1978 May 13

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

SAVVAS SAVVIDES,

Appellant-Defendant,

v.

KYRIACOS CHRISTOFIDES,

Respondent-Plaintiff.

(*Civil Appeal No.* 5117).

Contract—Guarantee—Discharge of guarantor—Default of principal debtor—Creditor allowing him time to pay—Waiver or indulgence of creditor—A mere voluntary forbearance to sue which does not discharge the guarantor—As it does not affect his equitable right to compel the debtor to perform his obligation—Section 95 *of the Contract Law, Cap.* 149.

Contract—Guarantee—Default of principal debtor causing damage to creditor—Guarantor liable to the full extent without being entitled to require notice of the default.

By a contract in writing in the form of a hire purchase agreement dated August 29, 1963, the respondent-plaintiff hired a number of machines of a total value of £2,150 to one Loizos Charalambous (to be referred to as the "debtor"). The debtor paid a first payment of £500 and received the machines in question. He agreed to pay the balance of £1,650 in two equal instalments, the first one on April 30, 1964 and the second on April 30, 1965, with interest on both instalments at the rate of 8% till final payment. It was, further, agreed that failure to pay any of the instalments together with interest, rendered due, payable and demandable any balance due of the agreed price; and gave the right to the owner to seize the said machines and sell them by public auction for the account of the debtor, the latter remaining liable for any balance due. The duration of the hire purchase was fixed from April 1, 1963 to April 30, 1965.

The appellant–defendant by a contract of guarantee* guaranteed payment of the two instalments.

In the addition to the first payment of £500 the debtor paid £100.– on October 20, 1963 and £200 on October 25, 1964; and as he failed to pay in full the first instalment by April 30, 1964 and the second instalment by April, 1965, the respondent brought an action against him and against the guarantor (the appellant in these proceedings) in 1966, which was withdrawn in so far as the guarantor was concerned due to his absence abroad. Judgment was thereupon entered against the debtor in the sum of £1,350.

In 1966 the parties to this appeal visited together the debtor at Famagusta where the respondent made it quite clear to both the debtor and the appellant that he wanted his money. The appellant tried to convince the debtor to pay his debt and when the latter failed to do so and satisfied only part of the aforesaid judgment debt, the respondent sued the appellant (guarantor) in 1970 for the balance.

The trial Court found that the appellant knew of the delays in payment by the debtor as from 1966; and rejected appellant's submission (based on sections 92 and 93 of the Contract Law, Cap. 149) that he had been discharged from his contract of guarantee because respondent, by accepting lesser amounts from the debtor and not suing him as soon as he was unable to pay fully the first instalment, had entered into a new implied contract with him. The trial Court further found that respondent's conduct amounted to a mere forbearance to sue or enforce any other remedy against the debtor as provided by section 95** of Cap. 149 and gave judgment against the appellant. Hence the present appeal

Held, (1) That the creditor (respondent) has not given a contractual promise to the debtor to allow him time to pay the guarantee debt and that, accordingly, the guarantor is not discharged or released from his obligations to the creditor.

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* The guarantee clause reads as follows: "I guarantee jointly with the hire-purchaser Loizos Charalambous the payment in the above agreed manner till the final payment of the amount still owing from the hire-purchase of £1,650 (One thousand, six hundred and fifty pounds) with interest".

** Quoted at p. 310 *post.*

(2) That the guarantor is not discharged by the mere voluntary forbearance of the creditor to take steps earlier to obtain performance by the debtor of the obligation which was the subject of the guarantee for this does not affect the guarantor's equitable right to compel the debtor to perform it; that what has happened in this case amounts to no more than a waiver or indulgence on behalf of the creditor and that, accordingly, the guarantor is not released or discharged.

(3) That though the trial Court failed to construe the contract of guarantee the appellant guaranteed the performance by the principal debtor of his obligation under the hire purchase contract, namely the payment of the two instalments; that there was material before the Court that the debtor evinced an intention not to perform his guaranteed contractual obligations regarding the payments; that once he was in default, the creditor could, if he so wished, repudiate the hire purchase agreement; that though the Court has not addressed its mind on this point, at a later time the creditor accepted such repudiation and filed an action against both the debtor and the guarantor; and that, accordingly, the appellant-guarantor was in breach of his own obligations once he had guaranteed the performance of the payment of the two instalments (Prnciples laid down in *Moschi* v. *Lep Air Services Ltd.*, [1972] 2 All E.R. 393 at pp. 401, 402, 403 *applied;* statement discussed by Rowlatt on the Law of Principal and Surety 3rd ed. [1936] p. 144, to the effect that on default of the principal promisor causing damage to the promisee the surety is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require notice of the default, adopted and followed).

Appeal dismissed.

Cases referred to:

Kirkham v. *Marter* [1819] 2 B. & Ald. 613 at p. 616;

Moschi v. *Lep Air Services Ltd.*, [1972] 2 All E.R. 393 at pp. 401, 402, 403;

Chatterton v. *Maclean* [1951] 1 All E.R. 761 at pp. 764-765;

R. v. *Ward, Ltd.*, v. *Bignall* [1967] 2 All E.R. 449 at p. 455;

Banque Populaire De Limassol Ltd. v. *Stavros Theodotou* (1971) 1 C.L.R. 307 at pp. 319-320.

Appeal.

Appeal by defendant against the judgment of the District

Court of Nicosia (Demetriades, Ag. P.D.C. and Papadopoulos, D.J.) dated the 30th June, 1972, (Action No. 1260/70) whereby he was adjudged to pay to the plaintiff the sum of £1,513.800 mils on a guarantee.

T. Papadopoullos, for the appellant.

T. Eliades, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

HADJIANASTASSIOU J.: This is an appeal by the defendant from the judgment of the full District Court of Nicosia dated June 30, 1972 in an action based on a guarantee, in which the defendant was adjudged to pay to the plaintiff the sum of £1,513.800 mils with interest thereon, at the rate of 8% per annum as from January 15, 1972, till final payment.

By a contract in writing in the form of a hire purchase agreement dated August 29, 1963, the plaintiff Kyriakos Christofides, to whom we will refer as the owner, hired a number of machines to the total value of £2,150 to one Loizos Charalambous.

Under clause 2 (a) of the agreement, Loizos Charalambous, to whom we will refer as "the hirer" was to pay a first payment of £500 and he did so, and received on April 30, 1963, the machines in question.

Under clause 2 (b) the hirer agreed to pay the balance of £1,650 in two equal instalments, the first one on April 30, 1964 of the amount of £825, and the second on April 30, 1965 with interest on both sums at the rate of 8% from April 30, 1963, till final payment.

By clause 3, the hirer agreed that the period of the hire-purchase agreement would be April 1, 1963 until April 30, 1965, being the period fixed for the payment of the amount due to the owner by the hirer. But there was a further condition to the effect that if the latter would have paid off the owner on the above-mentioned date, otherwise until it was paid off in full.

By clause 4, it was agreed that failure to pay any of the instalments together with interest by the hirer to the owner as provided by paragraph 2 of this agreement, renders due payable

and demandable any balance due of the agreed price, together with interest due. Furthermore, it gives the right to the owner to seize the aforesaid (para. 1) described goods which he should sell by public auction for the account of the hirer, the latter remaining responsible for any balance due. Any remaining amount, after the covering of the amounts due and the expenses, will be returned to the hire purchaser.

By clause 5, the hire purchaser declared that the articles referred to in para. 1 of the agreement were the ownership of the owner and that he undertook not to sell or hire or to pledge same to anyone before paying in full his debts.

Finally, by clause 6, it was provided that the expenses for the good maintenance of the articles referred to would be paid during the hire purchase agreement by the hire-purchaser and any damage to the said machinery would be paid exclusively by him.

By a contract of guarantee, the defendant guaranteed due performance of the payment of the two instalments. The said guarantee is in this form: "I guarantee jointly with the hire-purchaser Loizos Charalambous the payment in the above agreed manner till the final payment of the amount still owing from the hire purchase of £1,650 (One thousand, six hundred and fifty pounds) with interest".

As the principal debtor, the hirer failed to meet his obligations under the contract of hire-purchase, an action was brought against him and against the guarantor in 1966, but that action so far as the guarantor was concerned, was withdrawn and dismissed without prejudice, and proceeded only against the principal debtor. It appears further from the judgment of the Court that the debtor, having paid the first instalment, he paid also the sum of £100 on October 20, 1963, and £200 on October 25, 1964, and judgment was entered against the debtor on October 8, 1966 for the sum of £1,350 with interest thereon at 8% per annum as from April 30, 1963 to final payment.

On March 6, 1970, an action was brought against the guarantor, the present defendant, and it was alleged that after judgment was signed against the hirer he went abroad; in the meantime an amount of £225 was collected sometime in May, 1967.

The defence was filed on October 20, 1970, and it was alleged, *inter alia*, that after the expiration of the period of April 30, 1965, the defendant was not liable for the non-compliance by the hirer, to the terms and conditions of the hire purchase agreement.

When the pleadings were closed, on January 24, 1972 Mr. Eliades on behalf of the plaintiff made a statement in Court regarding the amount which was due by the principal debtor, and produced a statement showing that amount, *i.e.* £1,513.800 mils.

On the contrary, to a question put by the Court, to counsel appearing for the defendant, this statement was recorded:-

> " We dispute that that agreement makes the defendant in this action responsible and my alternative submission is that even if he is proved to be responsible, he cannot be responsible to more than the original debtor was responsible in law to pay, therefore the statement of account, *exhibit* 1, is accepted by us as a true statement of account of the original debt, amounts of payment made by the original debtor, additional amounts collected by the plaintiff in the present action and the interest thereon, but subject to that total amount being the responsibility of the original debtor to pay, this is a true account of the amounts in issue in the present case. If it is later proved that the original debtor is not liable to pay this whole amount or part of it, neither will be the guarantor, assuming that his guarantee is still valid."

The plaintiff, in giving evidence before the Court said that he repeatedly approached Loizos Charalambous and asked him to pay the balance of the judgment debt, but he always found an excuse for not paying. When in 1967 he was informed that the present defendant returned from the United States to Cyprus, they met. Having explained to him that Loizos Charalambous did not pay to him the amount of the judgment debt, the defendant asked him to go with him in order to visit the shop of the judgment debtor and inspect the machinery in question. Having done so, the defendant who was the importer of those machines, inquired from the judgment debtor why he was not paying his debt and the reply of the latter was that because he was financially ruined. In the light of that reply,

the plaintiff made it quite clear to both that he wanted his money. Then on their way back to Nicosia, the defendant informed him that Loizos Charalambous had promised to him that he would pay the judgment debt. In the meantime, the defendant had left for the United States and had returned 6 months or a year later. He called on him and asked him whether the amount of the debt was paid, and his reply was that nothing was paid to him.

In cross-examination the plaintiff agreed that Loizos Charalambous under the hire purchase agreement had to pay the value of the machinery within a period of 2 years. He also conceded that although the sum of £825 should have been paid on April 30, 1963, the hirer paid only £500. He further agreed that although the second instalment of £825 was payable on April 30, 1965, nothing was paid towards that instalment.

The defendant, on the other hand, in giving evidence, denied that he returned to Cyprus in 1967 and told the Court that he was informed for the first time in 1970, that Loizos Charalambous did not pay the money due by him to the plaintiff. He further denied that he visited Loizos Charalambous in Famagusta together with the plaintiff.

The trial Court in considering the evidence before it, thought that the only thing it had to determine was whether the defendant knew of the delays in payment by the principal debtor as early as in 1966 or only in 1970.

The Court, having watched the demeanour of both parties, in giving evidence, believed the evidence of the plaintiff, that he told the defendant in 1966 about the delays in payment and that it was satisfied that both parties visited the principal debtor in Famagusta in 1966.

Finally, the Court dealt with the submissions of counsel for the defendant *viz.*, that the plaintiff having accepted lesser amounts from the principal debtor contrary to the terms of the hire purchase agreement, as well as by giving time to him to pay the balance, the surety was discharged from his contract of guarantee because a new implied contract was created; and because once such a variation was made without the surety's consent, the surety was discharged with regard to the transactions subsequent to the variance of the terms of the contract.

With this in mind, the trial Court dealt with the provisions of ss. 91, 92, and 93 of our Contract Law Cap. 149, and reached this conclusion:-

> " We are unable to agree that the way the plaintiff acted in the present action brings the defendant under either of the above sections. We are inclined and indeed agree with the submission of learned counsel of plaintiff that by accepting lesser amounts and not suing the principal debtor as soon as he was unable to pay fully the first instalment, does not amount to a new agreement express or implied between the plaintiff and the principal debtor in any way, but in our opinion his conduct amounts to mere forbearance to sue or enforce any other remedy as provided by section 95 of our Contract Law, Cap. 149. Section 95 reads as follows:-
>
> > ' Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.'
>
> .....
>
> Mr. Papadopoullos also submitted that even if defendant was found to be liable, he would not be liable for more than the original debtor was.
>
> We fully agree with this submission which is clear from section 86 of our Contract Law, Cap. 149 which reads:-
>
> > ' The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.'
>
> We have, however, found nothing to show that the original debtor would not be bound to pay the amount claimed."

We think the true position here was that the hirer had clearly been guilty of a breach of the hire purchase agreement. He appears to have been almost about more than three years in arrears with his two monthly payments. Furthermore, the owner had also the right given to him by clause 4 of the hire purchase agreement to retake possession of the machinery and to sell them by public auction. We think, therefore, that the

true effort of what happened is that the hirer remained under any liability that has already accrued on the date of the acceptance of the breach of the agreement. The hirer would also remain liable for any damages for breach of contract. If he remained liable for the accrued liability—and of course, it was only right that he should remain liable, because he had had the benefit of the machinery for the period relating to it—*prima facie* he being liable, and the instalments not having been paid, the guarantor is liable under the ordinary principles of law.

It was rightly admitted by both sides that the owner could have sued the hirer for hire due and the guarantor would have had no answer whatsoever. *Prima facie*, therefore, the defendant in this action would also be liable unless he could show that he had been released.

As we said earlier, there has clearly been delay in enforcing a claim for payment against the hirer. The question therefore which arises in this case is whether in view of the wording of clause 2 (b), of the hire purchase agreement, and of the guarantee, the delay or misconduct amounted not merely to a waiver or indulgence, but to a departure by the creditor from his contract with the guarantor without the guarantor's consent.

We find it convenient before dealing with the submissions of counsel on this point, to state that the meaning and effect of the guarantee which we have set out in this judgment earlier, is also the subject of this appeal. We would, therefore, propose to make some observations about the general principles of the law of guarantee which counsel argued governs this situation. The law of guarantee is under the English law and the Cyprus law part of the law of contract. The law of contract is part of the law of obligations. The English law and Cyprus law which follows closely the English law of obligations is about their sources and the remedies which the Court can grant to the obligee for a failure by the obligor to perform his obligations voluntarily. It should be added that obligations which are performed voluntarily require no intervention by a Court of law. They do not give rise to any cause of action. English law, and indeed Cyprus law, is thus concerned with contracts as a source of obligations. The basic principle which the law of contract seeks to enforce is that a person who makes a promise to another ought to keep his promise. This basic prin-

ciple, in England, is subject to an historical exception that English law does not give the promisee a remedy for the failure by a promisor to perform his promise unless either the promise was made in a particular form, e.g. under seal, or the promisee in return promises to do something for the promisor which he would not otherwise be obliged to do, *i.e.* gives consideration for the promise. This principle has been adopted also in our law. The present contract which gives rise to the instant appeal does not fall within this exception. In return for the guarantor's promise to the creditor, the latter promised to grant credit to the principal debtor.

Each promise that a promisor makes to a promisee by entering into a contract with him creates an obligation to perform it owed by the promisor as obligor to the promisee as obligee. If he does not do so voluntarily, there are two kinds of remedies which the Court can grant to the promisee. It can compel the obligor to pay to the obligee a sum of money to compensate him for the loss that he has sustained as a result of the obligors failure to perform his obligation. This is the remedy at common law and in damages for breach of contract. But there are some kinds of obligation which the Court is able to compel the obligor actually to perform. In some cases, such as obligations to transfer title or possession of property to the obligee or to refrain from doing something to the detriment of the obligee, a remedy to compel performance by a decree of specific performance or by injunction is also available. It was formerly obtainable only in a Court of equity. In those cases it was an alternative remedy to that of damages for breach of contract obtainable only in a Court of common law. But, since a Court of common law could make and enforce orders for payment of a sum of money, where the obligation was itself an obligation to pay a sum of money even a Court of common law could compel the obligor to perform it. In England, historically, this was the only remedy which the Court could grant at common law when an obligor failed to perform this kind of obligation. The remedy of damages for non-performance of the obligation was not available as an alternative. It ceased to be important to identify an obligation which the obligor had failed to perform as being an obligation to pay a sum of money after the Supreme Court of Judicature Act 1875 had abolished the necessity for a plaintiff to select the form of action appropriate to his claim.

In England in section 4 of the Statute of Frauds (1677) a contract of guarantee is described in the language of the 17th Century as "any special promise to answer for the debt, default or miscarriage of another person". Translated into modern legal terminology "to answer for" is to "accept liability for", and "debt, default or miscarriage" is descriptive of failure to perform legal obligations, existing and future, arising from any source, not only from contractual promises but any other factual situations capable of giving rise to legal obligations such as those resulting from bailment, tort, or unsatisfied judgments. These words were so construed by Abbott, C.J., in *Kirkham* v. *Marter*, [1819] 2 B and Ald. 613 at 616.

In Cyprus, in s. 84 of the Contract Law, a "contract of guarantee" is described as "a contract to perform the promise or discharge the liability of a third person in case of his default". The person who gives the guarantee is called the surety; the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor.

Counsel on behalf of the appellant urged upon us that the very acceptance by the creditor of the hirer's contract, *viz.*, that he did not take legal proceedings against Loizos Charalambous because every time he used to see him and ask for money he used to promise that he was going to pay his debt, is a variation of the terms of the contract between the creditor and the guarantor; and that it discharged the guarantor, who is relieved from liability by the creditor's dealings with the principal debtor in a manner of variance with the contract, the performance of which was guaranteed; (b) that the Court failed to consider the possibility that a variance in the terms of the contract did in fact take place as early as 1966 or at any time thereafter but prior to 1970 and that it failed to consider the effect of such variations regarding the liability of the defendant as a guarantor and failed to make any finding on this point or as to its legal effect on the liability of the defendant; and (c) that the Court failed to consider that any variance of clause 4 of the hire purchase contract regarding the payment was operating to the great disadvantage of the guarantor and the Court failed again to direct its mind to s. 97 of our Contract Law.

In *Moschi* v. *Lep Air Services Ltd.*, [1972] 2 All E.R. 393,

Lord Diplock, speaking about the contractual promise of a guarantor said at pp. 401–402:-

> " By the beginning of the 19th century it appears to have been taken for granted, without need for any citation of authority, that the contractual promise of a guarantor to guarantee the performance by a debtor of his obligations to a creditor, arising out of a contract gave rise to an obligation on the part of the guarantor to see to it that the debtor performed his own obligations to the creditor. Statements to this effect are to be found in *Wright* v. *Simpson*[1] per Lord Eldon L.C. and in *Re Lockey*[2] per Lord *Lyndhurst*. These are the two cases which are cited as authority for this proposition by Sir Sidney Rowlatt in his authoritative work on principal and surety[3]. They can be supplemented by other similar statements, including one in your Lordships' House, which confirm that it was taken for granted that this was the legal nature of the guarantor's obligation arising out of a contract of guarantee (*Mactaggart* v. *Watson*[4] per Lord Brougham).
>
> It is because the obligation of the guarantor is to see to it that the debtor performed his own obligations to the creditor that the guarantor is not entitled to notice from the creditor of the debtor's failure to perform an obligation which is the subject of the guarantee, and that the creditor's cause of action against the guarantor arises at the moment of the debtor's default and the limitation period then starts to run. It is also why, where the contract of guarantee was entered into by the guarantor at the debtor's request, the guarantor has a right in equity to compel the debtor to perform his own obligation to the creditor if it is of a kind in which a court of equity is able to compel performance (see *Ascherson* v. *Tredegar Dry Dock & Wharf Co. Ltd*).[5] It is the existence of this right on the part of the guarantor that accounts for the rule laid down by Lord Eldon L.C. in *Samuell* v. *Howarth*[6] and approved by your

1. [1775–1802] All E.R. Rep. 257 at 264.
2. (1845) 1 Ph. 509 at 511.
3. The Law of Principal and Surety (3rd edn., 1936) p. 144.
4. (1835) 3 Cl. & Fin. 525 at 540.
5. [1909] 2 Ch. 401.
6. (1817) 3 Mer. 272 at 278.

Lordships' House in *Creighton* v. *Rankin*[1] that where the creditor, after the guarantee has been entered into, gives a contractual promise to the debtor to allow him time to pay the guaranteed debt, the guarantor is discharged from his obligation to the creditor. This is because the creditor, by altering the debtor's obligation to him has deprived the guarantor of his equitable right to compel the debtor to perform his original obligation to the creditor, which was all that the guarantor had guaranteed. In contrast, the guarantor is not discharged by the mere voluntary forbearance of the creditor to take steps to obtain timeous performance by the debtor of the obligation which is the subject of the guarantee; for this does not affect the guarantor's equitable right to compel the debtor to perform it.

It follows from the legal nature of the obligation of the guarantor to which a contract of guarantee gives rise that it is not an obligation himself to pay a sum of money to the creditor, but an obligation to see to it that another person, the debtor, does something; and that the creditor's remedy for the guarantor's failure to perform it lies in damages for breach of contract only. That this was so, even where the debtor's own obligation that was the subject of the guarantee was to pay a sum of money, is clear from the fact that formerly the form of action against the guarantor which was available to the creditor was in special assumpsit and not in indebitatus assumpsit (*Mines* v. *Sculthorpe*[2]).

The legal consequence of this is that whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as damages for breach of his contract of guarantee, whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure. The debtor's liability to the creditor is also the measure of the guarantor's.

In *Chatterton* v. *Maclean*, [1951] 1 All E.R. 761, Parker, J., in dealing with the question as to whether the guarantor was released, said at pp. 764–765:-

1. (1840) 7 Cl. & Fin. 325 at 345.
2. (1809) 2 Camp 214.

" The real point here is whether what has happened amounts to more than a waiver or indulgence, namely, a giving up of existing rights on which the guarantor can say that he had been released. Counsel for the defendant urges, first, that the very acceptance, the very treating of the hirer's conduct as a repudiation of the contract, amounts to a new contract. That leads to the rather startling conclusion that a guarantor of the performance of a contract is always released where the creditor does what he is lawfully entitled to do, namely, to treat the principal debtor's breach as a repudiation. It would mean that whenever a creditor exercised his ordinary rights a guarantor was released, not merely in respect of future liabilities, but in respect of accrued liabilities."

Then, the learned Justice, having quoted an authority, continued in these terms:-

" It is perfectly true that the determination in such a case is a consensual one, but I find it very difficult to think that those words can be used to support the proposition that by that consensual act a new contract is made which impinges on the rights of the guarantor. It seems to me that it is merely bringing the contract to an end—something which the creditor is lawfully entitled to do—and that the guarantor cannot complain of it."

Finally, he reached this conclusion:-

" I do not think that a surety under a hire-purchase agreement has any right in any circumstances to have possession of the property. It is not all the rights of the owner to which he succeeds by payment. I should have thought it was quite clear, for instance, that the right of purchase, the option to purchase, is a right solely in the purchaser and not one of which the guarantor could avail himself. Similarly, it seems to me that the right to seize and take possession of the car as against the hirer which is provided by the hire-purchase agreement is one personal to the owner and not one to which the guarantor can succeed, as it were, by payment.....

Here, of course, we are considering the position, not of an assignee, but of a guarantor, but, if a person cannot by

assignment obtain the right to seize, then equally, I should have thought, a guarantor, who on no view could succeed to the property in the goods, also could not succeed to the bare right of seizure. I do not think that a guarantor could ever succeed to the owner's rights of seizure. It is perfectly true that contracts of guarantee must be strictly construed and that any alteration of the contract between the creditor and the principal debtor may release the guarantor, and, further, that the courts are not concerned to inquire whether the alteration had the effect of benefiting or prejudicing the rights of the guarantor, but it seems to me that the rights which are altered must be rights which, as it were, impinge on the rights of the guarantor. If, as I think, the guarantor, could never have any right to avail himself of the provisions for seizure, then the alteration of the position between the creditor and the principal debtor in regard to that matter could not impinge on the rights of the guarantor."

This principle was adopted and followed in *Moschi* v. *Lep* (*supra*) by the House of Lords.

In *R. v. Ward, Ltd.*, v. *Bignall* [1967] 2 All E.R. 449 Diplock, L.J., dealing with the question of the rescission of a contract, said at p. 455:-

" Rescission of a contract discharges both parties from any further liability to perform their respective primary obligations under the contract, that is to say to do thereafter those things which by their contract they had stipulated that they would do. Where rescission occurs as a result of one party's exercising his right to treat a breach by the other party of a stipulation in the contract as a repudiation of the contract, this gives rise to a secondary obligation of the party in breach to compensate the other party for the loss occasioned to him as a consequence of the rescission, and this secondary obligation is enforceable in an action for damages; but until there is rescission by acceptance of the repudiation the liability of both parties to perform their primary obligations under the contract continues.....

The election by a party not in default to exercise his right of rescission by treating the contract as repudiated

may be evinced by words or by conduct. Any act which puts it out of his power to perform thereafter his primary obligations under the contract, if it is an act which he is entitled to do without notice to the party in default, must amount to an election to rescind the contract."

This case was applied in *Moschi* v. *Lep* (*supra*), and Lord Diplock in his speech, said at pp. 402-403:-

"The debtor failed to perform voluntarily many of his obligations under the contract—both the obligation of which performance was guaranteed and other obligations. The cumulative effect of these failures by 22nd December 1967 was to deprive the creditor of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract. The creditor accordingly became entitled, although not bound, to treat the contract as rescinded (see *Hong Kong Fir Shipping Co. Ltd.*, v. *Kawasaki Kisen Kaisha Ltd.* [1962] 1 All E.R. 474). He elected to do so on that date. It was held by the official referee and by the Court of Appeal ([1971] 3 All E.R. 45), in my view rightly, that the debtor's failures to pay the instalments of the existing debt were in themselves sufficient to deprive the creditor of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, even if his failures to perform other obligations were left out of account.

My Lords, it has become usual to speak of the exercise by one party to a contract of his right to treat the contract as rescinded in circumstances such as these, as an 'acceptance' of the wrongful repudiation of the contract by the other party as a rescission of the contract. But it would be quite erroneous to suppose that any fresh agreement between the parties or any variation of the terms of the original contract is involved when the party who is not in default elects to exercise his right to treat the contract as rescinded because of a repudiatory breach of the contract by the other party. He is exercising a right conferred on him by law of which the sole source is the original contract. He is not varying that contract; he is enforcing it.

It is no doubt convenient to speak of a contract as being terminated or coming to an end when the party who is

not in default exercises his right to treat it as rescinded. But the law is concerned with the effect of that election on those obligations of the parties of which the contract was the source, and this depends on the nature of the particular obligation and on which party promised to perform it.

Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of the rescission. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces (see *R. v. Ward Ltd.* v. *Bignall* [1967] 2 All E.R. 449).

In *Banque Populaire De Limassol Ltd.* v. *Stavros Theodotou*, (1971) 1 C.L.R. 307, Vassiliades, P., dealing with the question as to whether there was a discharge of the guarantor, by reason of variance in the terms of the contract, said at pp. 319–320:–

"The second issue, whether such excess credit had the effect of discharging the guarantor from liability under the contract, turns mainly on the provisions of the contract; which must be read and interpreted so as to give effect to the intention of all parties thereto, as expressed in their contract. We have already described the contract earlier in this judgment. We do not think that it can be read as meaning that the parties intended that if the Bank allowed credit to the principal debtor beyond the limit of £500 such conduct would amount to a breach of the contract likely to cause loss or damage to any of the other parties; or to give them the right to repudiate the contract. What the

parties obviously intended was that the Bank would agree and undertake to allow credit to the principal debtor up to £500; for which the guarantor would be answerable to the Bank. That was obviously intended to be the limit of the Bank's obligation to the other parties during the validity of the contract; and the limit of the guarantor's liability. But surely it was not intended to limit the Bank's right, outside the contract, to give credit to a customer as the Bank might decide to do from time to time, at the Bank's own risk. Such credit would offer facility and advantage to the debtor; with no risk to the guarantor; and in the ordinary course of the parties' business, it would be useful to the debtor whom the guarantor had agreed to help up to the limit of his guarantee.

Reading the contract as a whole, we can have no doubt in our mind that this was the intention of the parties in entering into the contract in question; and that this is the effect of the language used in expressing it. The Bank would not be bound to give to the debtor credit beyond £500; and in any case the guarantor would not be liable beyond that amount, plus interest and other usual charges. In fact at the end of the renewed period (31.12.1960) the debt amounted to £485.330 mils; which was gradually reduced by payments made by the debtor as stated earlier, to the amount of the claim, £242.950 mils plus interest.

The law applicable to the parties' contract is the relevant part of our Contract Law, Cap. 149 (Part XI sections 82-105). The defence of the guarantor's discharge by reason of variance in the terms of the contract is provided for in section 91. Such defence is only available to the guarantor when the variance made to the contract by the other parties thereto, without his consent, puts him at a disadvantage compared with his position under the contract. Here, as already indicated, the parties' contract was neither intended not did it have the effect of prohibiting other credit transactions between these parties outside the guaranteed credit under the contract."

Finally, and still on the same point, Lord Simon of Glaisdale, delivering a separate speech in *Moschi* v. *Lep*, (*supra*), said at pp. 407, 408, 409:-

" It was argued for the appellant that the respondents' acceptance of the company's repudiation effected a substantial alteration in the contractual relationship of the parties; that this was clearly prejudicial to the appellant's interest as guarantor; that he should, therefore, have been consulted before, and his consent obtained to, the alteration; and that, since he was not so consulted and never consented, he was discharged from liability.

This seems to me to be, with all respect, an impossible argument. It is only in the jurisprudence of Humpty Dumpty that the rescission of a contract can be equated with its variation. The acceptance of the repudiation of an agreement does not alter its terms in any way—it merely transmutes the primary obligation of the promisor to perform the terms contractually into a secondary obligation, imposed by law, to pay damages for their breach.

Moreover, the suggested rule would make nonsense of the whole commercial purpose of suretyship; you would lose your guarantor at the very moment you most need him, namely, at the moment of fundamental breach by the principal promisor. Take a usual case giving rise to suretyship, that of a trader with a bank overdraft. The bank forbears to close the account (so as to put the trader into bankruptcy or liquidation) in consideration of the trader finding a guarantor of the overdraft and agreeing to pay it off by instalments. The trader thereafter repudiates his obligation to pay off the overdraft by instalments; whereupon the bank closes the account, so terminating the contractual relationship of banker and customer. It would be absurd to suppose that the guarantor of the overdraft was thereby discharged from his liability as surety.

Finally, if authority were needed *Chatterton* v. *Maclean* ([1951] 1 All E.R. 761) is against the appellant's proposition.....

It was argued for the respondents, on the other hand, that the contractual duty assumed by the appellant was to ensure the performance by the company of such of its contractual obligations as were guaranteed; and that, when the company evinced an intention not to perform its gua-

ranteed contractual obligations, and when such repudiation was accepted by the respondents, the appellant became in breach of his own obligation, so as himself to be liable in damages. In my judgment, the argument for the respondents is the correct legal analysis, for the following reasons.

(1) The contention of the appellant is, in my view, both in principle and in practice impossible to reconcile with the rule in *Hochster* v. *De la Tour* [1843–60] All E.R. Rep. 12, namely, that if a promisor under a contract, even before the time for its performance has arrived, evinces an intention not to perform it, the promisee may treat this as an immediate breach of contract and bring his action accordingly. Logical objections have been advanced against this rule, mainly on the ground that the promisor has a locus poenitentiae, and may decide, and put himself in a position, to perform his promise before its time for performance has arrived. But the rule is firmly established in the law, having been consistently followed, and been approved in *Martin* v. *Stout* ([1925] A.C. 359 at 363, 364)."

Then, His Lordship, having quoted from the book of Rowlatt (See the Law of Principal and Surety (3rd Edn., 1936) p. 144), said:–

" The learned author was discussing the rule that on default of the principal promisor causing damage to the promisee the surety is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default, or previous recourse against the principal, or simultaneous recourse against co-sureties. 'The reason for the rule', wrote Rowlatt 'is that it is the surety's duty to see that the principal pays or performs his duty, as the case may be.....' No other reason for the rule was proposed in argument before your Lordships, nor was the rule itself questioned; which suggests that Rowlatt's proposed reason is the correct one, which his own high standing would in any case vouch. It is true that the authorities which Rowlatt cited for the proposition, *Wright* v. *Simpson* ([1775–1802] All E.R. Rep. 257 and Re Lockey (1845 1 Ph. 509) are not direct decisions on the point, in the sense of its being their ratio decidendi.

But, more significantly, both Lord Eldon LC. in the former case and Lord Lyndhurst in the latter seem to assume without question that the law is as stated by Rowlatt.

(5) That it is the surety's duty to see that the principal pays, or performs his other duty, as the case may be (so that non-payment or other non-performance by the principal is a breach of the surety's contract, sounding in damages) is further suggested by the wording of s. 4 of the Statute of Frauds (1677): '.....any special promise to answer for the debt default or miscarriages of another person.....' The teutonic 'answer for' is used here in a sense more accurately connoted in modern English by its Romance equivalent 'be responsible for' (See OED, 'answer', v. 1, 3). A further shade of meaning as indicating the nature of the surety's common law obligation may be seen in Shakespeare's 'Let his neck answer for it, if there be any martial law'.

(6) The point is still further reinforced by the historical analysis of my noble and learned friend Lord Diplock, which shows that the liability of the surety gave rise to an action of special assumpsit not of indebitatus assumpsit, breach therefore sounding in damages and not in debt, even if it was a debt which was guaranteed. (And see Jordan's Case (YB Mich 27 Hen VIII pl. 3, fo 24, translated in Fifoot, History and Sources of the Common Law: Tort and Contract (1949), pp. 353-355) per FitzJames C.J.; see also Simpson (The Place of Slade's Case in the History of Contract, (1958) 74 LQR 381 at 384) and Cheshire and Fifoot (The Law of Contract (7th Edn. 1969) p. 10).

This is only consistent with the surety's obligation, even when guaranteeing a payment, being not to pay a sum of money in default but to ensure performance of the principal promisor's obligation."

Finally, Lord Simon having quoted a passage from the judgment of Parker, J., in *Chatterton* v. *Maclean* (*supra*), said:-

" Parker J. treats it as self-evident that, where the principal creditor lawfully accepts the principal debtor's breach as a repudiation of the contract, the surety is not released either in respect of accrued or of future liabilities.

It follows, in my judgment, therefore, that when on 22nd December 1967 the respondents accepted the company's fundamental breach of the terms of the contract, including those guaranteed, as a repudiation of the contract, the respondents were entitled to sue the appellant for the total sum guaranteed (except insofar as already satisfied by payment made by the company), and that the measure of damages would be such net sum with an appropriate discount for accelerated payment (although in the instant case there is no question of any discount). I would therefore dismiss the appeal on this ground."

Directing ourselves with these weighty judicial pronouncements, we have reached the conclusion to affirm the judgment of the trial Court because in our own opinion the creditor has not given a contractual promise to the debtor to allow him time to pay the guarantee debt, and, therefore, the guarantor is not discharged or released from his obligations to the creditor. The guarantor is not discharged by the mere voluntary forbearance of the creditor to take steps earlier to obtain performance by the debtor of the obligation which was the subject of the guarantee for this does not effect the guarantor's equitable right to compel the debtor to perform it—as indeed the former had tried to convince the debtor to pay his debt, and although it was alleged that he promised him to do so, actually the debtor did not pay his debt. It would have been, of course, a different matter if the creditor gave a contractual promise to the debtor to allow him time to pay. This is because the creditor, by altering the debtor's obligations to him, has deprived the guarantor of his equitable right to compel the debtor to perform his original obligation to the creditor, which was all that the guarantor had guaranteed.

We would, therefore, dismiss this contention of counsel, because, as we said earlier, what has happened in this case amounts to no more than a waiver or indulgence on behalf of the creditor and the guarantor is not released or discharged.

The second complaint of counsel was that the trial Court has failed to construe correctly or at all the provisions of the agreement of guarantee, or to make any finding as to its purport and effect, and that because of such failure the trial Court misdirected itself in law.

In order to meet the argument of counsel, we think it is necessary to see what in fact the appellant did undertake to do. We are aware, of course, that there is no general rule applicable to all guarantees, but the rules of construction governing contracts in general apply to the contract of guarantee also. With this in mind, we find ourselves in agreement with counsel for the appellant that the trial Court has failed to construe the said contract of guarantee. We further agree that dealing with a guarantee as a mercantile contract, the Court had to construe it so as to give effect to what may fairly be inferred to have been the real intention, and understanding of the parties, as expressed by them in writing.

The first, therefore, and most important question of construction is to determine what it was that the appellant was guaranteeing. In our view, this was, expressly, the performance by the principal debtor of certain of his obligations under the hire purchase contract. The guarantor was guaranteeing jointly with the hire purchaser the payment of the two instalments and interest, the first one due on April 30, 1964, and the second on April 30, 1965. But the guarantor went even further and guaranteed the final payment of the amounts still owing from the hire purchase of £1,650 with interest.

As we said earlier in this judgment, the debtor on April 30, 1964, failed to pay in full the amount of the first instalment, and indeed he failed to pay the balance due and the second instalment on April 30, 1965. It is true, of course, and we agree with counsel, that from such conduct there was material before the Court that the debtor evinced an intention not to perform his guaranteed contractual obligations regarding the payments; and once he was in default, the creditor could, if he so wished, repudiate the hire purchase agreement. It is equally true that the Court has failed to address its mind on this point, but it is equally clear that at a later time the creditor accepted such repudiation and filed an action against both the debtor and the guarantor. In our view, and in accordance with the principles enunciated in *Moschi* v. *Lep*, (*supra*), the appellant was in breach of his own obligations once he had guaranteed the performance of the payment of the two instalments.

We would, therefore, adopt and follow the statement discussed by the learned author, Mr. Rowlatt on the Law of Prin-

cipal and Surety 3rd edn., (1936) at p. 144, who said that the rule that on default of the principal promisor causing damage to the promisee the surety is, apart from special stipulation immediately liable to the full extent of his obligation, without being entitled to require either notice of the default..... The reason for the rule, as the author put it, is that it is the surety's duty to see that the principal pays or performs his duty as the case may be.

With this in mind, we would like to express our appreciation to counsel for their labours in presenting the case before us, in one of the less explored fields in the Cyprus Legislation, and for the reasons we have given at length, we would dismiss the appeal with costs in favour of the respondents.

Appeal dismissed with costs.