NIRMAL JIT SINGH HOON (*Defendant*) ..... APPELLANT;

1966
*Feb. 2, 3
Mar. 11

AND

THE BANK OF NOVA SCOTIA (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Guarantee—Guarantees signed by defendant for indebtedness of two companies to plaintiff bank in consideration of bank's agreeing to deal with the companies "in the way of its business as a bank"—Payment demanded shortly after guarantees signed—Bank subsequently agreeing to extension of time for payment on furnishing of additional securities—Whether failure of consideration.

On April 10, 1959, the defendant signed two guarantees for the indebtedness of D Ltd. and M Ltd. to the plaintiff bank "in consideration of the bank's agreeing to deal with [the said companies] in the way of its business as a bank". D Ltd. owed the bank $20,000 on a demand loan and about $28,400 by way of overdraft. M Ltd. owed the bank $20,000 on a demand loan but had a credit balance of something over $4,000 in its current account.

Following the signing of the guarantees the bank refused to honour outstanding cheques of D Ltd. unless cash were deposited to cover them, although up to that time the account had been allowed to become overdrawn. Four days after the signing of the guarantees the bank transferred $5,000 from the account of M Ltd. in part payment of the demand loan, thereby reducing that loan to $15,000 and creating an overdraft in the account of close to $900. On April 23 the bank's manager told the defendant that the bank would not advance further moneys to either D Ltd. or M Ltd. on the basis of the security that had been offered by the defendant. On April 24 the bank demanded payment in full of the indebtedness of the two companies and on April 27 demanded payment thereof from the defendant under the guarantees.

After some days of discussion an arrangement was completed by May 12, 1959, whereby the bank was provided with certain additional security and in return agreed to a postponement of payment until April 29, 1960. However, payment was not made and an action on the two guarantees was commenced on January 11, 1961. The trial judgment in favour of the bank was affirmed by the Court of Appeal with one member of the Court dissenting. On the appeal to this Court one ground of defence required consideration, *i.e.*, that it was a condition precedent to the defendant's liability on the guarantees that the plaintiff should carry out its agreement to deal with D Ltd. and M Ltd. as its customers in the way of its business as a bank, that the plaintiff did not carry out those agreements, and indeed never intended to do so, and that consequently the defendant who received no part of the consideration for his promises was under no liability.

Held (Judson J. dissenting): The appeal should be allowed.

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*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

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Per Cartwright, Martland, Ritchie and Hall JJ.: The intention of the bank, far from being to deal with D Ltd. and M Ltd. as customers, was to terminate that relationship immediately upon receiving the guarantees and by April 24, 1959, it had done so. The arrangement completed on May 12, 1959, did not alter this position in favour of the bank. It was the case of a creditor pressing its debtors for payment of the balances due at the time when it had, for all practical purposes, put an end to its relationship of banker and customer with them and agreeing to give an extension of time for payment on the furnishing of additional securities. It did not constitute a *bona fide* fresh transaction between the parties as banker and customer. The bank did not grant an extension of time for payment by the two debtor companies as consideration for the obtaining of the guarantees from the defendant. What it did do was to demand and obtain additional security as the price for postponement of the enforcement of its claim for payment.

The defendant's letter wherein he acknowledged that the acquisition of additional securities by the bank was "in no way" to affect his liability as guarantor did not assist the plaintiff. Its purpose was to retain matters *in statu quo*. It neither increased nor diminished the liability of the defendant. The liability did not exist.

Royal Bank of Canada v. Salvatori, [1928] 3 W.W.R. 501, applied.

Per Judson J., *dissenting*: The guarantee by its express terms was a continuing guarantee and it was in existence at the time of the settlement. The settlement provided that the taking of the additional security was not to affect the defendant's liability as guarantor of the two companies. A binding extension of time given to the two companies was within the consideration recited in the guarantee.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Aikins J. Appeal allowed, Judson J. dissenting.

I. Sara, for the defendant, appellant.

V. R. Hill, for the plaintiff, respondent.

The judgment of Cartwright, Martland, Ritchie and Hall JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] affirming a judgment of Aikins J. in favour of the respondent for $76,305.16. Bull J.A., dissenting, would have allowed the appeal and dismissed the action.

The action was brought on two guarantees signed and sealed by the appellant. It was commenced on January 11, 1961, by specially endorsed writ. The first paragraph of the endorsement reads as follows:

> The Plaintiff's claim against the Defendant is for the sum of $49,392.76 plus interest at the rate of 6% per annum on the sum of $45,169.84 from the 9th day of January, 1961 until payment or Judgment, being the balance

[1] (1965), 52 W.W.R. 592, 53 D.L.R. (2d) 239.

and accrued interest due and owing by the Defendant to the Plaintiff under an unlimited guarantee in writing under seal dated the 10th day of April, 1959 signed by the Defendant and given by him to the Plaintiff in consideration of the Plaintiff agreeing to deal with Dunsmuir Construction Ltd. in the way of the Plaintiff's business as a bank.

The second paragraph is in the same words except that the name of "Modern Aluminum Ltd." appears instead of "Dunsmuir Construction Ltd.," and the amounts of $17,476.03 and $15,769.85 appear instead of $49,392.76 and $45,169.84.

At the trial there was direct conflict between the evidence of the appellant and that of Mr. Summers who was the manager of the branch of the respondent bank at which the transactions out of which the action arises took place. The learned trial judge preferred to accept the evidence of Mr. Summers. His findings of fact were accepted by all the judges in the Court of Appeal and were not challenged before us. In the result there is now only one ground of defence to the action which requires consideration.

The facts as found are set out in the reasons of the learned trial judge and in those of Bull J.A. I shall endeavour to state them as briefly as is consistent with making clear the reasons for the conclusion at which I have arrived.

In the spring of 1959 Haro Holdings Ltd., hereinafter referred to as "Haro", was building an apartment house in Vancouver. Dunsmuir Construction Ltd., hereinafter referred to as "Dunsmuir", was the construction contractor and Modern Aluminum Ltd., hereinafter referred to as "Modern Aluminum", was the supplier of aluminium materials to Dunsmuir for use in the building. These three companies banked with the respondent at its Columbia and Hastings Streets Branch. All three were short of working capital and were indebted to the bank. In early April 1959 Dunsmuir owed the bank about $28,400 by way of overdraft and $20,000 on a demand loan and Modern Aluminum owed the bank $20,000 on a demand loan but had a credit balance in its current account of $4,133.44. At this time the appellant was engaged in negotiations looking to obtaining control of the three companies.

The appellant met with Summers on April 9 and 10, 1959. As to what occurred at these meetings the learned

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trial judge accepted the evidence of Summers which he summarized as follows:

> There was some discussion as to the bank advancing $75,000.00 to Dunsmuir and Modern Aluminum. Mr. Summers asked for the defendant's personal guarantees, the defendant agreed to give guarantees and he signed the guarantees without the bank making any commitment to make further loans to Dunsmuir or Modern Aluminum.

The two guarantees were signed on April 10, 1959. They were on printed forms prepared by the bank. The opening paragraph of that relating to Dunsmuir reads as follows:

> In consideration of the bank's agreeing to deal with Dunsmuir Construction Ltd. (hereinafter called 'the customer') in the way of its business as a bank, the undersigned hereby guarantees payment to the bank of the liabilities whether direct, contingent or otherwise which the customer has incurred or is under or may hereafter incur or be under to the bank, whether arising from dealings between the bank and the customer, or from other dealings or proceedings by which the bank may become in any manner whatever a creditor of the customer.

The guarantee relating to Modern Aluminum is the same except that "the customer" is Modern Aluminum Ltd. instead of Dunsmuir Construction Ltd.

Following the signing of the guarantees the bank refused to honour outstanding cheques of Dunsmuir unless cash were deposited to cover them, although up to that time the account had been allowed to become overdrawn. Four days after the signing of the guarantees the bank transferred $5,000 from the account of Modern Aluminum in part payment of the demand loan, thereby reducing that loan to $15,000 and creating an overdraft in the account of $866.56. On April 23 Summers told the respondent that the bank would not advance further moneys to either Dunsmuir or Modern Aluminum on the basis of the security that had been offered by the appellant. On April 24 the bank demanded payment in full of the indebtedness of Dunsmuir and Modern Aluminum and on April 27 demanded payment thereof from the appellant under the guarantees.

On the following day, April 28, there was a stormy interview between the appellant and Summers. The bank demanded further securities for the indebtedness of Dunsmuir, Modern Aluminum and Haro as the price of postponement of immediate payment. After some days of discussion an arrangement was completed by May 12, 1959; Haro gave further security for its own indebtedness and gave guarantees, secured by mortgages on the equity of

redemption in the apartment building, of the indebtedness of Dunsmuir and Modern Aluminum; in return the bank agreed to a postponement of payment until April 29, 1960.

On either May 11 or May 12 (Mr. Summers was not sure on which of these days) the appellant signed a letter dated May 8, 1959, which is ex. 5. Mr. Summers said that it was one of a number of documents prepared by the bank's solicitor and presented to the appellant for signature. It is dated at Vancouver, B.C. and reads as follows:

The Manager,
The Bank of Nova Scotia,
Hastings & Columbia Branch,
Vancouver, B.C.
Dear Sir:

Re: Haro Holdings Ltd.,
Dunsmuir Construction Ltd.,
Modern Aluminum Ltd.

In confirmation of discussions between myself and the Bank of Nova Scotia with regard to loans made by the Bank to the three companies named above, I agree that any or all of the following measures be carried out in order to improve the Bank's security position and I will cause the companies concerned to execute and deliver to the Bank all necessary documents to implement the following steps:—

(1) That Haro Holdings Ltd. guarantee to the Bank the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

(2) That Haro Holdings Ltd. furnish to the Bank by way of additional security for loans to Haro Holdings Ltd., a mortgage payable on demand with interest at 6% per annum over Lot 20, Block 32, District Lot 185, Group 1, New Westminster District, Plan 92.

(3) That Haro Holdings Ltd., in support of its guarantee for the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd. furnish the Bank by way of additional security with a further mortgage over the aforesaid property, such mortgage to be payable on 29th April, 1960 with interest at 6% per annum.

(4) That Haro Holdings Ltd. deliver to the Bank and to Great-West Life Assurance Company a letter under seal in accordance with the copy attached hereto and initialled by me.

(5) That Haro Holdings Ltd. will furnish the Bank with a letter of undertaking to execute and deliver the mortgages referred to in paragraphs (2) and (3).

I acknowledge that the acquisition by the Bank of the foregoing securities or any of them shall in no way affect my liability as guarantor of the indebtedness to the Bank of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

Yours truly,

'N. S. Hoon'

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The defence of the appellant is that it was a condition precedent to his liability on the guarantees that the respondent should carry out its agreements to deal with Dunsmuir and with Modern Aluminum as its customers in the way of its business as a bank, that the respondent did not carry out those agreements, and indeed never intended to do so, and that consequently the appellant who received no part of the consideration for his promises is under no liability.

As to the defence the learned trial judge said in part:

> The defendant's position is that the plaintiff did not carry out its part of the bargain because it did not deal with Dunsmuir or Modern Aluminum in the way of its business as a bank after it got the defendant's personal guarantees, and that there was therefore a total failure of the consideration for which the personal guarantees were given. The question therefore is whether or not the bank did deal with Dunsmuir and Modern Aluminum in the way of its business as a bank after the plaintiff had received the defendant's personal guarantees of the liabilities of these two companies.
>
> The case made by the defendant for failure of consideration rests largely on the assertion that the plaintiff bank, immediately after it got the defendant's personal guarantees, required Dunsmuir's outstanding cheques to be covered by cash, withdrew funds to the credit of Modern Aluminum and applied those funds in partial satisfaction of the monies owing by Modern Aluminum, and on what Mr. Summers said he intended to do at the time that he obtained the guarantees. I think it established that Mr. Summer's intent at the time that he got the guarantees, was to demand payment immediately from the principal debtors and from the defendant as guarantor if payment was not forthcoming from the principal debtors, that is, Dunsmuir and Modern Aluminum, or if what the bank considered to be proper security was not provided. Put briefly, the defendant's case is that obtaining the personal guarantees of the defendant, then refusing to honour Dunsmuir's cheques without cash cover, arbitrarily applying Modern Aluminum's current account credit balance to reduce that company's liability, demanding immediate payment from Dunsmuir and Modern Aluminum and then demanding payment from the guarantors, including the defendant, cannot be considered as dealing with either Dunsmuir or Modern Aluminum in the way of the plaintiff's business as a bank, because all this amounted to was nothing more than an attempt to collect the money owing. There might well be considerable virtue in this submission if this action had been brought following demand for payment on the defendant without there having been, as there in fact was in this case, a general settlement of the differences between the plaintiff, Haro, Dunsmuir, Modern Aluminum and the defendant, with the defendant participating in such general settlement, not only personally, but also as an officer of each of the three companies which I have mentioned.
>
> The issue which I would have to decide would be very different if after demand for payment was made on the defendant, there had been no settlement of the plaintiff's demand for immediate payment, and the plaintiff had immediately sued upon the defendant's guarantees. In fact the bank did not insist on immediate payment without offering an alternative

to the companies concerned, and to the defendant as guarantor of the liabilities of Dunsmuir and Modern Aluminum. The bank's demand for payment brought matters to a head. It is patent that the bank offered to extend the time for payment if the additional securities and guarantees, which I have already listed, were given and it is patent that these securities and guarantees were in fact given and that the defendant agreed that the taking of security by the bank would not affect his personal guarantees.

Put simply, what took place in my opinion was this: The Bank demanded payment of Dunsmuir and Modern Aluminum of the monies owing by these two companies; the bank, when payment was not forthcoming, then demanded payment from the defendant as guarantor. After payment was demanded a settlement was reached whereby the bank agreed to postpone its demands for payment for a year, further security and guarantees were given to the bank, all of which I have enumerated, and the defendant agreed that the bank acquiring these securities, or any of them, would in no way affect his liability to the bank as guarantor of the indebtedness of Dunsmuir and Modern Aluminum. I particularly note that the bank agreed to postpone its demands for payment for a year and that the defendant and the companies concerned have had the benefit of that agreement to postpone.

It appears to me to be implicit in the reasons of the learned trial judge that he would have dismissed the action if it were not for the effect which he ascribed to the arrangements completed on May 12, 1959, in connection with which the letter ex. 5, quoted above, was signed by the appellant. In this I think he would have been right. The finding of fact, fully supported by Summers' own evidence, that the respondent (which acted throughout its dealings with the appellant through its manager Summers) had no intention of dealing with Dunsmuir or Modern Aluminum in the way of its business as a bank would have been fatal to the respondent's claim. The case would have been indistinguishable from the decision of the Judicial Committee in *Royal Bank of Canada v. Salvatori*.[1]

The language of the guarantee under consideration in that case did not differ in any material particular from that in the case at bar. The facts were very similar. In the *Salvatori* case following the execution of the guarantee by the defendant the bank left the account of the debtor firm open but refused to extend further credit to it. Lord Atkinson who delivered the judgment of the Board said at pp. 508 and 509:

Their Lordships do not think that the language of this deed is so ambiguous as the appellants contend that it is, but if it be so, then they think that the key to its construction is that laid down by Lord Blackburn. *Weir River Commrs. v. Adamson* (1878) 2 App. Cas. 734, at 763, 47 L.J.Q.B. 193. In the report he expressed himself thus:

[1] [1928] 3 W.W.R. 501.

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> Though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment. My Lords, it is of great importance that those principles should be ascertained; and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of law act in construing instruments in writing; and a statute is an instrument in writing.
>
> In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used . . .
>
> Adopting that rule of construction, it is impossible in their Lordships' view, having regard to the circumstances out of which the deed of guarantee arose and in reference to which its language was used, to suppose that what was intended was that these broken and insolvent traders, the firm, should get no help from the bank beyond leaving their account open, merely continuing to carry the liability, as Connell phrases it. The learned Judge, Mr. Justice Adrian Clark, said that the words 'continuing to deal with Antoni Brothers in the way of its business as a bank must involve some *bona-fide* fresh transaction between the parties.' Their Lordships concur with him in this view. They think it is impossible to confine these words to merely keeping the account of this firm open, that is, merely receiving payment from anyone who chooses to pay in money to the bank to the firm's credit. The deed really contains two covenants or contracts, one being the consideration for the other, the first covenant being that if the bank continue to deal with the firm as their customer in the way of its business as a bank, the guarantor will pay to the bank the $40,000 at the times and in the manner specified and do the other things he has undertaken to do. The bank have failed to perform this covenant, they have not continued to deal with the firm as their customer in the way of their business as a bank. The guarantor has not received the consideration, i.e., the whole of the consideration upon which his covenant was based. He is therefore not bound to perform that covenant by reason of this failure.

In the case at bar the intention of the respondent, far from being to deal with Dunsmuir and Modern Aluminum as customers, was to terminate that relationship immediately upon receiving the guarantees from the appellant and by April 24, 1959, it had done so.

The real question on which there has been a difference of opinion in the Court of Appeal is as to whether the arrangement completed on May 12, 1959, altered this position in favour of the respondent. In my opinion it did not. The transaction then carried out, while it involved a number of documents, was a simple one. It was the case of a creditor pressing its debtors for payment of the balances due at the time when it had, for all practical purposes, put an end to its relationship of banker and customer with them and

agreeing to give an extension of time for payment on the furnishing of additional securities. It did not, in my opinion, constitute a *bona fide* fresh transaction between the parties as banker and customer. The essential point is that the respondent did not grant an extension of time for payment by the two debtor companies as consideration for the obtaining of the guarantees from the appellant. What it did do was to demand and obtain additional security as the price for postponement of the enforcement of its claim for payment.

It remains to consider whether the situation is affected by the concluding paragraph of the letter, ex. 5, signed by the appellant. The letter has been quoted in full above and as a matter of convenience I repeat the final paragraph:

> I acknowledge that the acquisition by the Bank of the foregoing securities or any of them shall in no way affect my liability as guarantor of the indebtedness to the Bank of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

Without having recourse to the maxim, *Verba chartarum fortius accipiuntur contra proferentem,* I am of opinion that this letter does not assist the respondent. Its purpose is to retain matters *in statu quo*. It neither increases nor diminishes the liability of the appellant. That liability, whatever it may be, is "in no way" affected. I have already expressed my view that the liability did not exist.

The respondent did not plead any cause of action based on the terms of the letter ex. 5, nor did it plead either estoppel or waiver, but I do not found my judgment on the form of the pleadings. In my opinion on the facts found by the learned trial judge the action cannot succeed.

Counsel for the respondent relied on the decisions in *Royal Bank of Canada v. Mills*[1] and *Royal Bank of Canada v. Fleming et al.*[2] For the reasons given by Bull J.A. I agree with his conclusion that these cases are distinguishable and that the case at bar falls within the principle of the *Salvatori* case.

I wish to found my judgment not only on the reasons set out above but also on those given by Bull J.A. with which I am in full agreement. I would allow the appeal with costs throughout and direct that judgment be entered dismissing the action with costs.

[1] [1932] 3 W.W.R. 283, 4 D.L.R. 574, 26 A.L.R. 453.
[2] [1933] O.R. 601, 3 D.L.R. 353.

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JUDSON J. (*dissenting*):—The Bank of Nova Scotia sued the defendant, Nirmal Jit Singh Hoon, on two guarantees which he signed for the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd., companies in which he was interested as a majority shareholder. The trial judge gave judgment for the bank. This judgment was affirmed on appeal[1] with Bull J.A., dissenting. I agree with the judgment at trial.

Hoon first met the bank manager on April 9, 1959. He had then signed an agreement to acquire one-half of the issued shares in Dunsmuir and Modern Aluminum. He was also to become the controlling shareholder in Haro Holdings Limited. Haro Holdings Limited had an unfinished building on which no work had been done for some time. The general contractor for this building was Dunsmuir. Modern Aluminum was a supplier of materials for the building. All three companies were indebted to the bank and it is quite apparent that on April 9, when Hoon first called, the bank had real doubts of its ability to collect the outstanding indebtedness from Dunsmuir and Modern Aluminum.

The manager says that on April 9, on the first call, he asked Hoon to guarantee the accounts of the two companies. He did this because Hoon represented that he was or was about to become the controlling shareholder. Hoon said that he would think about the matter. He came back the following day and did sign the two guarantees upon which this action is brought.

At the trial, Hoon first said that it was never intended that these documents should be his personal guarantee, that the guarantor was to be Haro Holdings Limited, and that he was merely signing as president of Haro Holdings Limited with the intention that the documents were to be completed later under that company's seal. This defence is an accusation of fraud against the bank manager in using documents as personal guarantees. The trial judge found clearly and decisively against this defence and with good reason.

Hoon also said that the guarantees were signed on the understanding that the bank would make further loans

[1] (1965), 52 W.W.R. 592, 53 D.L.R. (2d) 239.

totalling $75,000 to the two companies. There is an equally decisive finding by the trial judge against this defence.

He also said that when he signed the documents, they were not under seal and that the seals were affixed later. The trial judge found that the seals were affixed at the time of the signature. Nothing turns on the rejection of this defence. The real question is whether there was failure of consideration.

The findings of fact of the learned trial judge which depend upon all the probabilities of the situation and his impression of the credibility of Hoon were not disturbed on appeal. In the Court of Appeal the argument was confined to the question of failure of consideration and this does require further examination. It was the only point argued in this Court and it was the basis for the dissenting judgment of Bull J.A.

It is unnecessary to set out the terms of the guarantee at length. The opening paragraph reads:

> In consideration of the bank's agreeing to deal with Dunsmuir Construction Ltd. (hereinafter called "the customer") in the way of its business as a bank, the undersigned hereby guarantees payment to the bank of the liabilities whether direct, contingent or otherwise which the customer has incurred or is under or may hereafter incur or be under to the bank, whether arising from dealings between the bank and the customer, or from other dealings or proceedings by which the bank may become in any manner whatever a creditor of the customer.

At the time when the guarantees were signed, April 10, 1959, Dunsmuir owed the bank $20,000 on a demand note and approximately $25,000 on an overdraft. Modern Aluminum owed the bank $20,000 on a demand note but had a credit balance of something over $4,000 in its current account. This sum was the residue of the moneys from its loan of $20,000 represented by the demand note. On April 14, 1959, the bank applied a sum of $5,000 on the Modern Aluminum note and, as a result, created an overdraft in the current account of close to $900. There was nothing to prevent the bank from doing this at any time. As far as Dunsmuir is concerned, the bank insisted that before any cheques would be honoured, they would have to be covered by special deposits, the company being already overdrawn by more than $20,000. In summary, after the guarantees were signed, the bank made no further advances to these two companies.

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Some time between April 10 and April 23, 1959, the manager received information that the two companies were operating accounts with another bank.

The next meeting between the manager and Hoon was on April 23. On this date the manager told Hoon that the bank would not lend money to Dunsmuir and Modern Aluminum on the basis of the defendant's pledging the shares of Haro Holdings Limited as collateral. Hoon at this time did not seem to be unduly disturbed. He said that he could make other arrangements for the completion of the building.

On April 24, the bank sent to Dunsmuir and Modern Aluminum demands for payment of their total indebtedness, and on April 27, demand was made on Hoon as guarantor.

The next interview between the bank and Hoon was on April 28 and, according to the trial judge, this was a stormy interview. Without going into details, the manager was demanding further security for the accounts of these companies and Hoon was saying that he was the victim of fraud.

The learned trial judge's summary of the position at this time is contained in the following paragraph:

> The position on April 28th and immediately thereafter can best be summarized I think in this way: The plaintiff had demanded payment of the loans of Dunsmuir and Modern Aluminum and had demanded payment of these loans from the guarantors, including the defendant, under the guarantees executed by him on the 10th of April. The bank was prepared to forego its demand for immediate payment of these liabilities and defer payment for a year provided that certain additional security and undertakings were given to the bank and provided that the bank's position vis-à-vis the defendant under his personal guarantee of the liabilities of Modern Aluminum and Dunsmuir was fully preserved.

We are not concerned in this appeal with what would have happened if the bank had sued the guarantor at this stage. The learned trial judge found that the differences between the bank, Dunsmuir, Modern Aluminum, Haro Holdings Limited and the defendant were all settled by an exchange of letters early in May 1959. On May 8, 1959, Hoon wrote to the bank the following letter:

Dear Sir:

re:

Haro Holdings Ltd.,
Dunsmuir Construction Ltd.,
Modern Aluminum Ltd.

In confirmation of discussions between myself and the Bank of Nova Scotia with regard to loans made by the Bank to the three companies named above, I agree that any or all of the following measures be carried out in order to improve the Bank's security position and I will cause the companies concerned to execute and deliver to the Bank all necessary documents to implement the following steps:—

(1) That Haro Holdings Ltd. guarantee to the Bank the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

(2) That Haro Holdings Ltd. furnish to the Bank by way of additional security for loans to Haro Holdings Ltd., a mortgage payable on demand with interest at 6% per annum over Lot 20, Block 32, District Lot 185, Group 1, New Westminster District, Plan 92.

(3) That Haro Holdings Ltd. in support of its guarantee for the indebtedness of Dunsmuir Construction Ltd. and Modern Aluminum Ltd. furnish the Bank by way of additional security with a further mortgage over the aforesaid property, such mortgage to be payable on 29th April, 1960 with interest at 6% per annum.

(4) That Haro Holdings Ltd. deliver to the Bank and to Great West life Assurance Company a letter under seal in accordance with the copy attached hereto and initialled by me.

(5) That Haro Holdings Ltd. will furnish the Bank with a letter of undertaking to execute and deliver the mortgages referred to in paragraphs (2) and (3).

I acknowledge that the acquisition by the Bank of the foregoing securities or any of them shall in no way affect my liability as guarantor of the indebtedness to the Bank of Dunsmuir Construction Ltd. and Modern Aluminum Ltd.

On May 12 the bank wrote the following letter to Hoon confirming the settlement:

Dear Sir:

Re:

Haro Holdings Ltd.,
Dunsmuir Construction Ltd.,
Modern Aluminum Ltd.

We refer to our recent discussions concerning the indebtedness of the above companies and wish to confirm with you as follows:

(1) We are agreeable to deferring the repayment of our loans to Dunsmuir Construction Ltd., and Modern Aluminum Ltd., until April 29th, 1960, save that in the event of a sale being made prior to that date of the apartment building and property owned by Haro Holdings Ltd., situate on Lot 20, Block 32, District Lot 185, Group 1,

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N.W.D. Plan 92, we shall have the right to call for the repayment of such loans forthwith.

(2) With regard to your guarantees to us of the indebtedness of Dunsmuir Construction Ltd., and Modern Aluminum Ltd., which are dated the 10th April, 1959, we will not call upon you for payment thereunder prior to the 29th April, 1960, unless the Haro Holdings property above referred to is sold prior thereto and we fail to receive the payment of our loans from the proceeds of sale.

(3) With regard to our loans to Haro Holdings Ltd., and the mortgage over the above referred to property given to us as additional security, we will release the said mortgage upon the receipt from the Great-West Life Assurance Company of the sum of $136,750.00 together with a further payment from Haro Holdings Ltd., of an amount equal to the interest accrued on our loans to that Company.

The further security promised was duly executed and delivered to the bank.

Before this agreement was made the bank had an immediate right of action against the two companies. It did not enforce that right. It did not agree to lend more money. With one of the companies, it applied a credit balance against a demand note. With the other, it insisted on deposits to cover cheques as they were presented. On the facts of this case it cannot be said even at this stage that the bank did not deal with the customer "in the way of its business as a bank." Masten J.A. in *Royal Bank of Canada v. Fleming et al.*[1] considered these very words in a bank guarantee and I am content to adopt his statement of what they demand of the bank:

> There is nothing in these words to deprive the Bank of its discretion in granting or refusing further advances which might be sought by the debtor company. All the words call for is that it shall carry on as a Banker for the company in the usual and ordinary manner, that is to say, retaining entire freedom to exercise its own banking judgment on each individual transaction as it arose and retaining entire freedom to act as circumstances might require in respect to the large over-draft then owing.

However, this is not the issue here. This guarantee by its express terms is a continuing guarantee and it was in existence at the time of the settlement. The settlement provided that the taking of the additional security was not to affect Hoon's liability as guarantor of the two companies. A binding extension of time given to the two companies was within the consideration recited in the guarantee and the defence of failure of consideration, in my opinion, fails. The case is not within the decision in *Royal Bank of Canada v. Salvatori*[2]. In that case it was held that the words

[1] [1933] O.R. 601 at 608.

[2] [1928] 3 W.W.R. 501.

"continuing to deal with the customer in the way of its business as a bank" must involve some *bona fide* fresh transaction between the bank and the customer, and that if the bank did no more than keep the account open by merely receiving payment from time to time, the consideration was not satisfied. It is no authority for any principle that a binding agreement to extend time for payment is not within the consideration.

The above grounds are those on which the learned trial judge founded his judgment. I am in full agreement with them and I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

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