Act which is expressed to be payable –*  
*(a) at a fixed period after date or sight;*

*(b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.*

*An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.”*

Mr. Louison’s submissions on this issue are in essence that first, there is no certainty as to the sum payable under the Note; second, that there is uncertainty as to the terms of its repayment; and third, that there is no certainty as to the date on which it is to be paid.

For a promissory note to be treated as cash, as was said in the *Fieldings case*, there must be certainty as to its terms.

*“It is of the essence of a bill that it should be payable at all events. Therefore its requisites must appear on its face with reasonable certainty.”* See *Chalmers on Bills of Exchange, 13<sup>th</sup> Ed., page 14* quoting **Story, Bills of Exchange** as follows:

*“The reason is . . . . that it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit and their negotiability, if paper securities of this kind were issued out into the world*

*encumbered with conditions, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would be reduced to a certainty. And hence the general rule is that a bill of exchange always implies a personal general credit not limited or applicable to particular circumstances and events which cannot be known to the holder in the general course of negotiations.”*

Deciding whether the terms of the Note appear on its face with reasonable certainty requires an examination of the provisions to be found on page 2, or the reverse, of the Note and whether those provisions themselves form a part of the Note. Such an examination reveals three principal matters.

The first is that the monies were advanced by the Plaintiff for the purposes of the Defendants establishing their various business ventures. Clearly, on the evidence, this related to the importation and resale of the motor vehicles in question by the Second Defendant and its Managing Director, the First Defendant, who also held 98% (as he expressed it) of the Second Defendant's issued share capital. For some reason best known to the Plaintiff and her attorney-at-Law, they saw fit to include this provision. It sets out the purpose for which the moneys advanced to the Defendants are to be used and in my view leaves open for answer the question of what consequences would flow if those moneys were used, partly or wholly, for some other purpose. I do not have before

me that answer, nor would any third party to whom the Note might be negotiated. To my mind this gives rise to an element of doubt, of uncertainty.

Second, the advances are said to have been disbursed in accordance with disbursement instructions of 1<sup>st</sup> October (presumably 1996) “which forms a part of this document”. I have had the advantage of seeing what the parties agree to be these disbursement instructions because it is in evidence before me as Exhibit A3, but the question is whether a third party to whom this Note might be negotiated would be so aware, or, more particularly, be reasonably certain that he had seen the disbursement instructions which are referred to here. Had that letter of 1<sup>st</sup> October been attached, or better yet its wording set out at page 2 of the Note, there would be no doubt, but then, would or should the third party be obliged to ascertain whether those disbursements had in fact been made as set out in the disbursement instructions? In other words, should an indorsee of the Note be required to establish that consideration had in fact been given for the promissory note.

There is the presumption that consideration has been given but in my view, a third party faced with this Note would wish to assure himself that he would not, for example, be met with a defence of failure of consideration should it be necessary to sue on the Note. Again, there is in my view an element of uncertainty.

Third, these advances are to be made, at least partly, in pounds sterling and United States dollars and to be repayable in those currencies “ . . . notwithstanding the

currency in which the pro note is made . . . notwithstanding any fluctuation before repayment.”

Much has been made of this provision during the course of the trial. Mr. Serrano’s evidence is that its intention, and effect, is that the advances would be repaid in the same amounts and currencies as when made, no matter what the rate of exchange might be at the time of repayment, subject always to a total of no more than TT\$300,000.00 being paid. He does not say what would happen if these advances were repaid at a cost lower than TT\$300,000.00, so is one to assume that any difference would be made up in Trinidad and Tobago Dollars, or that the difference would not be payable? His evidence was in effect that if the cost of these currencies in which the advances were made were to rise very substantially, and that the advances could not be repurchased except at a total cost of more than TT\$300,000.00, then the Plaintiff would forego the difference, as well as all profit which she would have received. I find that more than just unlikely. It is in my view improbable.

While I am prepared to accept that the expression “. . . any fluctuation . . .” is properly to be taken to mean any change in the relevant rates of exchange, be they up or down, the net effect of this provision in my view is to contradict what is set out at page 1 of the Note as being the amount payable. Additionally, if it is a part of the Note, then it imports into the Note an element of uncertainty as to the total amount which the Defendants are ultimately to pay to the Plaintiff. How can a third party to whom this Note may be negotiated be reasonably certain as to what amount or amounts, in the

aggregate, he is to receive when the Note falls due – or thereafter if there be default? He cannot, in my view.

There is a further aspect to be considered. While the Note is stated to be in Trinidad and Tobago dollars, and payable in that currency, it is for the larger part to be disbursed in certain foreign currencies. There is provision for repayment in those foreign currencies. This has one of two possible consequences, possibly both. First, the Note is not in the sum of TT\$300,000.00 at all. Second, if it is a Trinidad and Tobago dollar promissory note, then after repayment of the advances in these foreign currencies, there will then have to be a further conversion of those amounts into Trinidad and Tobago currency at a rate of exchange which will be lower than that used when the foreign currencies were purchased. So, ultimately, the monies to be realised are not known and cannot be readily ascertained from the provisions of the Note.

I now turn to the second limb of this issue and whether the provisions of page 2 of the Note form a part of it. In my view they do and I say this because, if for no other reason, it clearly calls for repayment of advances in currencies other than Trinidad and Tobago dollars as is set out at page 1. This introduces a new term, and to introduce a new term there must clearly be both the intention to do so, and that intention must be given effect. Clearly, this is the intention of the parties and effect is given to this new term by including it at page 2, or on the reverse, of the Note, and by having both the Defendants sign the Note again. Additionally, the text at page 2 of the Note makes more than one reference to “this pro note” and “notwithstanding” which in my view are clear indications

that the parties were making more than passing references to the Note or merely setting out provisions by which the terms of the Note would be implemented, or better implemented.

In short, these provisions, but particularly those relating to payment and repayment of advances in foreign currencies, form part of the terms of the Note. The provision for repayment introduces and imports into the Note an element of uncertainty. There must be reasonable certainty as to the terms of a promissory note even if there is no absolute certainty. The uncertainty here is as to the amount payable under the Note. It does not set out that sum with the required degree of certainty. The Note does not comply with the requirements of Section 83 of the Act. It is not a valid promissory note within the meaning of the Bills of Exchange Act and is not enforceable, and I so hold. The Plaintiff's claim based on the Note must fail.

Having so held the other issues before me do not fall for determination. I will, however, in response to the request of Advocates at the trial and in acknowledgment of the possible importance of issues involved, give my views on them.

First, continuing with the issue of uncertainty and as it relates to the of date of payment, it is my view that the use of the words "on or before" do not introduce an element of uncertainty or contingency in so far as the date of payment of a Note is concerned. In the instant case, it is quite clear that the Note must be paid. It falls due for payment on 30<sup>th</sup> November 1996, no matter what may happen or befall before that date. There was,

as I understand and accept the evidence, an agreement by which the Second Defendant could pay off the Note before the 30<sup>th</sup> November 1996. It was his option, his choice. That does not to my mind mean that or have the effect of making 30<sup>th</sup> November 1996 uncertain or contingent, nor does the introduction of that option create that element of uncertainty or contingency.

I have been referred to the decisions in *Williamson v. Rider* (1962) 2 ALL E.R. 268, 1962 3 W.L.R. 119; and *Claydon v. Bradley & Anor.* (1987) 1 ALL E.R. 522 in support of the Defendants' submission as well as to *Creative Press Limited v. George S. Harman & Another* (1973) I.R. 313; and *John Burrows Limited v. Subsurface Surveys Limited* (1968) SCR 607, 68 Dom. L.R. (2d) 354 and H.C.A. 668 of 1972 *Kubach & Sambrook Ltd. v. Udit Narinesingh* in support of the Plaintiff's submissions. I have also had the benefit of reading in full the article "Time and Notes" by A. H. Hudson (1962) 25 M.L.R. 593.

Although I do not necessarily find comfort for my view in the decision of Georges J. in *Kubach & Sambrook Ltd. v. Udit Narinesingh* because the point was not ventilated there, my view is sustained, if not fortified, by an examination of the other decisions and the article to which I have referred. Clearly, my view is in accord with those held in Canada and Ireland, and also with certain of the six English Court of Appeal Judges who pronounced in this regard. Ormerod L.J.'s dissenting judgment in *Williamson's case* is a powerful one and has met with approval in other decisions. The Court of Appeal in *Claydon's case* considered itself bound by the earlier decision in *Williamson's case*. I

do not consider this Court to be so bound. That decision is in my view only persuasive to me, as indeed are all of the other decisions. In my view the decision in *De Lasala v. De Lasala [1980] A.C. 546* is to be distinguished on the basis that there a decision of the English Court of Appeal was found to be binding on the Court of Appeal of the Colony of Hong Kong. Trinidad and Tobago is an independent republic within the Commonwealth, not a colony. Mr. Louison further submitted that if decisions of the English Court of Appeal were to be regarded only as persuasive, then they should be regarded as being a great deal more persuasive than the decisions of the Irish or Canadian Courts. That degree of persuasiveness, however, if it were indeed to be regarded as being of higher authority than the Canadian or Irish decisions, is in my view necessarily diminished by the judgments of Ormerod L.J. in *Williamson's case* and Dillon and Simon Brown L.J.J. in *Claydon's case*.

It is my view, that the words, "on or before" do not take the Note in issue outside of the provisions of Section 83 of the Bills of Exchange Act. There is in my view no uncertainty or contingency, arising from the use of these words.

This defence should therefore fail.

I now turn to the various other defences seriatim.

There was no agreement to borrow from the Plaintiff.

Given my findings as to the facts as set out above, Beebee Gokool, the payee named on the face of the Note and the Plaintiff, is the party entitled to payment of the moneys involved.

Once the existence of a principal is disclosed then, even if not actually identified by name, the principal can maintain the action. See *Halsbury's Laws of England, 4<sup>th</sup> Ed., Vol. 1(ii), paragraph 137*. I am satisfied that the existence of a principal was made known by Mr. Serrano to the Defendants and the Plaintiff's name is clearly and uncontrovertibly stated on the face of the Note. It was there at the time when the Defendants signed the Note on 3<sup>rd</sup> October 1996 and the First Defendant said in cross examination that at the time of signing the Note he knew the Second Defendant was undertaking to pay the Plaintiff. The Defendants cannot now be heard to say that the identity of the Plaintiff was not known to them at that time or at this time.

This defence should therefore also fail.

Mr. Serrano was the lender of the moneys.

Again, given my findings as to the facts, this defence should fail. The moneys in question were borrowed from the Plaintiff and not from Mr. Serrano.

Undisclosed Principal.

Similarly, given my findings of fact, the defence of Mr. Serrano not having disclosed to the Defendants that he was acting as agents of an undisclosed principal cannot be maintained. This defence should also fail.

Conversion of the Loan into a Shareholding in Brit Motors Limited.

The evidence as to the events which followed 3<sup>d</sup> October 1996 does not support the Defendants' plea that this loan was converted into an investment in BML or that BML assumed liability for the loan in place of the Second Defendant, or for that matter, the First Defendant. There was no allotment of shares nor even an agreement to allot shares. Mr. Serrano functioned as a director and made certain further financial assistance available to BML but there is nothing before me to establish the conversion of this loan into a shareholding. Finally, the First Defendant's evidence was that he held 98% of the issued share capital in the Second Defendant and in his letter of 5<sup>th</sup> November 1996 it was made clear that BML was to be a wholly owned subsidiary of the Second Defendant. In these circumstances I find it improbable, without more than is already before me in evidence, that Mr. Serrano was to be a shareholder in BML. Further, there is no evidence or not sufficient evidence to persuade me that BML assumed responsibility for this loan by way of assignment or otherwise and that the Plaintiff agreed to this, or knew of this had it in fact been done.

This defence should therefore also fail.

Estoppel.

Similarly, there is no evidence or not sufficient evidence to support a plea of estoppel.

There is no evidence to show that Mr. Serrano induced anyone to invest the monies due under the Note, or any part of those monies, in BML.

This defence should therefore also fail.

Terms of the Contract Not Incorporated in the Note.

The defence that the Note does not incorporate the full terms of the contract requires some greater examination.

First, there is no requirement in law that has been made known to me by Mr. Louison that a promissory note must incorporate all the terms of the contract to which it relates or from which it flows. A promissory note gives rise to a cause of action separate and apart from any action which may lie on the underlying transaction. In a sale of goods to be paid for by a bill of exchange or promissory note, for example, it is no defence to an action on the bill or note that the goods were not all of the required specification or standard. A separate claim will lie in that regard.

Second, it is a common feature of financing transactions that a lender takes a promissory note from the borrower to secure the transaction and repayment of moneys made available under the financing agreement. Such a note does not incorporate all the terms of the financing transaction, but it does form the basis of the lender's action to recover

the monies if they are not paid when due. The promissory note must however satisfy the requirements of the statutory definition.

Third, and in any event, the Note here sets out the terms of the lending. It reflects the amount borrowed, the mode of disbursement, the purpose of the loan and the mode of repayment. They are all included in the document or incorporated by reference.

Consequently, this defence should also fail.

Extortionate Bargain or Unconscionable Bargain.

A plea of extortionate bargain is one which flows essentially from a transaction caught by the provisions of the Moneylenders Act. I will deal with the applicability of that statute to this transaction later on.

As to the defence of unconscionable bargain, a plea of this nature must in my view be considered in the context of the transaction generally. The degree of risk involved to the creditor and the nature of any security provided by the borrower are material considerations. Here there was an unknown borrower, save for the yet uncompleted WASA discounting transaction. The borrower needed money urgently but was providing no security save the First Defendant, an equally unknown quantity.

*“If an advance is wholly unsecured, and the financial position of the debtor precarious, very high rates of interest may be justified, provided*

*the debtor fully appreciates the transaction and no advantage is taken of him.” See Guest and Lomnicka “An Introduction to the Law of Credit and Security” (1973) at paragraph 163.*

Also as to unconscionable bargain, *Boustany v. Piggott (1993) 42 W.I.R.* 175 at 180 is instructive:

*“ . . . . It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that ‘one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.’ . . . . . “‘Unconscionable’ relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterized by some moral culpability or impropriety;” . . . . . “Unequal bargaining power or objectionable unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness ‘it was not right that the strong be allowed to push the weak to the wall.’” . . . . . “A contract cannot be set aside in equity as an ‘unconscionable bargain.’ against a party innocent of actual or constructive fraud; even if the terms of the contract are unfair in the sense that they are more favourable to one party than the other ‘contractual imbalance’, equity will not provide*

*relief unless the beneficiary is guilty of unconscionable conduct.” . . . . .*  
*. “In situations of this kind it is necessary for the Plaintiff who seeks leave to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances.”*

See also the opinion of **Lord Brightman** in **Hart v. O’Connor (1985) 1 A.C.** 1000 at 1027-1028:

*“ . . . . . the terms of the bargain were the terms proposed by the Vendor’s Solicitor, not terms imposed by the Defendant or his Solicitor. There was no equitable fraud, no victimization, no taking advantage, no over-reaching or other description of unconscionable doings which might have justified the intervention of equity to restrain an action by the defendant at law.”*

The terms of the loan in the instant case were suggested by the Second Defendant acting through the First Defendant. There was no fiduciary or other relationship between the Plaintiff and the Defendants, or as between Mr. Serrano as agent for the Plaintiff and the Defendants, which would impose on the Plaintiff and/or Mr. Serrano the burden of justifying the terms of the bargain. There is no evidence to suggest the Defendants found the bargain extortionate or unconscionable. There is nothing to demonstrate that the loan, or its terms, were forced on the Defendants by the Plaintiff or Mr. Serrano, nor that there were any circumstances existing at the time which indicate that the Second Defendant was placed in an unequal bargaining position. There is nothing to show any

unevenness in the relative bargaining position of the parties. The price to be paid by the Second Defendant for the money was high, yes, but the parties were engaged in an arms length business transaction.

Further, it is apparent from Document A.2(c) of the Agreed Bundle that the profit expected from the importation and sale of the vehicles was in excess of TT\$854,000.00, gross, based on an outlay of approximately TT\$1,000,000.00. The net profit was to be approximately \$554,000.00. In that context the payment of \$100,000.00 for the use of \$200,000.00 even for so short a period as seven weeks, does not in my view become an unconscionable lending. It assumes the reality of a relatively small amount given the total outlay involved and becomes a great deal more acceptable as a business proposition. It represents a return of some 30% of the outlay. There can be no disadvantage to that or in that. Further, this was a proposal which the Second Defendant put to Mr. Serrano. There is no evidence that Mr. Serrano did anything in an attempt to better the terms for his client, or to increase the obligations on the Second Defendant, in relation to which the latter was not in a position to effectively negotiate.

I have examined the decisions to which Mr. Louison referred me with respect to extortionate bargains: e.g. *Samuel & Anor. v. Newbold* [1906] A.C. 461; *Parkfield Trust Ltd. v. Dent* [1931] 2 K.B. 579; *Patience Kasumu & Others v. Gbadamosi Baba-Egbe* [1956] A.C. 539. These decisions all concern transactions entered into by moneylenders and in my view can therefore each be distinguished on their own facts. I do not see in the instant case that there was a presumption of either an unconscionable

bargain or an extortionate bargain which the Plaintiff was required to displace, or that the Defendants established such a bargain, sufficient so as to persuade me that the instant transaction should be set aside.

Consequently this defence should also fail.

The First Defendant was only a Surety.

The positions in liability which parties assume on a negotiable instrument can be varied or even reversed by agreement between them. ". . . .the form of the instrument is not the sole factor determining the rights and liabilities of the parties." See ***O'Donovan and Phillips*** on "***The Modern Contract of Guarantee, 1985***, pages 530-531. If a defendant can establish that he is merely a surety to the knowledge of the plaintiff he can invoke any defences available to a guarantor under the law of suretyship. See ***O'Donovan and Phillips*** at page 531. Parole evidence is admissible to establish the true relationship whether a question of indemnity arises between the principal debtor and the guarantor, or a question of contribution between co-sureties, but this it would appear does not arise as between the maker of a promissory note and the payee.

Mr. Louison conceded, quite properly in my view, that if I were to come to a finding that this Note was valid and enforceable then (contrary to what is pleaded on behalf of the First Defendant) the Plaintiff would be able to recover against the First Defendant if the First Defendant were found to be a guarantor. There were, he said, however, good reasons as to why the First Defendant should not be held to be the guarantor of the liability incurred by the Second Defendant.

Mr. Serrano's viva voce evidence is that he told the Defendants that the First Defendant had to sign the Note in his personal capacity; that there is no separate document or agreement relating to the First Defendant's liability on the Note and, in answer to a question from the Court as to whether both Defendants borrowed the money and signed as co-principals, he said "*we have to say that they are both principals. They are jointly and severally liable on the note.*"

The First Defendant's evidence in examination-in-chief was that "*I signed the note a second time because Mr. Serrano told me he wanted me to be the guarantor. He told me why. He said that was the way the note is normally prepared.*"

It is a practice of long standing amongst lenders that a guarantor is required to co-sign a Note. In this way, the payee has an equally good claim and equally expeditious recourse to either of the parties signing, and is regarded generally as being a more acceptable method of obtaining security as compared to having the maker of the note make it payable to the guarantor, who then, in turn, endorses it to the payee. The latter methodology opens up or permits arguments to arise as to matters such as presentment for payment, holder for value and in holder due course.

On the evidence before me I have no hesitation in finding that the First Defendant signed this Note as guarantor of the indebtedness being assumed by the Second Defendant. Mr. Louison submitted that if there were to be finding that the First Defendant was the guarantor or surety for the debt due by the Second Defendant, then he provided no

consideration on the Note and acted solely for the accommodation of Serrano and/or his client, the Plaintiff, and that, consequently, the First Defendant is not liable on the bill.

Quite apart from this submission representing a substantial departure from the defence as pleaded, I find it to lack merit. “Accommodation bills,” as they are commonly called are those accepted or indorsed without consideration. Strictly speaking, however, they are accepted or endorsed to accommodate, usually, the drawer of a bill of exchange so that the party so accommodated, or facilitated, can either raise money on the bill or make some other use of it. See *Byles on Bills of Exchange 26<sup>th</sup> Ed.* p. 263. Section 28 of the Bills of Exchange Act provides that an accommodation party to a bill is a person who signs a bill of exchange, e.g. as acceptor, without receiving value and who does so for the purpose of lending his name to another person. The “accommodator’s” liability is also provided for in Section 28. By Section 89 of that Act the maker of a promissory note is deemed to correspond with the acceptor of a bill of exchange.

In the circumstances of the instant case, I do not think that the question of accommodation arises. The First Defendant would be liable on the Note. He may have signed it as a maker but his liability would be as surety for the Second Defendant.

#### No Presentment for Payment

Page 2 of the Note quite clearly sets out a waiver of presentment and notice of dishonour by both Defendants. Section 87 of the Bills of Exchange Act requires presentment for payment of a promissory note which is stated to be payable at a particular place. For this reason, it is the common practice not to insert in the body of a promissory note any

specified place for payment because then, by the provisions of the Act, no presentment for payment is necessary.

Mr. Serrano said that his training in the preparation of promissory notes calls for the insertion of a specified place of payment and then a waiver of presentment and notice of dishonour. That may be so, but I would not have thought it to be the optimal approach.

Both the First Defendant and Jillian Tulloch gave evidence that they were unaware of the meaning and effect of the words “*presentment and notice of dishonour of this pronote is waived.*” I find that difficult to accept.

The First Defendant is, as I have said, a businessman and financial consultant and advisor of some considerable experience. He said in his evidence that he is very familiar with documentation such as loan debentures and letters of credit. I would not myself have thought anyone who was familiar with those documents would have no knowledge whatever of a promissory note or, as the First Defendant said, that he had never seen one before. Similarly, Ms. Tulloch is the holder of an Advanced Diploma in Administration from the Association of Business Executives in London, England. She says that this is equivalent to a Degree in Management and that she has other qualifications as well. I do not accept that with those qualifications, which included the London Chamber of Commerce Certificate in Accounting, and her fourteen years of working experience, including a number spent in accounting itself, enables her to say that she does not understand the meaning of the term “*to waive*”. I find that improbable, and I find it

improbable in the same way as I find it improbable that the First Defendant, with all his years of experience should assert in his evidence that, in effect, the term ‘*jointly and severally*’ meant that he was contracting on behalf of the Second Defendant. In sum, I do not accept their evidence and I find that waiver of presentment and notice of dishonour was agreed. There was therefore no need to present the Note for payment and I make no finding as to whether it was in fact ever presented.

This defence should also fail.

#### A Moneylending Transaction.

It is a question of fact in each case whether the lender of moneys was in the business of money lending. See for example *Petty Civil Appeal 17 of 1964 Gonzales v. Hassanali*.

There is no evidence, or certainly not sufficient evidence, before me to enable me to conclude that the Plaintiff was a money lender at or around 30<sup>th</sup> September 1996. Nor, for the sake of completeness, was there the evidence required to establish that Serrano was a moneylender at that time.

There was no evidence of any financial transaction entered into by the Plaintiff prior to 30<sup>th</sup> September 1996, or 3<sup>rd</sup> October 1996, for that matter; nor of any financial transactions entered into by her prior that date.

As to Mr. Serrano, there is only evidence of the transaction involving the WASA purchase order. That in my view, as I have said, was a transaction by which an account receivable, whether payable to Douglas Associates Limited or the Second Defendant, was discounted. Discounting of debts is not the lending of money. See *Chalmers on Bills of Exchange, 13<sup>th</sup> Ed. p. 89.*

As to the transaction in issue, I need only say this. Whether, as Serrano contends, the \$200,000.00 was “*made available*” to the Second Defendant, or whether that amount was lent to the Second Defendant, as the Defendants’ claim, or whether it was an investment as has been variously claimed; and whether the \$100,000.00 was a return on an investment, or a profit, or interest on the principal amount of \$200,000.00, is to my mind a matter of semantics. A rose is a rose by any other name. The transaction was, pure and simple, a loan of \$200,000.00 and the amount of \$100,000.00 was the consideration for that loan i.e. the interest payable. There can be little doubt that this was the real nature of the transaction given the references to “Lender” and “Borrowers” in the text on the reverse of the Note itself.

In sum, there is at best evidence of one financial transaction involving Mr. Serrano (the WASA discounting) and evidence of one financial transaction involving the Plaintiff (the \$200,000.00 loan). One swallow does not make a summer; a single isolated transaction of either nature set out above does not constitute the provider of the funds a moneylender.

Further, there is no evidence before me that the Plaintiff advertised, announced or held herself out in any way as carrying on the business of moneylender. Nor, for the sake of completeness, although it is not necessary for me to come to any conclusion in this regard given my previous finding that the \$200,000.00 was lent by the Plaintiff, is there any evidence to this effect on the part of Mr. Serrano save the *ipse dixit* of Reynold Howard which I do not accept as establishing that Mr. Serrano advertised, announced, or held himself out to be a moneylender. I am therefore of the view that the Plaintiff does not fall within the statutory definition of a moneylender as set out in S.2 of the Moneylenders Act and this defence should fail.

#### Undue Influence.

In the absence of a special relationship between the parties, it is for the person seeking to avoid the transaction to show that there was actual coercion or that there was such a general degree of domination or control over him that his independence of decision was substantially undermined. See *Chitty on Contracts, Vol. 1*, paragraph 504. If a special relationship exists then undue influence is presumed and the other party is to establish that the transaction was free from undue influence. Such a presumption is said to arise where a guarantee is given by one of a bank's customers to secure a debt due from another customer. See *Chitty on Contracts, Vol. 1*, paragraph 506.

It is my view that in all the circumstances of this case, no such fiduciary relationship existed at the material time and that the Defendants have failed to satisfy the burden of proof placed on them. There was no reposing of trust and confidence by the Defendants

or either of them in the Plaintiff, or in Mr. Serrano on her behalf, as is set out in *Barclays Bank Plc v. O'Brien v. Another (1984) 1 A.C. 180*. There is nothing in the evidence to show that the Defendants were not given the opportunity to seek advice on the Note and its terms.

The Note in any event reflected the proposal which the Second Defendant put forward and in relation to which the Second Defendant would have had the opportunity to consult with lawyers of its own choice. The Second Defendant had lawyers available to it at the time, and doubtlessly so did the First Defendant, and while there has been mention of urgency in obtaining the funds there is absolutely no evidence before me to show how this urgency might have arisen, save for a disputed assertion that the vehicles which were to be imported were initially due to arrive in Trinidad and Tobago around mid-October and were in the dock in England awaiting shipment.

As to the First Defendant's personal position and his personal liability on the Note, I have already remarked upon his years and experience as a businessman and financial advisor and consultant. I do not accept that he did not know full well the meaning of the various constituent parts of the document in question. He must have been fully aware of the obligations of the makers of the Note and of joint and several liability generally, and which would be no different on a promissory note. As I have said, I do not accept his explanations of his understanding of the meaning of jointly and severally, or that he did not know at the time of signing that he was personally and separately undertaking to pay the promissory note. He knew full well what a guarantor was and that if the Second

Defendant did not pay the Note then he was liable to do so. Further, the Defendants well knew at the time of signing the Note that the Plaintiff was the payee. Furthermore, there was no superior financial position and knowledge on the part of Mr. Serrano or the Plaintiff, and the failure to inform the Defendants, for in my view they were not told or advised to seek independent advice, did not in all the circumstances constitute undue influence.

Even if I were to be wrong in my conclusion that there was no fiduciary relationship existing at the material time, then it is my further view that the evidence establishes that the transaction was free from undue influence and that the Plaintiff satisfied the burden placed upon her to demonstrate this.

This defence should therefore fail.

#### Negotiability of the Note

The remaining issue is that of the negotiability of the Note. Mr. Louison submits that by virtue of these very terms no one would be interested in becoming a holder for value, no one would be interested in taking an endorsement of the Note. It might be negotiable in principle, he submits, but not in reality.

His submission, as I understand it, relates to what might be called the “commercial negotiability” of the Note, i.e. that no one would take an assignment or transfer of it because of the uncertainty of its terms arising out of the matters set out at page 2, or the

reverse of, the Note. An indorsee or assignee or transferee of the Note would not know what he was getting, was the submission. There is no submission that the Note is not otherwise negotiable; there is nothing on its face indicating non-transferability or prohibiting transfer. See **Section 4 of the Bills of Exchange Act**. In my view, there is nothing in law to prevent or prohibit the Note from being negotiated, although Mr. Louison's submission as to "commercial negotiability" might well reflect the position to be adopted by potential third party indorsees or assignees.

As I have said, the Plaintiff's claim must fail. Consequently I dismissed it and ordered the Plaintiff to pay the Defendants' costs of the action.

DATED this 17<sup>th</sup> day of March, 2000

C.V.H. STOLLMAYER  
JUDGE