C.A. No. 118490

NOVA SCOTIA COURT OF APPEAL

Cite as: Offshore Leasing Corporation v. Adelaide Capital Corporation, 1996 NSCA 24

Freeman, Roscoe, and Pugsley, JJ.A.

BETWEEN:	
OFFSHORE LEASING INCORPORATED, a body corporate Appellant	Robert G. Belliveau, Q.C. and Michelle C. Awad for the Appellant
- and -	
ADELAIDE CAPITAL CORPORATION, a body corporate Respondent	Darlene A. Jamieson for the Respondent
	Appeal Heard: January 10, 1996
	Judgment Delivered: March 14, 1996

THE COURT: The appeal is dismissed with costs to the respondent by the appellant in the amount of $4,000.00, plus reasonable disbursements, to be taxed as per reasons for judgment of Roscoe, J.A.; Freeman and Pugsley, JJ.A., concurring.

ROSCOE, J.A.:

In 1987, the appellant, Offshore Leasing Incorporated, guaranteed the debt of Belmont House Limited owing to Central Trust Company, a predecessor of the

respondent, to a limit of $259,896.00 or 12.74% of the balance owing after the security was realized. The principal security for the debt was a second mortgage in the amount of $1.7 million on an office building in downtown Dartmouth owned by Belmont. Seven other corporations signed guarantees in various percentages to the total amount of $2,042,000. The first mortgage was foreclosed in 1992 and the proceeds of sale were insufficient to pay off the first mortgage. The respondent demanded payment of approximately $245,000 plus interest from the appellant.

Offshore denied that it was responsible based on a number of alternate assertions including that there had been a novation, that there had been an agreement to release the guarantee and that the application of the doctrines of promissory estoppel and estoppel due to unconscionability should prevent the respondent from relying on the guarantee.

After trial, Justice Hall made a number of critical findings of fact and concluded that the respondent was entitled to enforce the guarantee and collect the amount of $245,110.14 from the respondent.

FACTS

The background facts are set out succinctly by the trial judge as follows:

> The defendant [Offshore] was one of several partners who owned an interest in Belmont House Limited, herein referred to as "Belmont". The latter was a corporation organized to construct and own a commercial office building in the City of Dartmouth, known as Belmont House. This enterprise was managed by Fairwyn Enterprises Ltd., a development Company owned by Kirk E. MacCulloch. Its principal officers were Mr. MacCulloch and Michael Joseph MacCormick.
>
> Under date of January 30, 1987, Central agreed to lend to Belmont $1,700,000.00. The purpose of the loan was to provide financing to enable Belmont to pay down the first mortgage loan by $1,000,000.00 to save on interest and the balance of $700,000.00 was to be used to pay for construction of leaseholds. It was intended, once a sufficient per cent of its space was leased, to pay off both mortgages by obtaining a new mortgage sufficient to consolidate the

two loans. It was described as "Second Mortgage (subject only to a prior charge in favour of the Manufacturers Life Insurance Company for $3.8 million approximately)". The security for the loan included a second mortgage on Belmont House and the guarantees of the several partners as follows:

Fairwyn Enterprises Ltd.	$ 779,280.	38.2%
Bermuda Leasehold Inc.	360,264.	17.66%
Read Restaurants Ltd.	130,152.	6.38%
Ocean Resources Limited	130,152.	6.38%
PacPam Incorporated	130,152.	6.38%
Fairwyn Holdings Ltd.	119,152.	5.88%
Offshore Leasing Ltd.	259,896.	12.74%
Oakwood Holdings Ltd.	130,152.	6.38%
Total	$2,040,000.	100.00%

The interest to be paid on the loan was to be a floating rate at 1 1/2 per cent over Central's prime demand loan interest rate. The term of the loan was for one year with "annual review". The interest adjustment date was to be the first day of the month following the month in which the final advance of mortgage funds was made and the first payment was to be payable on the first day of the month following the interest adjustment date.

In furtherance of the requirement that the partners guarantee the loan, each of the partners, including the defendant [Offshore], executed a guarantee in the following form:

WHEREAS:

1. Central Trust Company has agreed to provide second mortgage financing in an amount of ONE MILLION SEVEN HUNDRED THOUSAND ($1,700,000.00) DOLLARS to BELMONT HOUSE LIMITED over the lands and premises owned by Belmont House Limited and located at Civic No. 33 Alderney Drive, in the City of Dartmouth, County of Halifax, Province of Nova Scotia;

2. The terms of such mortgage loan are as contained in a Letter of Commitment dated the 30th day of January, A.D. 1987;

3. Belmont House Limited is a body corporate and a nominee company on behalf of a partnership known

as The Belmont Group Partnership;

4. One of the conditions contained in the aforementioned mortgage commitment was that the principals in the said partnership provide separate Guarantees in an amount totalling $2,040,000.00.

IN CONSIDERATION of Central Trust Company agreeing to grant a mortgage loan to Belmont House Limited, the undersigned guarantees the payment to Central Trust Company of the liabilities which Belmont House Limited has incurred, or may incur, to Central Trust Company, to a limit of **Two Hundred Fifty-Nine Thousand Eight Hundred Ninety-Six** (**$259,896.00**) DOLLARS.

This is a continuing guarantee intended to cover all monies now due or to become due and owing by Belmont House Limited to Central Trust Company with respect to the said mortgage loan, and it is agreed that the undersigned shall be liable for **Twelve Point Seven Four** (**12.74**%) PERCENT of any ultimate balance remaining after all monies obtainable, pursuant to the terms, conditions and covenants of the realty mortgage and any other security, shall have been applied in reduction of the amount which shall be owing from Belmont House Limited to Central Trust Company. [emphasis added]

And it is further agreed that Central Trust Company may, at any time or times and from time to time, and without notice to the undersigned, extend or agree to extend the time for payment of all or any of the monies due from Belmont House Limited, or may refrain from enforcing payment thereof and alter the terms and times of payment thereof or the rate or time of payment of interest thereon and may release, or at its option realize on any part of the lands to be mortgaged under the realty mortgage, or any person liable on all covenants, or any other security, collateral or otherwise, and notwithstanding the same, the undersigned shall remain fully liable under the foregoing covenants.

This Guarantee shall be in addition to and without prejudice to any other security which Central Trust Company may now or hereafter possess in respect of the liabilities of Belmont House Limited to it.

This Guarantee shall bind and the benefit thereof shall extend to the successors and assigns of the undersigned, and to the successors and assigns of Central Trust Company as if they had been expressly named therein.

At the time the guarantee was signed, Offshore was owned by Alfred

Smithers and Kirk MacCulloch who were both also shareholders in Secunda Marine Services Limited. MacCulloch was also the major shareholder in Fairwyn Enterprises Limited, Fairwyn Holdings Limited and Oakwood Holdings Limited, three of the other shareholders in Belmont.

On May 1, 1987 Central Trust and Belmont agreed to alter the terms of the mortgage respecting the interest rate, the date of the first payment and the maturity date. By terms of the amending agreement, payments were to commence on June 1, 1987 and the maturity date was set as May 1, 1989.

During 1988, six of the shareholders of Belmont, including Offshore, joined with others to form a new company, API Holdings Ltd., which became the owner of 75.96% of Belmont House.

By letter dated June 1, 1989 to Belmont, Central agreed to renew the mortgage for a further period from one to five years at the option of Belmont. The term chosen was one year.

The letter contained the following:

> Upon acceptance of this offer to renew, such acceptance forms a binding agreement in accordance with the mortgage indenture dated February 11, 1986 between Belmont House Limited, Mortgagor and, Fairwyn Enterprises Limited, Bermuda Leaseholds Inc., Read Restaurants Limited, Ocean Resources Limited, PacPam Incorporated, Fairwyn Holdings Limited, Offshore Leasing Limited and Oakwood Holdings Limited, Guarantor, and Central Trust Company, Mortgagee, now known as Central Guaranty Trust Company.
>
> The date of the mortgage is deemed to be the date of this renewal.
>
> To indicate your acceptance of this offer to renew, please sign and return the original letter to our office no later than June 14, 1989.

The acceptance, which was signed by Belmont House Limited and the Guarantors, including Offshore, was as follows:

> We, Belmont House Limited and Fairwyn Enterprises Limited, Bermuda Leaseholds Inc., Read Restaurants Limited, Ocean Resources, PacPam Incorporated, Fairwyn Holdings Limited, Offshore Leasing Limited and Oakwood Holdings Limited accept the renewal agreement as set out in this letter. We acknowledge that this letter is a binding contract in extension to the original loan commitment and indenture and that the date of the mortgage is deemed to be the date of this renewal. All other terms and conditions contained in the mortgage shall continue in full force and effect.

During 1989, Smithers and MacCulloch entered into an arrangement whereby Smithers would purchase the shares owned by MacCulloch in Offshore and Secunda and MacCulloch would acquire Smithers' property interests. Smithers had difficulty raising the funds to complete the transaction. In the end, he transferred his shares in API to MacCulloch as of January 1, 1990. Smithers testified that it was his understanding that MacCulloch would "step into his shoes" with respect to the guarantee signed by Offshore until June 1, 1990 at which time he understood Offshore's guarantee "expired" or "elapsed".

As the June 1, 1990 maturity date approached, Michael MacCormick, the Vice-President of Fairwyn Enterprises Limited, on behalf of Belmont, negotiated with Mark Richardson of Central for a further renewal. By letter dated May 16, 1990 Central offered to renew the mortgage for a further term. The letter was similar to the one sent the year before. MacCormick testified that there were two concerns with the renewal: one being that Belmont would have the option to repay the mortgage at any time since the interest rates were then 15%, and secondly that Offshore not be required to sign as a guarantor, since it no longer owned an interest in Belmont.

MacCormick testified that he advised Richardson that Offshore no longer held an interest in Belmont House and, therefore, they would not be signing the renewal letter as a guarantor. Over the course of several telephone conversations, he told Richardson that since the balance owing on the mortgage was $1,620,000 and the

guarantees, not including Offshore's, totalled $1,780,000, that Central had 110% "coverage". MacCormick indicated that Richardson responded by saying "in that case Offshore doesn't have to sign this as a guarantor".

Richardson recalled having conversations with MacCormick regarding the renewal letter in 1990 but was not able to remember the specific content of the discussions.

MacCormick returned the letter to Central Trust which was in turn sent back to MacCormick with a cover letter signed by Donna Conrod, the Administration Manager of Central Trust which said:

> Further to our recent discussions, we are returning the Offer to Renew dated May 16, 1990 for execution by all parties. We note and acknowledge that Offshore Leasing will not be executing this renewal.

The renewal letter was signed by Belmont House and all the guarantors except Offshore. The signed document was received by Central on November 13, 1990.

During the summer of 1990, Smithers applied for a loan from Central on behalf of Secunda Marine in the amount of $5,000,000. He testified that since he was asked to personally guarantee the loan, it was necessary for him to provide financial information regarding his other holdings. Among the documents supplied were the financial statements of Offshore which Smithers indicated did not show the contingent liability of the Belmont House guarantee.

Smithers testified that he dealt with Richardson of Central in supplying the documentation required. He also testified that he supplied the financial statements for Offshore for the previous year which did show the contingent liability.

Smithers also testified that in 1991 he acquired ownership of a ship valued in excess of $6,000,000, the title of which he placed in Offshore, which he said he would not have done if he had known that the guarantee was still in effect.

In 1992, Manufacturer's Life Insurance Company which held the first mortgage on Belmont House commenced foreclosure proceedings which resulted in the property being sold at a sheriff's sale to Manufacturer's Life. The proceeds of the resale were insufficient to satisfy the first mortgage. Central received no proceeds from the sale or from Belmont House when it demanded payment in full of the mortgage. In November, 1992, Central demanded payment of the sum of $245,110.14 from Offshore, the figure that represented 12.74% of the total outstanding on October 21, 1992.

THE DECISION OF THE TRIAL JUDGE

The trial judge found that there was no ambiguity apparent with respect to the guarantee and that therefore parol evidence was not admissible to explain its terms. He found that it was a continuing guarantee which would continue until the debt owed by Belmont was repaid or the guarantees were otherwise discharged. He found that the guarantee contemplated renewals and extensions and variations in interest rates and that the June 1, 1989 agreement did not replace earlier agreements and therefore the original loan guarantee was not extinguished by novation.

The trial judge also found that the discussions between Richardson and MacCormick resulted in an agreement or understanding that Offshore's liability under the guarantee was to be at an end and that Smithers believed that Offshore had been relieved of liability under the guarantee. The trial judge further found that although neither Richardson nor Conrod had the authority to release the guarantee, that Central would have been bound by their representations, except for the fact that there was no consideration given by Offshore, and since it was not an agreement in writing and under seal, Central was not bound by it.

On the question of estoppel, the trial judge found that although there was an existing relationship between the parties at the relevant time, and Offshore acted to its detriment in its belief that it had been released by not taking further action to obtain

a formal release, there was no clear promise or representation by Central that Offshore was to be released and that Central was to be bound by the undertaking. In that respect, the trial judge said:

> The evidence of Mr. MacCormick was to the effect that in response to his suggestion that even without the defendant's guarantee the remaining guarantees still provided 110 per cent security, Mr. Richardson replied, "If that's the case Offshore doesn't have to sign it (the 1990 renewal) as guarantor". In my opinion, this does not amount to a clear promise that the defendant was to be released from its guarantee. Instead it was a rather vague adoption of a proposition based upon an incorrect supposition as to the effect of the remaining guarantees...

The trial judge also found that Smithers was unaware of the Conrod letter until after the proceeding commenced and that Smithers' failure to demand a formal release was not because of his reliance on his knowledge of the discussions between MacCormick and Richardson, but rather "because of his belief that the defendant's liability came to an end with the expiry of the 1989 release in June, 1990 and that the defendant was no longer bound because it had not signed the May 16, 1990 renewal".

The trial judge thus found that Offshore had failed to prove that it was entitled to rely on the doctrine of promissory estoppel. He also decided that "a party may not rely on its own misrepresentation, albeit innocent, to claim that it would be unconscionable for the other party to exercise its rights when the correct position is established".

With respect to the amount outstanding, he found that Central was entitled to judgment in the amount of $245,110.14, plus pre-judgment interest in the amount of 5% from the date of the demand which was November 3, 1992.

ISSUES

The appellant raises the following issues on appeal:

Findings of Fact

1. Did the Learned Trial Judge err in

holding that as of June 1990, the outstanding Guarantees, other than the Appellant's Guarantee, did not provide 110% coverage of the outstanding loan balance?

2. Did the Learned Trial Judge err in finding that the Guarantee related to a second mortgage and not a term loan?

3. Did the Learned Trial Judge err in finding that the June 1989 Loan Agreement did not replace the 1987 Loan Agreement?

Release of Guarantee

4. Did the Learned Trial Judge err in finding that the Respondent's agreement to release the Appellant's Guarantee was not conveyed to the Appellant?

5. Did the Learned Trial Judge err in finding that there was no consideration for the Respondent's agreement to release the Appellant's Guarantee?

Estoppel

6. Did the Learned Trial Judge misapprehend the law of estoppel?

7. Did the Learned Trial Judge err in law in failing to conclude that the Respondent was estopped from relying on its strict legal rights, specifically after making the finding of fact that the Appellant and the Respondent had agreed that the Appellant's liability under the Guarantee was at an end?

8. Did the Learned Trial Judge err in holding that the Appellant did not detrimentally rely on the Respondent's representations that the Guarantee was at an end?

FIRST ISSUE - 110% Coverage

The appellant submits that the trial judge erred in finding that MacCormick was wrong in his assertion to Richardson in 1990 that even without the Offshore guarantee, the balance of the guarantees provided "110% coverage". The appellant submits that this factual conclusion by the trial judge amounts to a palpable and

overriding error. It is the appellant's submission that since in 1990 the balance of the loan was $1,619,953.00 and the total dollar amounts of the seven other guarantees was $1,780,104.00 that there was therefore 110% coverage of the balance owing. This argument completely ignores the clauses in the guarantees providing that the guarantor shall be liable for a specific percentage of any ultimate balance remaining: "...and it is agreed that the undersigned shall be liable for **Twelve Point Seven Four (12.74%)** of any ultimate balance remaining...". On the interpretation suggested by the appellants Fairwyn Enterprises Ltd., for example, which guaranteed 38.2% of the loan up to $779,280.00, could be called upon to pay the whole balance if the amount outstanding at the time of the call was anything less than $779,280.00.

The plain meaning of the words in the guarantee cannot possibly support the interpretation suggested by the appellant. If at any time Offshore was released from its obligation under the guarantee, Central would be left with guarantees totalling 87.26% of any outstanding balance. There is absolutely no merit to the first ground of appeal.

SECOND ISSUE - Term Loan or Mortgage

The appellant submits that when Belmont negotiated the loan with Central, it was seeking a term loan, not a mortgage, and that the trial judge erred in finding that the guarantee related to a second mortgage and not a term loan which expired in May, 1989.

It should be noted here that there is no appeal from the finding of the trial judge that there was no ambiguity apparent on the face of the documents and, therefore, extrinsic evidence was not admissible to explain their terms.

The guarantee was, on its clear and unambiguous terms, a guarantee which continued until all monies owing by Belmont House were paid to Central Trust. The debt which was guaranteed by Offshore was not paid out at the end of the first

term. The terms of the guarantee contemplate both extensions of time for payment and alterations to the terms and times of payment of the mortgage, including the rate of interest and the time for payment of interest. These extensions were agreed to by the letters dated June 1, 1989 and May 16, 1990. These letters simply extended the time for payment of the original debt. The consent of the guarantors to the extensions however, was not necessary. They had agreed in advance by signing the guarantee that Central could extend the time for payment without notice to them. In my view, Justice Hall was correct when he stated:

> . . . I am satisfied from the evidence that the guarantee was with respect to a mortgage loan and not as counsel for the defendant suggested a "term loan" or "bridge financing". It is clear, however, from the terms of the document that it was with respect to second mortgage financing and not to guarantee other loans or future loans outside of the ambit of the original mortgage loan.

THIRD ISSUE - 1989 Loan Agreement replaced the 1987 Loan Agreement

Offshore submits that the learned trial judge erred in fact and in law in his conclusion that the 1989 loan agreement did not replace the 1987 loan agreement. The appellant contends that documents relating to the 1989 loan support its position that it was a new loan which replaced the 1987 loan. The documents referred to include the renewal submission which assigned a new loan number to the file and showed a different balance owing for the loan. The appellant places some significance in the fact that Central reassessed the value of the security for the loan and Belmont's ability to pay it. The appellant states that if one of the parties had a question as to its obligation under the loan subsequent to June, 1989, and had looked at the 1987 loan agreement, they would have found incorrect and outdated information. It is for these reasons the appellant states that the trial judge erred in fact.

The appellant also submits that the trial judge erred in law in his determination that the principles of novation could only apply to the lending contract and

not the guarantee. The appellant's argument in this respect is summarized in paragraphs 94 and 95 of its factum:

> It is respectfully submitted that the principles of novation apply in this case and the 1989 loan agreement extinguished the 1987 loan agreement. The 1989 loan agreement incorporated the guarantee signed by Offshore in 1987, by reference, and that incorporation occurred because Offshore signed p. 5 of the 1989 loan agreement. Had that signature not been affixed, Offshore would not have been a party to the binding contract which was the 1989 loan agreement. By virtue of the facts at hand and the principles of novation, it is respectfully submitted that the 1989 loan agreement forever extinguished the 1987 loan agreement.
>
> Based on the foregoing, it is further submitted that the principles of novation also apply to the May 16, 1990 loan agreement. It too extinguished the earlier loan agreement, this time the 1989 loan agreement . . .

This argument is very similar to that made on the second issue and for similar reasons must also fail.

The June 1, 1989, letter to Belmont House Limited to Central Trust begins:

> We are pleased to offer a renewal of the subject mortgage as outlined below.
>
> On p. 2, it says in para. 10:
>
> All security provided for under the original loan shall continue in full force and effect and be applicable during the renewal term.

The existing loan was not paid out; no new funds were advanced and no new security documents were executed in June, 1989. No person assumed the debt of Belmont and became the principal debtor. The letter contains no promise to pay the debt.

This Court recently considered the principles involved in novation in **Newfoundland Capital Corporation Limited v. the Maritime Life Assurance Company Limited** (C.A. No. 118601, dated January 10, 1996). In that decision, the court relied on the decision of **National Trust Company v. Mead et al**, [1990] 2 S.C.R. 410 where

Wilson, J., for the court described novation and set out the test for determining if novation has occurred at p. 427 as follows:

> A novation is a trilateral agreement by which an existing contract is extinguished and a new contract brought into being in its place. Indeed, for an agreement to effect a valid novation the appropriate consideration is the discharge of the original debt in return for a promise to perform some obligation. The assent of the beneficiary (the creditor or mortgagee) of those obligations to the discharge and substitution is crucial. This is because the effect of novation is that the creditor may no longer look to the original party if the obligations under the substituted contract are not subsequently met as promised.
>
> Because assent is the crux of novation it is obvious that novation may not be forced upon an unwilling creditor and, in the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling. Thus, while the court may look at the surrounding circumstances, including the conduct of the parties, in order to determine whether a novation has occurred, the burden of establishing novation is not easily met. The courts have established a three-part test for determining if novation has occurred. It is set out in **Polson v. Wulffsohn** (1890), 2 B.C.R. 39 as follows:
>
> 1. The new debtor must assume the complete liability;
>
> 2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
>
> 3. The creditor must accept the new contract in full satisfaction and substitution for the old contract.

Justice Wilson reviewed numerous cases where novation was at issue and noted at p. 430 that the essence of novation is the substitution of debtors. In all of the cases reviewed by Justice Wilson, the equity of redemption of the property had been sold and in some cases, there was an assumption agreement by the purchaser. It appears that novation usually arises in the context of a sale of the property. As indicated above, here there is no sale, there is no substitution of the principal debtor, that is Belmont House.

The appellant relies on **Toronto Dominion Bank v. A. E. A. Properties**

Limited (1987), 81 N.S.R. (2d) 179 (Co.Ct.) where Justice MacDonnell, then of the County Court, found that novation had occurred in relation to security given pursuant to s. 178 of the **Banks and Banking Law Revision Act** by the debtor company. Justice MacDonnell relied on the following explanation of novation found in **Black's Law Dictionary** (5th Ed.):

> Novation. Substitution of a new contract, debt, or obligation for an existing one, between the same or different parties. The substitution by mutual agreement of one debtor for another or of one creditor for another, whereby the old debt is extinguished. The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one. **Blyther v. Pentagon Federal Credit Union**, D.C. Mun. App., 182 A. 2d 892, 894.
>
> (Emphasis Added)
>
> A novation substitutes a new party and discharges one of the original parties to a contract by agreement of all three parties. A new contract is created with the same terms as the original one but only the parties are changed. **Restatement of Contracts**, SS423, 430.
>
> In the civil law, there are three kinds of novation: where the debtor and creditor remain the same, but a new debt takes the place of the old one; where the debt remains the same, but a new debtor is substituted; where the debt and debtor remain, but a new creditor is substituted. **Wheeler v. Wardell**, 173 Va. 168, 3 D.E. 2d 377, 380.

The appellant submits that in this case there is a novation of the first kind noted in **Wheeler v. Wardell, supra**, that is, where the debtor and creditor remain the same, but a new debt takes the place of the old one.

As noted above, there is no new debt in this case. The conclusion of the trial judge on this issue is, in my view, correct:

> It is important not to confuse the lending contract with the guarantee. Novation applies only to the contract.
>
> In my view the June 1, 1989, renewal document was nothing more than an acknowledgement and approval of the variation in the terms of the original loan agreement. The document cannot stand by itself as a guarantee of anything

> since there are no words of guarantee set forth in it. In order for it to make any sense it must be read in conjunction with the original guarantee. The document in fact does refer to it being an extension of the original loan commitment and confirms the terms and conditions of the mortgage.
>
> It does not substitute a new debt for the original but merely changes some of the terms with respect to repayment, which variations were contemplated in the original undertaking. The obligation remained the same, it referred to the same loan and the same parties were involved insofar as the defendant's guarantee was concerned. There was, accordingly, no new contract and the original obligation was not thereby extinguished. The position in regard to the May 16, 1990, renewal was exactly the same in this respect.
>
> Furthermore, in my opinion, the defendant was not released from its obligations under the guarantee by the simple fact that it did not sign the 1990 renewal. I agree with the position taken by Ms. Jamieson, on behalf of the plaintiff, that under the very broad terms of the guarantee the defendant had contracted out of its common law rights and the plaintiff had authority to alter the terms of the mortgage loan as it did without the consent of the guarantors and they would continue to be bound by their guarantees.
>
> This case is distinguishable from Toronto Dominion Bank v. A.E.A. Properties Limited, (1987) 81 N.S.R. (2d) 179. In that case a new security document under then section 178 of the Banks and Banking Law Revision Act, 1980, was substituted each time that the loan obligation came up for renewal . . .

FOURTH AND FIFTH ISSUES - Release of Guarantee

The trial judge found that the discussions between Richardson and MacCormick resulted in an agreement or understanding that Offshore's liability under the guarantee was to be at an end. The trial judge then said that:

> . . . I also find that although this information was not formally conveyed by Mr. MacCormick to the defendant, through Mr. Smithers or otherwise, Mr. Smithers believed that the defendant [Offshore] had been relieved of liability under its guarantee.
>
> The trial judge also stated:
>
> It also was not clear that the undertaking, whatever it was, was communicated to the defendant [Offshore].

The appellant takes issue with these findings of fact and says there is "no evidence whatsoever" to support the trial judge's findings. These findings have an impact upon the estoppel issues.

The evidence of Mr. Smithers' regarding his discussions with MacCormick after MacCormick had discussions with Richardson was:

> He had told me that he had a conversation with Mark Richardson and that the total aggregate of the remaining investors was such that they didn't need Offshore Leasing's guarantee and that you know they never even asked for it ...

Mr. Smithers indicated that he did not ask for a release of the guarantee because he did not need one. He assumed that if he did not sign the 1990 renewal that his guarantee came to an end. He did not have any discussions with anyone at Central respecting the guarantee or its release. The evidence of Mr. MacCormick on this subject was that he was not sure whether he relayed his discussions with Richardson to Smithers. In my opinion, there is sufficient evidence upon which the trial judge could make the findings of fact that he did.

On the question of consideration, the trial judge said:

> . . . although I am of the opinion that Central through Mr. Richardson and Ms. Conrod agreed to release the defendant from its guarantee, there was no consideration for this agreement, and since it was not in writing and under seal the plaintiff is not bound by it . . .

The appellant submits that the consideration for the release of guarantee was the agreement of Belmont to renew the mortgage. Once again, in order to support this argument, the appellant incorrectly characterizes the 1990 renewal as a new loan. In my view, if in fact there was agreement between Richardson and MacCormick to release Offshore, there was no consideration given to Central. There was no additional payment made on the mortgage. There was no additional security given. The other guarantors did not increase the percentage of the debt for which they would be responsible. In short, the appellant can point to no benefit received by Central.

SIXTH, SEVENTH AND EIGHTH ISSUES - Estoppel

The appellant claims that Central should be estopped from demanding payment on the guarantee because of the representations given by Richardson to MacCormick.

The trial judge listed the five essential features of promissory estoppel as outlined by Fridman in **The Law of Contracts**, Third Edition, (pages 128 - 136), which are as follows:

> (1) There must have been an existing legal relationship between the parties at the time the statement on which the estoppel is founded was made . . .
>
> (2) There must be a clear promise or representation made by the party against whom the estoppel is raised, establishing his intent to be bound by what he has said . . .
>
> (3) There must have been reliance, by the party raising the estoppel, upon the statement or conduct of the party against whom the estoppel is raised . . .
>
> (4) The party to whom the representation was made must have acted upon it to his detriment . . .
>
> (5) The promisee must have acted equitably.

The trial judge found that Offshore had proven the existence of the first and fourth elements, that is, that there was an existing relationship between the parties and that Offshore acted to its detriment in its belief that it had been released from its guarantee in "not taking further action to obtain a formal release or protection against its guarantee". The trial judge, however, found that the appellant did not prove the existence of facts supporting the second, third and fifth elements.

With respect to the second element, the trial judge said:

> The evidence of Mr. MacCormick was to the effect that in response to his suggestion that even without the defendant's guarantee the remaining guarantees still provided 110 per cent security, Mr. Richardson replied, "If that's the case Offshore doesn't have to sign it (the 1990 renewal) as guarantor". In my opinion, this does not amount to a <u>clear</u>

> promise that the defendant was to be released from its guarantee. Instead it was a rather vague adoption of a proposition based upon an incorrect supposition as to the effect of the remaining guarantees . . .

The appellant repeats its argument on the first issue respecting the "110% coverage" and says that the trial judge erred in determining that there was an incorrect supposition. The appellant argues that there was 110% coverage and therefore there was a clear representation that Offshore's guarantee was not required. As indicated above, the trial judge, in my view, was correct in his determination that there would not be 110% coverage if Offshore were released from the guarantee. It is also obvious from the evidence that Richardson would not have agreed to reduce the total amount of guarantees to 87.26% of the outstanding balance.

The trial judge was correct in finding that in the circumstances of this case, the second requirement for proof of promissory estoppel was not met. I agree with the trial judge's characterization of the discussions between MacCormick and Richardson as "a vague adoption of a proposition based upon an incorrect supposition". This clearly does not meet the test. At p. 130 of **The Law of Contracts, supra**, Fridman says:

> The function of promissory estoppel is to alter or affect the legal relations between the parties. Therefore it is essential that the statement or conduct that grounds the estoppel be intended to have such consequence. As Judson J. said in **Conwest Exploration Co. v. Letain**, there must be "an unambiguous representation of intention ... which was intended to be acted upon and was acted upon. ...

This situation here is analogous to that discussed by Professor Fridman on p. 131 in his analysis of **Bank of Montreal v. Loomis Armoured Car Service Ltd.** (1980), 21 B.C.L.R. 247 (B.C.S.C.):

> . . . There was no intention that the defendants should believe that the plaintiff would not enforce its rights under the contract. There was no promise that the plaintiff was abandoning its rights. It was an informal statement with no

> legal significance, nor did the security manager have any authority, as an agent, to grant a release from liability. As is made clear by the Supreme Court of Canada in **John Burrows Ltd. v. Subsurface Surveys Ltd.**, equitable or promissory estoppel does not arise because one party has taken advantage of an indulgence granted by the other. The party in question must have believed that strict rights under the contract would not be enforced and the contractual relationship between the parties would be altered . . .

Although Justice Hall found that Offshore acted to its detriment because Mr. Smithers did not demand a formal release of the guarantee and thus met the fourth requirement of promissory estoppel, he found that the third element was not present because the reason Mr. Smithers did not request a formal release was not because of his reliance on his knowledge of the discussions between Richardson and MacCormick, but rather "because of his belief that the defendant's liability came to an end with the expiry of the 1989 release in June, 1990, and that the defendant was no longer bound because it had not signed the May 16, 1990, renewal".

With respect to the fifth requirement, the trial judge found that although Offshore acted honestly and in good faith, the mistake and confusion was induced by Mr. MacCormick's incorrect assertion. In my view, the trial judge did not err in his finding that the appellant had not met the burden of proving promissory estoppel.

As an alternate argument, the appellant submits that the respondent should be denied the right to enforce the guarantee on the basis of estoppel due to unconscionability. The appellant says that it would be unconscionable to bind Offshore to the guarantee because of the facts surrounding Secunda's loan from Central in 1990 in the amount of $5,000,000, which was guaranteed by Smithers. The appellant says that Offshore's guarantee of the Belmont House mortgage was shown on its financial statements as a contingent liability in 1989, but not in 1990. The appellant states:

> . . . Given that Offshore never held any significant assets prior to 1991, the Respondent must have noticed the removal of a $259,896 contingent liability between the two years. If it did not notice that, it ought to have, and to now

> allow the Respondent to avoid the repercussions of its oversight would be unconscionable.

The appellant also states that Smithers would not have vested title in Offshore of the vessel he purchased in 1991 had he known that his guarantee was still enforceable.

On the question of estoppel due to unconscionability or acquiescence, Justice Hall referred to the five necessary elements as listed by Hallett, J. (as he then was) in **Robertson v. McCarron** (1986), 71 N.S.R. (2d) 34 as follows:

> . . . Ordinarily the five requisites necessary to invoke this type of estoppel are:
>
> 1. The person seeking to raise the estoppel must have made a mistake as to his legal rights.
>
> 2. He must have done some act to his detriment, such as the expenditure of money, on the faith of the mistaken belief.
>
> 3. The person sought to be estopped must know of the existence of his own right which is inconsistent with the right claimed by the party seeking to raise the estoppel.
>
> 4. The person sought to be estopped must know of the other's mistaken belief as to his rights.
>
> 5. The person sought to be estopped must have encouraged the other in the acts done to his detriment, either directly or by abstaining from asserting his own rights.

In this case, Justice Hall found that Offshore had not proven the third requisite. As well, the trial judge found that "... a party may not rely on its own misrepresentation, albeit innocent, to claim that it would be unconscionable for the other party to exercise its rights when the correct position is established".

There are several problems with the appellant's argument in respect to unconscionability. To start with, there is no evidence that anyone at Central Trust noticed the difference between the two sets of financial statements. The financial statements were not placed in evidence by the appellant at the trial, nor do they form

part of the record before this Court. It is, therefore, impossible to infer that the difference in the two statements would be obvious to a reader whose primary purpose would have been unrelated to the Belmont House mortgage. Secondly, the evidence of Smithers respecting the purchase of the new ship does not provide details as to the net value of the ship and what his other options regarding its ownership, were at the time. As well, it is not clear on the evidence that Offshore was a company without any value prior to the purchase of the ship in 1991. Mr. Smithers testified that it had a net worth consisting of loans owed by Secunda of "less than $200,000" (possibly only slightly less than the amount eventually claimed by Central on the guarantee). It is also important to note that Smithers was an experienced businessman capable of arranging complex financial transactions.

In **Robertson v. McCarron, supra**, Hallett, J. applied the principles of estoppel due to unconscionability as developed in **Taylor Fashions Limited v. Liverpool Victoria Trustees Co. Ltd.**, [1981] 1 All ER 897 where Justice Oliver adopted a much broader approach than earlier cases on estoppel. Oliver, J. indicated that the approach should be directed to ascertaining whether:

> . . . in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour. (p. 915)

At p. 919 Oliver, J. concluded that the court must look at the situation from the viewpoint of the person alleging unconscionability and the burden lies upon that person to prove the unconscionability of allowing the other party to rely on his legal rights, and in that respect he adopted the following burden established in **Dann v. Spurrier** (1802), 32 ER 94:

> It is upon the Plaintiff to prove, not merely to raise a

> probable conjecture, but to shew upon highly probable grounds a case of bad faith and bad conscience against the Defendant . . .

In the **Taylor Fashions** case, Oliver, J. was dealing with two sets of tenants and whether or not they could enforce options to renew their leases, after having made renovations to the property. The Taylors were unsuccessful in proving estoppel based on unconscionable conduct of the landlord because it was the solicitors of the Taylors who had wrongly assured them of the validity of their option. Oliver, J. says at p. 919:

> . . . I can find nothing in the defendants' conduct which can properly be said to have encouraged Taylors to believe in the validity of the option to any greater extent than they had already been encouraged to do so by what they had previously been told by their legal advisers.

Oliver, J. held that the other tenants, the Olds, had established estoppel:

> It would, in my judgment, be most inequitable that the defendants, having put forward Taylors' option as a valid option in two documents, under each of which they are the grantors, and having encouraged Olds to incur expenditure and to alter their position irrevocably by taking additional premises on the faith of that supposition, should now be permitted to resile and to assert, as they do, that they are and were all along entitled to frustrate the expectation which they themselves created and that the right which they themselves stated to exist did not, at any material time, have any existence in fact.

In **Robertson v. McCarron, supra**, at the trial level, Justice Hallett found that there was unconscionable conduct on behalf of Mr. McCarron, but on the appeal (73 N.S.R.(2d) 440), it was held that **Taylor Fashions** did not apply since there was no misrepresentation or inducement by Mr. McCarron upon which Mrs. Robertson could rely.

In this case, the position of Offshore is, in my view, more closely aligned to that of the Taylors' because Central did not encourage or induce Offshore to alter its

position. Here, there were no actions whatsoever by Central which could be described as unconscionable. There were never any discussions directly between Offshore and Central. Mr. Smithers relied on MacCulloch to take over his obligation with respect to the Belmont House guarantee. In my view, the trial judge was correct in finding that there was no unconscionable conduct by Central which caused Offshore to act to its detriment and which should now estop Central from enforcing its guarantee.

The appeal should therefore be dismissed.

A review of the evidence establishes that the trial judge was correct in his determination that the amount owing by Offshore on the guarantee on November 3, 1992 was $245,110.14. I would confirm the order of the trial judge with respect to pre-judgment interest.

I would dismiss the appeal with costs payable to the respondent by the appellant in the amount of $4,000.00, plus reasonable disbursements, to be taxed.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.