Judgment 48/2006 **KWL Advertising Limited (in Liquidation) v Kountouris and Kountouris – Royal Court (Civil Action File 856) – 18th October 2006**

Guarantees given by the defendants in respect of KWL's debts to Barclays Bank PLC – deed purporting to assign the bank's interests in those guarantees to KWL – whether the guarantees are enforceable or not – persuasive effect of Hutchens v Deauville Investments Pty Ltd (1986) 68 ALR 367 – held that the alleged assignment of the guarantees in favour of KWL, the primary debtor, was legally ineffective – proceedings dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

18th day of October, 2006 before Lieutenant Bailiff Patrick John Talbot QC, sitting alone.

KWL ADVERTISING LIMITED (in liquidation)

(Plaintiff)

v

NICOLA ANN KOUNTOURIS and GEORGE ALEXANDER KOUNTOURIS

(Defendant)

Where as on 18th July 2006 the Lieutenant Bailiff considered the Exceptions de Fond of the Defendant and heard thereon advocates C. J. Green and N. J.Barnes Counsel for the Plaintiff and Defendant respectively and whereas on 14th August 2006 the Lieutenant Bailiff upheld the said Exception de Fond and DISMISSED the proceedings. The Lieutenant Bailiff this day handed down his reasons for the said Judgement in the terms attached hereto

S.M.D.ROSS
Her Majesty's Deputy Greffier

MONDAY 14TH AUGUST 2006

IN COURT 4

Before

Patrick John Talbot, Esq., QC
Lieutenant Bailiff

KWL ADVERTISING LIMITED (in liquidation)
v
NICOLA ANN KOUNTOURIS and GEORGE ALEXANDER KOUNTOURIS

JUDGMENT of the Lieutenant Bailiff (approved)

Introduction

1. This is my judgment in the case of KWL Advertising Limited (in liquidation) against Nicola Ann Kountouris and George Alexander Kountouris.

2. By its Cause issued, I think, in September 2004, the Plaintiff, a Guernsey Company, which was placed in compulsory liquidation by order of the Royal Court dated 18th July 2000 ("the Company"), seeks judgment against each of the two Defendants pursuant to guarantees dated in 1998 and 1999 ("the guarantees") given by the Defendants, who are husband and wife, to Barclays Bank Plc ("the Bank") in relation to the debts owed to the Bank by the Company under a banking facility up to stated maximum monetary limits.

3. Accordingly, in usual banking terms, the Bank was the principal or primary creditor, the Company was the primary debtor and the Defendants were the secondary debtors.

4. Each of the guarantees was made in the standard form for "Channel Islands" customers of the Bank, (which the Bank may have used since about January 1988, the reference to the standard form being "CI 305(1/88)",) and it was expressly stated in Clause 28 that

"This guarantee will be governed by and interpreted in accordance with the Laws of Guernsey."

5. The Company claims to be entitled to the benefit of the guarantees under a Deed dated 1st September 2000 and made between (1) KWL Advertising (UK) Limited ("the UK Company") (2) the Company, in liquidation, and (3) the Bank, to which I shall refer as "the Deed". The Deed purported, *inter alia*, to assign the Bank's "right title and interest" under the guarantees to the Company as part of a larger commercial settlement made between the Bank, the Company acting via its liquidator Mr. Anthony Christian Pickford, and the UK Company, an English company in which the Company at that date held shares. The UK Company continued to trade after the making of the Deed.

6. The Deed, (which seems to have been drafted between English solicitors and may not have been reviewed by Guernsey Advocates on behalf of any of the parties to it,) is expressly stated in Clause 5.1 thereof to be "*interpreted and operated in accordance with the Law of England.*"

7. Insofar as it related to the guarantees, the Deed, if valid and effective in this regard, appears to have the effect of making the Company both the principal or primary debtor to the Bank and the party holding the benefit of the guarantees, which, of course, related directly to the Company's principal or primary debt to the Bank. During his arguments before the Court, Mr. Barnes, who appears for the Defendants, argued, amongst other things, that this offended commercial common-sense.

8. Before I turn to the questions raised in argument and in the helpful written skeleton arguments of Counsel, I shall set out the material terms of the guarantees and of the Deed and summarise the affidavit evidence and other written material before the Court.

The material terms of the guarantees

9. Each guarantee was given in consideration of the Bank *"giving time, credit and/or banking facilities and accommodation to [the Company]",* which was defined as "*the principal*".

10. By the guarantees, the Defendants guaranteed the payment or discharge to the Bank on demand in writing being made on them to *"pay or discharge to the Bank all monies and liabilities which shall for the time being be due, owing, or incurred by the principal to the Bank whether actually or contingently including interest which the Bank may, in the course of its business, charge"* for a total of £200,000 plus interest and other charges further set out in the guarantees.

11. Clause 5 provided for the guarantees to continue in force despite any winding up of the Company.

12. Clause 11 provided as follows:

> The Bank is *"to be at liberty without thereby affecting its rights hereunder at any time and from time to time … to compound with give time for payment and grant other indulgence to [the Company] … or to accept compositions from and make any other arrangements with [the Company]..."*

13. Clause 15 provided that in the event of the Company being wound up the Bank was entitled to the rank of a creditor and to prove in the Company's liquidation for the full amount of its claim and to receive dividends to the exclusion of the rights of any of the Defendants as guarantor in competition with the Bank until the Bank's claim was fully satisfied.

14. Clause 17 provided as follows:

> *"As a separate and independent stipulation [the Defendants] … agree that all sums of money which may not be recoverable on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of [the Company], or any other fact or circumstance whether known to the Bank or not shall nevertheless be recoverable from [the Defendants] as sole or principal debtors in respect thereof and shall be repaid by [the Defendants] on demand in writing made by the Bank or on its behalf."*

15. Clause 21 provided that:

> *" … the liability of each of [the Defendants] under the guarantee shall be joint and several…"*

16. Clause 24 provided as follows:

> *"Any rights which [the Defendants] may have under the existing or future laws of the Bailiwick of Guernsey to require that recourse be had to the assets of [the Company] before any claim is enforced against [the Defendants] in respect of obligations hereby assumed by [the Defendants] is hereby abandoned and waived."*

The material terms of the Deed

17. Recitals (b) and (c) refer to certain guarantees. The "Kountouris guarantees" are there mentioned, as are the two guarantees given to the Bank by the UK Company in 1998 and 1999 in respect of the liabilities of the Company to the Bank which were separately defined as the "KWL (UK) Guarantees".

18. Recital (d) referred to a life insurance policy issued to the Company by Standard Life on 22nd October 1998 over the life of the Second Defendant, Mr. Kountouris, in the sum of £258,980.00. The policy was the subject of a mortgage Deed dated 15th October 1999, executed by the Company in favour of the Bank ("the mortgage"), which was also recited.

19. Recital (e) stated that Mr. Kountouris then owed the UK Company a total sum of £31,435.00 in respect of advances made by the UK Company to him up to May 2000.

20. Recital (g) stated that the Company, by Mr. Pickford as liquidator, had on the same day transferred its shareholding in the UK Company to two named directors of the UK Company.

21. Recital (h) stated that the UK Company would enter a separate agreement with the Bank with regard to the UK Company's guarantee liability to the Bank.

22. Clause 1, where relevant to these proceedings, was in the following terms:

> *"ASSIGNMENT 1.1: The Bank hereby assigns to the Company such right title and interest that it has in:-*
>
> *1.1.1 the Kountouris guarantees; and*
> *1.1.2 the mortgage*
>
> *with all rights and remedies for enforcing the same…"*

23. Clause 1.3 related to the giving of notice of the assignments to the Defendants and Clause 1.4 provided that the Company agreed not to take any act or commence any proceedings to enforce the rights assigned in Clause 1.1 in the name of the Bank or the UK Company.

24. Clause 2 contained releases and in Clause 2.2 the Company released the Bank from all obligations and liabilities owed by the Bank to the Company of whatever nature, which, in the context of the facts relating to the Deed, was, perhaps, a somewhat unusual provision.

25. Clause 3 provided that in consideration of the Company executing the Deed the UK Company would pay to the Company on the same date the sum of £20,000.

26. Clause 4 was in the following terms:

> *"Agreement not to prove-*
>
> *4.1 The Bank hereby agrees not to prove for dividend purposes in the liquidation of the Company in respect of any debts due or obligations owed to the Bank by the Company such agreement being without prejudice to any other rights or remedies which the Bank may have in connection with such debts or obligations including in particular the right to vote at meetings of creditors in the liquidation of the Company and any rights which the Bank may have in connection with such debts or obligations against the UK Company."*

27. As I have mentioned above, Clause 5.1 provided that the Deed should be interpreted and operated in accordance with the law of England; it also provided that the parties to the Deed submitted themselves to the jurisdiction of the English courts.

28. Clause 5.3 was an "entire understanding" clause stating that the Deed superseded any previous arrangements between the parties in relation to the matters dealt with.

29. The Deed was executed by Mr. Pickford on behalf of the Company as the Company's liquidator.

The Issues before the Court

30. The primary issue before the Court is the effect of the Deed and, in particular, the effect of Clauses 1.1, 1.1.1 and 4.

31. But, before I turn to that issue, I shall deal with the evidence before the Court.

32. Mr. Pickford swore a short affidavit on 26th January 2005 in which he attempted to explain the factual background or commercial genesis to the Deed. In my judgment, this affidavit, especially paragraphs 6 and 7, does not advance the matter very much, if at all.

33. Paragraphs 5, 6 and 7 of Mr Pickford's affidavit were in the following terms:

> *"5. The assignment of the rights under the guarantee to KWL (in Guernsey liquidation) was made as part of the consideration for the disposal of shares owned by KWL Guernsey ("the Guernsey Company") in KWL Advertising UK ("the UK Company") to the directors of the UK Company.*
>
> *6. Barclays Bank Plc were owed substantial sums by the UK Company. It was therefore in the Bank's interests for there to be a transfer of the Guernsey Company's shares in the UK Company to the directors of the UK Company for a nominal consideration.*
>
> *7. In a nutshell, the assignment of the rights under the guarantee to KWL (in Guernsey Compulsory Liquidation) was made as part of a wider deal conducted between the Bank and the UK Company."*

34. Both before the full hearing and during it, I encouraged the parties, especially the Company and Mr. Pickford its liquidator, to put more evidence before the Court to assist my understanding of the full background to the Deed; but no further evidence was filed.

35. The documents before the Court established, by way of material evidence, that at the date of the Deed a sum totalling just under £202,000 was owed by the Company to the Bank and that the Company's loan facility letter from the Bank dated 12th May 1999 provided a group overdraft to a maximum limit of £200,000 for the Company and the UK Company *"to assist work in capital finance requirements of the companies."* This letter also showed that the security for the overdraft included the guarantees, the UK Company guarantees, the mortgage and a debenture from the UK Company.

36. It seems that each Defendant was given written notice of the assignment of the guarantees by the Bank to the Company (the First Defendant Mrs. Kountouris on 26th September 2000 and the Second Defendant Mr. Kountouris on 25th September 2000) by letters from Mr. Pickford as liquidator.

37. Thereafter, by letter dated 3rd May 2001, Mr. Pickford as liquidator of the Company made final demand on the First Defendant under the guarantees, (and I shall assume, I hope correctly, that he made a similar demand on the Second Defendant as well,) for the sum of £201,892.64.

38. The only other piece of material evidence before the Court is a letter from Barclays Private Clients to Mr. Pickford dated 17th April 2002, referring to recital (h) to the Deed, and stating that the document there referred to was a loan facility letter issued to the UK Company.

39. I now return to the central issue of the case. It is a legal issue and no questions of disputed facts arise on it. There is therefore no need for a trial before the Jurats.

40. Advocate Barnes on behalf of the Defendants raised several defences.

41. He accepted, I believe, that the effect of Clause 4 of the Deed was not to merge, and therefore eradicate, the debt owed by the Company with the right of the Bank to enforce the debt, (which he had earlier sought to argue had been the case.)

42. Mr Barnes accepted that, whilst not amounting to merger, Clause 4 operated under Guernsey Law as an agreement not to sue, or rather not to prove in the Company's liquidation, which did not discharge or vary the guarantees or either of them.

43. He also said that he would wish to argue, if necessary, that the Deed did not waive or vary the *droit de division* of each of his clients, whilst accepting, I think, (as I believe he must,) that the effect in the present case of Clause 24 of the guarantees is that the clause amounted to an express waiver of his clients' *droit de distribution.*

44. In light of my decision in this case, it is not necessary for me to deal with the issue of the *droit de division* and whether or not it was waived or varied in the guarantees. The effect, therefore, of Clauses 17 and 21 of the guarantees in this regard as a waiver of the *droit de division* is left for another day.

45. Before I turn to deal with the main issue, I need to record that, in addition to the point about the *droit de division*, which I have just mentioned, I have decided that it is also not necessary, because of the view I take on the central issue, for me to decide on the merits of the other defences raised by Mr. Barnes, including circuity of action, and set-off or *compensation* or whether or not the underlying debt owed by the Company to the Bank still exists. As to the last-mentioned defence, the only evidence before the Court is a bank statement attached to the demand made on the First Defendant, Mrs. Kountouris, showing the sum claimed in these proceedings as due to the Bank from the Company in August 2000 shortly before the liquidation of the Company; there is no other evidence which seems to me to touch on the question of whether or not the underlying debt still exists. But, as I have said, it is not necessary for me to determine that question in the light of the decision which I have reached.

46. Mr. Barnes' principal argument was that Clause 1.1 of the Deed operated, at most, as an ineffective attempt to assign the guarantees, and not the principal debt itself. He argued that the true construction of Clause 4 of the Deed showed a reference to the Bank's debts as existing debts enforceable by the Bank.

47. Advocate Green, who appeared for the Plaintiff, argued to the contrary and contended that the joint effect of Clause 1.1 and Clause 4 was that, by those clauses, there was an implied assignment of the debt as well as an express assignment of the benefit of the guarantees. He argued to this effect, despite the express agreement in Clause 4 on the part of the Bank not to prove in the Company's liquidation.

48. The issue between the parties is, therefore, whether, whilst the debt itself was retained by the Bank, the benefit of the guarantees was or was not validly assigned to the Company, the principal debtor. Mr. Green contended that all that was needed was an assignment of the guarantees, and the

rights related to them, to enable the Company to sue on the guarantees relying on the assignment in Clause 1.1.1 and to make the demands made on the Defendants in May 2001 valid demands. His submissions were really that simple and straightforward.

49. When I invited Counsel, if they wished, to lodge further submissions on Guernsey law and French law, including submissions referring to *Poitier* and *Gallienne*, no such submissions were lodged and I can, therefore, infer that Counsel found that no assistance could be found there.

50. I, therefore, turn back to the heart of the central issue. In my judgment, despite the wording of Clause 5 of the Deed, this issue is an issue of Guernsey law, and not of English law. The issue relates to the alleged continued enforceability of Guernsey guarantees. I consider that, in these circumstances, the issue for me to decide is an issue of Guernsey law and that, despite the apparent clarity of Clause 5 of the Deed, it is justiciable for it to be determined, and perhaps only possible for it to be determined, in this Court as a matter of Guernsey law. There was no provision in the Deed, apart from Clause 5, which purported to vary the governing law of the guarantees and, in all the circumstances, I conclude that they remain governed by Guernsey law. I shall, therefore, apply the law of Guernsey.

51. What then is the law of Guernsey on the central issue of the alleged enforceability of the guarantees by the Company? If there is no assistance to be found in the authorities, by which I mean the cases before the Guernsey Courts, including cases before the Royal Court and the Court of Appeal, or, apparently, in the leading text- books, it is necessary, I find, for me to look beyond this jurisdiction for help, which help, fortunately, can be found in a leading decision of the High Court of Australia, the final court of appeal in Australia.

52. I consider that decisions in the High Court of Australia should, in this jurisdiction, be given careful respect and attention and, in the instant case, I have found the decision of the High Court of Australia in *Hutchens v. Deauville Investments Pty Ltd* (1986) 68 ALR 367 persuasive. I am persuaded that the approach which the High Court took on a similar question to that now before this Court should be

adopted here as the law of Guernsey; and, accordingly, I adopt it.

53. I have also found it helpful to consider two modern text-books on the law of guarantees. First, I was cited material from the 4th edition (2005) of *The Law of Guarantees* by Geraldine Andrews QC and Richard Millett QC. The passage in paragraph 7-031 is helpful; it provides as follows:

> *"Assignees*
>
> *In the absence of express agreement to the contrary, the creditor is entitled to assign the guaranteed debt and the securities for the debt to someone else. The principles which apply are the same as for the assignment of any other contract, and the assignee acquires all the rights of the assignor, and may sue in his own name on the guarantee. The surety is not discharged by the assignment, and it makes no difference to his position whether he is given notice of it or not, though as a matter of prudence the creditor ought to give him notice…"*

I quote further from the same paragraph:

> *"If the contract of suretyship is a guarantee, the assignee of the guarantee or other security must also be the assignee of the underlying debt. In Hutchens v. Deauville Investments Pty Ltd (1986) 68 ALR 367 the Australian High Court held that the debt owed by a guarantor on default of the principal is the same debt as is owed by the principal. Accordingly, a creditor cannot assign the benefit of a guarantee or other security for the principal debt whilst at the same time purporting to retain the benefit of the guaranteed debt, thus converting one debt into two, one of which is owed by the guarantor to the assignee and the other by the principal debtor to the assignor."*

54. The contract of suretyship in both guarantees *is*, in my judgment, a guarantee, and the passage which I have just quoted from *Andrews and Millett* applies, as I see it, as part of the law of Guernsey just as much as it forms part of the law of England and, of course, part of the law of Australia.

55. The second text-book, to which I have given attention, is *The Modern Contract of Guarantee, English Edition*, by O'Donovan and Phillips (2003); (the subtitle of the book "English Edition" is explained in the Preface to the work). At paragraphs 10.173 and 10.175 the issue currently before this Court is dealt with in the following terms:-

> *"Assignees:*
>
> *A contract of guarantee is assignable as a legal cause of action. Hence, the acquisition by a bank of the assets and causes of action of another bank carries with it the right to enforce the guarantee given to the other bank. Usually notice of the assignment of the benefit of the guarantee needs to be given to the guarantor to protect the assignee's priority but is otherwise unnecessary.*
>
> *....*
>
> *10-175: A guarantee or the security for it cannot be assigned without the benefit of the principal obligation because otherwise a creditor could effectively divorce the guarantor's liability from that of the principal debtor."*

56. In *O'Donovan and Phillips* the authority for the passage quoted in paragraph 10-175 is the authority of the High Court of Australia in *Hutchens v. Deauville Investments Pty. Ltd*, and I respectfully agree with the learned editors of this work where they record, in note 95, that *"One possible result of this arrangement is the guarantor's rights of subrogation might be affected",* the arrangement to which they refer being an assignment of the benefit of the guarantee *without* an assignment of the benefit of the principal obligation or debt.

57. I turn now to the decision of *Hutchens v. Deauville Investments Pty. Limited* itself. The facts were somewhat complicated and I shall refer to them by reference to the head-note, which, is insofar as is material, is in the following terms:

> *"The appellant H executed a deal of guarantee and indemnity and a mortgage to secure advances by GC Limited to a company of which he was the director. The mortgage secured payment by H to GC Limited of 'each and all sums of money in which H may now or hereafter be indebted or liable … to the mortgagee on any account whatever … including … any moneys owing under pursuant to or in connection with"*

the guarantee and indemnity. The company in question became insolvent and the principal debt, together with H's guarantee and mortgage, was assigned by GC Limited to another company, Helvetica. Helvetica then assigned to the respondent, Deauville, all its estate and interest in the mortgage. There was no express transfer of the debt or the guarantee and indemnity secured by the mortgage. On the matter relevant to the present case, the

Court allowed the appeal and found, as is recorded in sub-paragraph (1) of the head-note:

> *"It was impossible, as a matter of basic principle, to assign the benefit of the guarantee or the security for it while retaining the benefit of the guaranteed debt, and thereby to convert the one debt owing by both principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee."*

58. In their judgment, after dealing with the complicated facts, the High Court of Australia turned to analyse the legal position at page 372. The passage material to the present case starts at line 10 and I think it is valuable to read the whole of the passage which ends, for present purposes, at line 16 on page 373:-

> *"The first, and most fundamental, of those further difficulties arises from the absence of any suggestion, in the amended statement of claim or the evidence, that there was any assignment, in law or in equity, to Deauville of the debt owing by Kenbrite to Helvetica or of the benefit of the first mortgage to debenture. Assuming that the notice of demand given by General Credits to Hutchens was, notwithstanding the failure to specify the amount claimed, effective to crystallize the debt secured by the real property mortgage, that debt remained owing by Hutchens in his capacity as guarantor of Kenbrite. As has been said, the only debt secured by the mortgage was that which Hutchens was liable to pay by reason of his guarantee of the indebtedness of Kenbrite. After Hutchens became bound to pay that debt as guarantor, it remained a debt owing to General Credits by Kenbrite as the principal debtor. If Kenbrite itself had paid the debt the liability of Hutchens to pay it as guarantor would automatically have been discharged. If Hutchens had paid the debt to General Credits, he would, subject again to the argument about the debt in Clause 2 of the guarantee, have been entitled to be subrogated to the rights of General Credits under the first mortgage debenture. Pending payment of the debt however Hutchens was in what Turner LJ, aptly described [Wheatley v. Bastow (1855) 7 DeGM & G261 at 280 …] as the "favoured debtor" position of the guarantor. As guarantor, he had rights against General Credits as creditor including a prima facie right in equity to have his liability reduced if General Credits by negligence or default allowed the benefit of his rights of subrogation to be lost or diminished …*
>
> *The overall transaction involving the assignment of the principal debt and the security for it, including Hutchens' guarantee and supporting mortgage by General Credits to Helvetica, raises no difficulty as a matter of general principle. The effect of it was that Helvetica was substituted for General Credits as creditor. Kenbrite remained liable as principal debtor; Hutchens remained liable as a guarantor upon whom a demand for payment had been made after default by the principal debtor … Where the difficulty in general principle arises is in the suggestion that the benefit of Hutchens' liability as guarantor and the real property mortgage to secure*

it were alone transferred to Deauville with the result that Kenbrite remained liable as principal debtor to Helvetica. As we follow the argument, it was suggested that, by such a transaction, Hutchens' liability as the guarantor could be transformed into an independent liability to a different creditor from the creditor to whom the guaranteed debt remained owing. That suggestion would seem to lie ill with the basic principle that the debt owed by a guarantor, following defaults of the principal debtor, is and remains the same debt as that owing by the principal debtor. Put differently, it would seem to be simply impossible, as a matter of basic principle, to assign the benefit of a guarantee or the security for it (as distinct from the property secured) while retaining the benefit of the guaranteed debt and thereby to convert the one debt owing by both principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee. If it were otherwise, the position would seem to be that, by assigning the benefit of a guarantee and the guarantor's security and retaining the benefit of the principal debtor's indebtedness and the principal debtor's security, a creditor could effectively divorce the guarantor's liability from that of the principal debtor and effectively deprive the guarantor of the rights which flowed from his position as such including (where available) his rights of subrogation …"

58. As I have said, I am persuaded by the decision in *Hutchens*, on an equivalent issue of fact arising in this case, that the law of Guernsey is that set out by the High Court of Australia at pages 372 – 373 in the passage from which I have quoted *in extenso*.

59. The position is even starker and clearer, in my judgment, on the facts of the present case than it was in *Hutchens.* Here, by virtue of the attempted assignment of the benefit of the guarantees, the principal debtor also became the party with the benefit of the guarantees, but not the party with the benefit of the principal debt, that is to say, the principal creditor.

60. The conclusion I reach is that the alleged assignment of the guarantees in Clause 1.1.1 of the Deed was legally ineffective and, irrespective of the effect of the rest of the Deed, (about which I need make no decision,) I conclude that the benefit of the guarantees was not, as a matter of the law of Guernsey, lawfully assigned to the Company; and the claim therefore fails. In particular, I conclude that the Deed did not operate to assign, by necessary implication, the principal debt from the Bank to the Company. In my judgment, Clauses 1.1. and 4 of the Deed, read together, do not operate to that effect.

61. I, therefore, dismiss the proceedings.

