JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 90/99

SUIT. NO: 1998/E 248

COR. THE HON. MR. JUSTICE FORTE,P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**CITIBANK, N.A.**	**PLAINTIFF/APPELLANT**
A N D	**BLUE CHATEAU LIMITED**	**DEFENDANT/RESPONDENT**

CONSOLIDATED WITH
SUIT NO. 1998/E- 564

BETWEEN	**BLUE CHATEAU LIMITED**	**PLAINTIFF/RESPONDENT**
A N D	**CITIBANK N.A.**	**DEFENDANT/APPELLANT**

D.A. Scharschmidt Q.C. and **Hector Robinson**
instructed by Patterson, Phillipson, Graham for
the Appellant

Patrick Foster, and **Katherine Francis**
instructed by Clinton Hart and Company
for the Respondent

26th, 27th , 28th January and 14th April, 2000

FORTE, P:

I have had the opportunity of reading in draft the judgment of Langrin, J.A. and am in agreement with his conclusions and the reasoning by which he arrived at these. Consequently, I agree that the appeal

should be allowed and that the orders proposed by Langrin, J.A. should be granted. Costs of course will go to the appellants, both here and below and to be taxed if not agreed.

WALKER, J.A.

I agree with the reasoning and conclusion of Langrin, J.A. and also with the Order proposed in disposing of this appeal.

LANGRIN, J.A.

This is an appeal by Citibank N.A. which was both plaintiff and defendant in two consolidated Originating Summonses from an order of Hibbert, J (Ag.) made on 16th June, 1999 as follows:

"1. That the Originating Summons filed in Suit No. E 248 of 1998 is hereby dismissed with costs to the Defendant to be agreed or taxed.

In Suit No. E. 564 of 1998 it is hereby declared that:-

(i) The guarantee which the Defendant alleges that the Plaintiff gave to the Defendant between the 30th day of January, 1998 and the 3rd day of February 1998 to secure advances made by the Defendant to Caldon Finance Group Limited is invalid and void because there was no

consideration moving from the Defendant to support the alleged guarantee.

(ii) The equitable mortgage which the Defendant alleges that the Plaintiff created in support of the alleged guarantee by depositing with the Defendant the duplicate Certificate of Title registered at Volume 1105 Folio 581 of the Register Book of Titles is also invalid and void because there was no valid guarantee and further because an equitable mortgage was not authorised by the Directors of the Plaintiff.

IT IS HEREBY ORDERED THAT :-

1. That an injunction be issued restraining the Defendant, whether by itself, its Directors, servants, agents, or otherwise howsoever from disposing of, mortgaging, assigning, charging or otherwise dealing with the property or the duplicate Certificate of Title for the said property.

2. The Defendant deliver to the Plaintiff the duplicate Certificate of Title for the said property.

3. Costs to the Plaintiff to be agreed or taxed.

4. Certificate for Counsel granted.

5. Stay of execution granted in respect of Order Numbered 2 for a period of six (6) weeks".

There is also a respondent's notice from the order by Blue Chateau Limited which was both the defendant and plaintiff in the Originating Summonses.

This appeal raises important questions of principle relating inter alia to the doctrine of consideration in respect to guarantees and the capacity and powers of companies incorporated under the Companies Act and the authority of directors.

The appellant, Citibank, N.A. is a company duly incorporated in the state of New York, United States of America and is licensed under the Banking Act to carry on the business of banking in Jamaica. The respondent, Blue Chateau Limited is a limited liability company duly incorporated under the Companies Act and is the registered proprietor of all that parcel of land part of Constant Spring Estates, comprised in Certificate of Title registered at Volume 1105, Folio 581 of the Register Book of Titles. The Company is comprised of 200 shares, 198 of which are held by Caldon Finance Group Limited (in Liquidation) hereinafter referred to as 'Caldon' and one share by Henry Fullerton, the Executive Chairman of Caldon and one share by Cynthia O'Sullivan, secretary of Caldon.

Dorothy Parkins a vice President of the Jamaica branch of Citibank swore to an affidavit on 7th May, 1998 stating that from and since the 29th March, 1994, Caldon opened a current account with Citibank. On the

27th January, 1998 Caldon's account became overdrawn in the sum of Seven Million, Seven Hundred and Eighteen Thousand, Five Hundred and Sixty Eight Dollars and Fifty Cents ($7,718,568.50). By agreement made on the 29th January, 1998 between Citibank and Caldon further advances were made to Caldon by Citibank by way of overdraft on Caldon's account. On that date the total advances amounted to Thirteen Million, Nine Hundred and Eleven Thousand One Hundred and Eighty Nine dollars and twenty four cents ($13,911, 189.24). It was agreed between Caldon and Citibank that interest would be charged on the overdraft on Caldon's account at the rate of 38 per cent per annum.

By an agreement made orally and supported by memoranda in writing between the 30th day of January, 1998 and the 3rd day of February, 1998 it was agreed between Citibank and Blue Chateau that in consideration for the former making the aforementioned advances by way of overdraft to Caldon, Blue Chateau would guarantee the payment of all sums of money up to a limit of Nine Million Dollars ($9,000,000) due by Caldon to Citibank by virtue of the overdraft on Caldon's account. The said agreement was arrived at in telephone conversations on the 30th January and the 2nd February, 1998 between Henry Fullerton a director of Blue Chateau on the one hand and Gerald Wight and Dorothy Parkins on behalf of Citibank.

As security for the said guarantee, Blue Chateau by its servant or agent Henry Fullerton on the 3rd February, 1998 deposited the duplicate Certificate of Title registered at Volume 1105, Folio 581 in respect of the mortgaged property with Citibank.

A resolution of the Board of Directors of Blue Chateau dated 3rd February, 1998 was duly signed by Henry Fullerton and Cynthia O'Sullivan.

For ease of reference I set out below a copy of the resolution.

"**RESOLUTION OF BLUE CHATEAU LIMITED**

RESOLVED:

THAT BLUE CHATEAU LIMITED do guarantee the financial obligation to **CITIBANK, N.A. of CALDON FINANCE GROUP LIMITED** which financial obligation arises as a result of temporary facilities provided by **CITIBANK, N.A.** in the sum of **NINE MILLION DOLLARS** ($9.0M).

WE, Henry A. Fullerton the Chairman and Cynthia O'Sullivan the Secretary of **BLUE CHATEAU LIMITED HEREBY CERTIFY** that the above is a true copy of a resolution duly passed by the Directors of the Company at a board meeting duly convened by the Directors and held on the Third day of February, 1998.

Henry Fullerton
CHAIRMAN

Cynthia O'Sullivan
SECRETARY"

A valuation report dated 22nd August, 1996 prepared in respect of the mortgaged property by D.C. Tavares & Finson Co. Ltd. Real Estate Appraisers was sent by Blue Chateau to Citibank in support of the security being provided by Blue Chateau for its guarantee.

On the 19th February, 1998 Citibank registered the equitable mortgage as a charge against Blue Chateau Ltd. at the office of the Registrar of Companies. Citibank has also lodged at the office of the Registrar of Titles a caveat against any dealing with the mortgaged property without first advising the Plaintiff. On the 20th February, 1998 Citibank's attorneys–at-law prepared and sent to Blue Chateau an instrument of mortgage in the form of a guarantor's mortgage for its due execution by Blue Chateau and return to sender but up to the present Blue Chateau has failed or refused to return the instrument of mortgage duly executed. On the 12th March, 1998, by a resolution passed by creditors of Caldon, Raphael Gordon of KPMG Peat Marwick was appointed Liquidator to wind up the affairs of Caldon.

Citibank in a letter to the Liquidator dated March 24, 1998 made a formal demand for the sum of Five Million Nine Hundred and Fifty Nine Thousand Five Hundred and Ninety Two Dollars and Sixty Three Cents ($5,959,592.63) which was currently due. On the following day Citibank wrote to Blue Chateau making a formal demand and referred to the equitable mortgage created by the deposit of the Title Deed. In addition

Citibank also gave formal notice pursuant to the Registration of Titles Act, indicating that if payment was not made within one month after service of the notice the Bank would exercise its powers of sale.

By 6th May, 1998 the balance due by Blue Chateau to Citibank by virtue of the guarantee was Six Million and Sixty Nine Thousand, Four Hundred and Ninety One Dollars and Seventeen Cents ($6,069,491.17) comprising principal of Five Million Nine Hundred and Ninety Three Thousand Five Hundred and Seventy Two Dollars and Fifty Seven Cents ($5,993,572.57) and interest of Seventy Five Thousand Nine Hundred and Eighteen Dollars and Sixty Cents ($75,918.60). The interest continues to accrue at the rate of Six Thousand Three Hundred and Twenty Five Dollars and Fifty Five Cents ($6,325.55) per day.

On the 8th May, 1998 an Originating Summons was filed by Citibank seeking an order for the sale of the mortgaged premises so as to satisfy the sum due to them. Blue Chateau, on the 27th November, 1998, filed an Originating Summons seeking declarations that both the guarantee and the equitable mortgage were invalid and requested the Court to make an order of injunction and delivery of title.

On the 18th September, 1998 and further to Dorothy Parkin's earlier affidavit, she said on oath:

> "...by way of additional consideration for the Defendant issuing the guarantee the Plaintiff at the time, the guarantee was being given at the request of the Defendant agreed to forbear to

> demand immediate payment by Caldon of its indebtedness to the Plaintiff and agreed to permit Caldon to maintain the overdraft facility so long as the guarantee issued by the Defendant remained in place".

It is important to note that both Caldon and Blue Chateau had interlocking shareholders and directors.

The compelling conclusion which emerges from the evidence is that Henry Fullerton, Chairman of Caldon, appreciating the financial difficulties of Caldon sought overdraft facilities from Citibank in order to inject some life blood into this company. Because Caldon owned 99% of the shareholding in Blue Chateau it would not be unreasonable to think that Blue Chateau contemplated a benefit in issuing a guarantee to Citibank. Surely, the viability of Caldon would redound to the benefit of Blue Chateau having regard to the interlocking nature of their relationship. On the evidence this inference seems to be irresistible. Further, Henry Fullerton as Managing Director of Blue Chateau Limited was acting as agent for that Company when he signed the guarantee.

When the matter came before Hibbert J, (Ag.) he made the following findings which are stated in his judgment at page 6:

> "I therefore find that the granting of overdraft facilities and the making of advances on the 29th January, 1998 could not be good consideration for the formation of a valid and binding contract of guarantee between Citibank and Blue Chateau.
>
> With regard to the forbearance mentioned in the second affidavit of Dorothy Parkins, Counsel for

> Blue Chateau urged that this evidence be rejected as being a mere afterthought prompted by the first affidavit of Raphael Gordon. Was there this additional consideration? Bearing in mind the history of the relationship between Citibank and Caldon, I find it inconceivable that on the 3rd February, 1998 or at anytime between the 29th day of January, 1998 and the 3rd day of February, 1998 there could have been the contemplation of a demand for immediate payment by Caldon of its indebtedness to Citibank, I therefore find that the additional consideration claimed in paragraph two (2) of the second affidavit of Dorothy Parkins did not exist and was a mere afterthought. I am fortified in this finding by the absence of mention of this consideration from the resolution of Blue Chateau. This therefore leads me to hold that there was no equitable mortgage between Citibank and Blue Chateau in respect of the property registered at Volume 1105 Folio 581 in the Register Book of Titles as this would be dependent on the existence of a valid contract of guarantee."

The learned judge came to this conclusion:

> "The question of whether or not an equitable mortgage was created would still arise if it was found that there was a valid contract of guarantee. The equitable mortgage was established primarily by extending the doctrine of part performance. A deposit of title deeds by way of security has been taken both as showing a contract to create a mortgage and also as being part performance of that contract even if not a word about such a mortgage has been said. As was shown in ***re Wallis and Simmonds (Builders) Ltd.*** [1974] 1WLR 391, the general rule that a deposit of title deeds to secure a debt created an equitable charge on the land applied even when the debt was owed not by the owner of the deeds but by a third party. The deposit must, however, be made for the purpose of giving a security".

I agree with this conclusion arrived at by the judge.

The grounds of appeal are summarised as under:

1. The learned judge erred in law in making the finding that the guarantee allegedly given by Blue Chateau Ltd. to Citibank is invalid and void for want of consideration moving from Citibank to support the guarantee.

2. The learned judge erred in law in making the finding and the declaration that the equitable mortgage which Citibank alleged that Blue Chateau Limited created in support of the alleged guarantee by depositing with Citibank the duplicate Certificate of Title registered at Volume 1105 Folio 581 is invalid and void because there was no valid guarantee and further because an equitable mortgage was not authorised by the directors of Blue Chateau" .

Mr. Scharschmidt Q.C. submitted that the only evidence available to the Court was that of Dorothy Parkins which demonstrated the agreement between the parties. In the absence of any evidence controverting the evidence of Parkins, the Court ought to draw an inference that Parkins was speaking the truth. He cited as authority The Law of Evidence in Civil Cases by Sopinka & Lederman, where it was stated at pg. 535:

> "... The well recognised rule that the failure of a party or a witness to give evidence which it was in the power of the party or witness to give evidence and by which facts might have been elucidated, justifies the Court in drawing the inference that the evidence of the party or a witness would have been unfavourable to the party to whom the failure was attributed..."

It was observed at page 537 that:

> "The party against whom the inference operates may explain it away by showing circumstances which prevented the production of the witness".

It is unfortunate that Mr. Fullerton never gave evidence of what transpired between the parties and no reasonable explanation has been given for his silence. On the contrary, Dorothy Parkins has given a full account of the transaction which must be examined with care.

The issue of forbearance to sue and past consideration

Reference was made to Section 2 of the Mercantile Law Amendment Act which provides that consideration for a guarantee need not appear by writing.

Our attention was drawn to an extract from Law of Guarantees by Andrews and Millett where it was stated that a creditor's forbearance from suing the principal may amount to good consideration to support a guarantee. There are two alternative circumstances in which forbearance to sue can constitute consideration:

(a) where the creditor promises to forbear in consideration for the guarantee; and

(b) the actual forbearance by the creditor given at the request of the guarantor and in return for something.

In the case of actual forbearance, the request of the guarantor may be express or implied. The author stated at pg. 22:

> "Thus, if there is a pre-existing debt, the existence of which cannot in itself amount to consideration, the inference will often be drawn that the guarantee was given on the understanding that the creditor would forbear from taking action with respect to that debt."

It is instructive to observe that the authors also noted at pg. 22 that:

> "Although the forbearance usually takes the form of the creditor refraining from instituting legal proceedings or proving in a bankruptcy or winding up, it may consist of the creditor refraining from asserting any legal right...".

We were referred to a number of authorities on the issue of the forbearance to sue. In ***Crears v Hunter*** [1877] 19QBD 341, the defendant's father owed the plaintiff a debt. For the purpose of inducing the plaintiff to give time to the defendant's father for payment of the debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt, with interest half-yearly at the rate of 5% per annum until the amount was paid. The plaintiff having forborne to sue for several years. It was held that the plaintiff having forborne from suing the defendant's father at the defendant's request, there was good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing.

Lord Esher M.R. at page 344 had this to say:

> "It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the

> substance of the transactions contemplated in the minds of the parties? Was not the understanding obviously that if the plaintiff would forbear to sue the father, the defendant would become liable on the note?"

Lindley L.J. at page 345 said:

> "Looking at the document and the history of the transaction, I cannot invent any rational theory by which to account for the defendant's giving the note except that it was for the purpose of benefiting his father by procuring for him time to pay the debt. To say otherwise appears to me inconsistent with human nature and the whole character of the transaction... But except on the theory that such was the understanding between the parties, the defendant's conduct is inexplicable."

Lopes L.J. at page 347 said:

> "Unless it were to procure forbearance, it is inconceivable why the defendant should have signed the note at all."

In ***Fullerton v Provisional Bank of Ireland*** [1903] A.C. 309, a customer of a bank had overdrawn his account and being pressed by the bank undertook by letter to deposit a title deed of an Irish estate as security for his overdraft. The customer afterwards mortgaged the estate to the appellants, who registered their charge without notice of the prior charge. Lord Macnaghten stated at p. 313:

> "In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time

> was in fact extended to the person who asked for it."

Lord Davey quoted Lord Bowen in ***Miles v New Zealand Alford Estate Co.*** 32 CHD 206, 290 who said at p. 316:

> "So it will be sufficient here that the directors did forbear, if their forbearance was at the request expressed or implied of the guarantor and in consequence of his guarantee being given, and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between businessmen."

In ***Glegg v Bromley*** [1912] 3 KB 474 C.A. Mrs. G. was largely indebted to her husband. He had requested her to give him further security and she executed in his favour a deed of assignment. Vaughn Williams L.J. made reference to ***Alliance Bank v Broom*** [1864] 2DR & SM 289, where Kindersley V.C. said:

> "... if on the application for security being made, the defendant had refused to give security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt and would have taken steps to enforce it.

He went on to say at p. 486:

> "...the mere existence of an antecedent debt is not good consideration for an assignment even by way of further security. If there has been pressure and in response to that pressure the further assignment is made, that suffices. But the cases all show that even if there has not been pressure, but there has been a further assignment and it is known to the

> person who is the creditor and has power to put pressure upon the debtor that a further assignment has been made the law will if it possibly can give effect to the probability that the fact that the security has been increased will have influenced the creditor and made her more forbearing."

Mr. Patrick Foster, Counsel for the respondent contended that the advances made before the giving of the guarantee could not have been good consideration for the giving of the said guarantee. The existence of a pre-existing debt could not validate a subsequent guarantee. This would amount to past consideration. Reliance was placed on ***Wigan v English & Scottish Law Life Assurance Association*** [1909] 1 Ch. 291. The facts reveal that H was indebted to W. who had pressed for payment or reduction of debt. H. executed a deed of assignment and delivered it to his attorneys, telling them to use their discretion as to whether they should inform W. of the assignment or not . In fact the solicitors obtained time from W. for payment of the debt without producing the deed, and acting on the instructions destroyed it. It was held that there was no valuable consideration for the assignment. Parker J made the following observations at p. 297:

> "It appears to me to be reasonably clear that the mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt if such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or if there be no express agreement, the law may very readily imply

> an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given."

Based on the foregoing analysis of the relevant authorities, it is clear that neither the request for forbearance nor the consideration given need be in written form. The forbearance can in fact be implied from the circumstances. The court will also be willing to look at the nature of the transaction and the business sense that would undoubtedly be operating within the minds of the parties.

It is clear from the foregoing analysis also, that forbearance does not only exist in the form of forbearance to sue, but can also be forbearance from exercising any other legal right. Citibank could be seen as withholding its power or its legal right to ask for immediate payment and such a right could in fact be exercised if the security were not given.

In my view, forbearance includes refraining from asserting a legal right, which could have been asserted but for the security. Implicit in the giving and receiving of a guarantee must be some element of forbearance. It cannot be gainsaid that Citibank, whether or not it had actually exercised it, had the power to make a demand for payment and the guarantee served the purpose of staying the Bank's hand. That would be the element of forbearance which is that as long as the Bank had the security it would not ask for immediate repayment.

A reasonable inference may be drawn that Citibank must have requested some security. No person is going to volunteer to part with his Title unless he is forced to do so.

It is inconceivable that any financial institution would have increased a customer's indebtedness by such a substantial sum without any mention of a security. In my view, the agreement for the guarantee on the 30th January was but the continuation of a process begun on the 29th January which finally culminated in the lodging of the Title on the 3rd February, 1998.

In light of the foregoing analysis on the issue of forbearance it is abundantly clear that there was in fact good consideration for the giving of the guarantee and therefore the question of past consideration does not arise. In my judgment the learned judge fell into error when he said:

> "... that the granting of overdraft facilities and the making of advances on the 29th January, 1998 could not be good consideration for the formation of a valid and binding contract of guarantee between Citibank and Blue Chateau".

Capacity and Power of the Company under the Companies Act

I turn now to an examination of the Respondent's Notice which has as its ground:

> "The guarantee which the Respondent allegedly gave to the Appellant between 30th day of January, 1998 and the 3rd day of February, 1998 is invalid, void and/or unenforceable, as to the actual or imputed knowledge of the Appellant there was no commercial benefit to the

> Respondent in giving the alleged guarantee and further, the Directors of the Respondent acted in excess or abuse of their powers in giving alleged guarantee".

The Respondents having filed a respondent's notice contend that the Directors of Blue Chateau acted in excess or in abuse of their powers by the giving of the alleged guarantee to Citibank. It is their contention that such an act was not exercised in furtherance of the objects and powers of Blue Chateau.

We have had the benefit of extensive arguments on this point.

The Memorandum of Association of Blue Chateau demonstrates that it has as its objects, the business of proprietorship which includes leasing , managing and letting of real properties. Apart from that core business there are several different clauses which seem to allow the Company to do many other things. The question then arises as to which of the clauses represent the objects of the Company as opposed to the powers. A distinction is usually drawn between objects and powers. A power signifies that a company has the legal ability to do a certain thing. The textbook writers define power as a means while the object is the end. Not all the activities listed in the Memorandum of Association are necessarily objects but some of them are clearly ancillary powers.

Clause 3(1.3) of the Memorandum provides in part:

> "To furnish and provide deposits and guarantee funds to any person or persons or corporation either at interest or without upon the security of freehold

> or leasehold property by way of mortgage or upon marketable security..."

Clause 39 of the same Memorandum allows the company:

> "To secure the repayment of any money borrowed, raised or owing by mortgage, Bill of Sale, charge or lien upon the whole or any part of the company's undertaking, property and assets (whether present or future) including the uncalled capital of the company and also by a similar mortgage, Bill of Sale, charge or lien to secure and guarantee the performance by the company or any other person or company or any obligation, liability or guarantee undertaken by the company or any other person as the case may be, or give and redeem and pay off any such loan or security." (emphasis supplied).

The respondent argued that the transaction whereby Blue Chateau allegedly provided a guarantee to Citibank to support Caldon's overdraft facility was an abuse of powers conferred on the Directors as it was not exercised in furtherance of the objects of Blue Chateau.

Reference was made to the case ***Rolled Steel Products (Holdings) Ltd. v British Steel Corp. & Ors*** [1985] 3 All E.R. 52. This case dealt with the validity of a guarantee given by a company, that not only was a benefit to others, but was also in excess of the indebtedness of the company. It was held inter alia at page 54:

> "In order to be **ultra vires** a company, transactions had to be done in excess of, or outside, the capacity of the company and not merely in excess or abuse of the powers of the company exercised by the Directors."

It was further stated on the same page:

> "... a transaction which was within the objects of the company or which was capable of being performed as reasonably ancillary or incidental to the objects of the company was not **ultra vires** merely because the Directors carried out the transactions for purposes which were not within the Memorandum of Association."

This case also dealt with the issue of Directors who are held out by the company as having ostensible authority to bind the company to transactions which expressly or impliedly fell within the powers conferred by the Memorandum. In such instances, a person who was dealing with the Company, in good faith, was entitled to assume that the Directors were properly exercising their powers for the purposes of the Company and was entitled to hold the Company to the transaction. Further, where a transaction was in excess or an abuse of the Director's powers even though it is within the objects of the Company, such a transaction could be set aside at the instance of the shareholders. However, a person dealing with the Company who had notice, whether actual or constructive, that the transaction had been entered into in excess or abuse of the Director's powers could not bind the Company to the transaction. Slade L.J. at p.86 observed:

> "First, if an act is beyond the corporate capacity of a company, it is clear that it cannot be ratified. However, the clear general principle is that any act that falls within the corporate capacity of a company will bind it, if it is done with the unanimous consent of the shareholders or is subsequently ratified by such consents."

This of necessity leads to an examination of the shareholding of Blue Chateau and who gave consent to the transaction. The relationship between Blue Chateau and Caldon will now become relevant. Having regard to the fact that of the 200 shares in Blue Chateau, 198 were held by Caldon, one by Henry Fullerton and the other by Cynthia O'Sullivan the inescapable conclusion is that all the shareholders of Blue Chateau were involved in the giving of the guarantee as indicated by the signatures on the guarantee. It is evident that the relationship between the two companies was incestuous in nature. In fact they had common shareholding and a common individual holding key positions in both.

Although there is no evidence that Blue Chateau was a part of a group of companies, Mr. Foster, Counsel for Blue Chateau pointed out the principles of Company Law in relation to holding companies and subsidiaries. It was indicated that such companies are separate legal entities. Reference was made to an extract from Company Law Robert R. Pennington, 5th Ed. pp.806-807. The article states:

> "If a subsidiary company enters into a transaction not for the purpose of promoting its own business or achieving its own objects, but in order to assist its holding company or a fellow subsidiary (eg. by guaranteeing or securing the other company's debts) the action may be **ultra vires** or at least a misuse of the powers of its directors and therefore not binding on the company".

It is instructive to examine the case of ***Charterbridge Corporation Ltd. v Lloyds Bank Ltd. & Anr.*** [1969] 2 All E.R. 1185, a case which bears

some similarity to the instant case. It was an action commenced by the plaintiff company, ***Charterbridge Corporation Ltd.*** claiming a declaration against ***Lloyds Bank Ltd.*** and ***Castleford Ltd.*** (defendant) that the legal charge made between the defendants, being a charge of leasehold interest was void as being outside the powers of the second defendant. A charge was given by one company where the Director, rather than considering separately the benefit of that particular company, considered instead the benefit of the whole group. In short, ***Castleford Ltd.*** had given a guarantee to ***Lloyds Bank*** to secure the indebtedness of ***Pomeroy Developments.*** ***Castleford Ltd.*** was one of a large group of companies at the head of which stood Mr. Pomeroy who owned all the issued shares in ***Castleford Ltd.*** except one which was owned by his wife. ***Castleford*** was not a subsidiary of ***Pomeroy Development*** but they had a common shareholding, directorate and office. In giving the guarantee ***Castleford*** deposited the title deeds of the ***Castleford*** property. A minute of the meeting held by the Directors of ***Castleford*** on the same day recorded the transaction. Mr. Pomeroy who caused **Castleford Ltd.** to enter into the guarantee was looking to the interest of the group as a whole and did not at the time of the transaction take into consideration the interest of **Castleford** separately. Pennycuick, J rejected the argument advanced, that Mr. Pomeroy in causing **Castleford** to enter into the guarantee was acting in the interest of **Castleford.** He said at p.1194:

> "This is a question of fact and the burden of proof lies on the plaintiff company".

He proceeded to lay down the test as follows:

> "The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of director of the company concerned, could in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company."

Mr. Fullerton as Director of Blue Chateau was the agent of the Company and was acting as such when he negotiated the guarantee. He therefore had authority to bind the Company to transactions which fell within the powers as laid down in the Memorandum of Association.

As was laid down in ***Royal British Bank v Turquand*** [1843-60] All E.R 435 and followed in ***Rolled Steel Products Ltd. v BSC*** (supra) a person who was dealing with the company in good faith, was entitled to assume that Directors were properly exercising their powers for the purposes of the company and was entitled to hold the company to the transactions. In the latter case it was clearly demonstrated that the transaction will be binding once done with the unanimous consent of all the shareholders. In the present case all the shareholders of Blue Chateau consented to the transaction.

In my judgment the only reasonable inference which could be drawn from the conduct of the appellant was that its officers acted in good faith. I do not accept Mr. Foster's submission on behalf of the

respondent that the appellant ought to have known that the transaction would not be of any commercial benefit to Blue Chateau.

One could reasonably have concluded that Caldon would benefit in the process and by extension a benefit would no doubt accrue to Blue Chateau as it would be in its interest to secure the financial stability of Caldon. Although Blue Chateau is a separate legal entity from Caldon when the corporate veils are lifted in order to prevent injustice, the incestuous nature of the relationship between both entities is revealed. The alleged wrongdoing Director in Blue Chateau is Executive Chairman of Caldon which holds 99% of the shares in Blue Chateau.

Further and more importantly whether the action taken by the Director and the other shareholder was for the benefit of Blue Chateau or not, is a question of fact and the burden of proof lies on the respondent. It is Blue Chateau which has raised this argument so it is for them to prove. In my view the burden has not been discharged.

Accordingly, it would be inequitable for the Respondent Company to avoid the guarantee which it gave to the appellant on the 3rd February, 1998 on the basis that it was invalid or unenforceable.

For these reasons, I would allow the appeal with costs .

The following reliefs are granted:

"1. That the amount due to the Plaintiff/Appellant by theDefendant/Respondent pursuant to a guarantee given by the Defendant/Respondent to the

Plaintiff/Appellant between the 30th day of January, 1998 and the 3rd day of February, 1998 as at the 6th day of May, 1998 stood at $6,069,491.17 with interest accruing at the rate of $6,325.55 per day until the date of payment.

2. The Plaintiff/Appellant being equitable mortgagees of all that parcel of land known as 16 East Strathmore, Kingston 8 in the parish of Saint Andrew registered at Volume 1105 Folio 581 of the Register Book of Titles [hereinafter called "the mortgaged property"] there be an Order that the mortgaged property be sold to satisfy the amount due to the Plaintiff/Appellant.

3. A Declaration that pending the above mentioned sale the amount due to the Plaintiff/Appellant be considered as being a charge on the mortgage property and that the Plaintiff/Appellant is at liberty to have such a charge endorsed on the certificate of title for the mortgaged property.

4. An Order that the Plaintiff/Appellant has conduct of the sale.

5. An Order that the proceeds of sale be applied as follows:

(a) Firstly, to pay the costs attendant upon such sale including, but not limited to, advertising and auctioneers' costs, attorneys' costs, all taxes and duties, and cost of valuation report if necessary;

(b) Secondly, to pay the costs of these proceedings;

(c) Thirdly, to pay to the Plaintiff/Appellant all sums found to be due and payable by way of principal and interest and costs under and by virtue of the said mortgage;

(d) Fourthly, in the event of any surplus to pay the sums to the Defendant/Respondent or to the Defendant/Respondent's agent duly appointed for that purpose or alternatively to pay any such surplus into Court.

6. An Order that the Registrar of the Supreme Court be empowered to sign all documents necessary to effect such sale including, but not limited to the agreement or agreements for sale and the Instrument of Transfer.

7. An Order that the costs of this appeal and in the court below be borne by the Plaintiff/Respondent.

8. An Order that there be liberty to apply."