



[2018] JMCC Comm 47

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE COMMERCIAL DIVISION  
CLAIM NO. 2017 CD 00277**

<b>BETWEEN</b>	<b>SURESH KHEMLANI</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>TOPAZ JEWELLERS LIMITED</b>	<b>1<sup>ST</sup> DEFENDANT/ 1<sup>ST</sup> ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>RAJU KHEMLANI</b>	<b>2<sup>ND</sup> DEFENDANT/ 2<sup>ND</sup> ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>TOPAZ INVESTMENTS LIMITED</b>	<b>1<sup>ST</sup> ANCILLARY DEFENDANT</b>
<b>AND</b>	<b>ISSAR COMPANY LIMITED</b>	<b>2<sup>ND</sup> ANCILLARY DEFENDANT</b>
<b>AND</b>	<b>LORD AND LADY LIMITED</b>	<b>3<sup>RD</sup> ANCILLARY DEFENDANT</b>
<b>AND</b>	<b>JEWELLERAMA LIMITED</b>	<b>4<sup>TH</sup> ANCILLARY DEFENDANT</b>

**IN CHAMBERS**

**Kevin A. Williams and David K. Ellis instructed by Grant, Stewart, Phillips & Co.,  
for the Claimant and 1<sup>st</sup> to 4<sup>th</sup> Ancillary Defendants**

**Mrs. Georgia Gibson Henlin QC and S. Tennyson Hanson instructed by Seyon T.  
Hanson for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and 1<sup>st</sup> and 2<sup>nd</sup> Ancillary Claimants**

**HEARD: 23 and 24 of January, 5 April, 10 May and 20 December, 2018**

**LOAN CONTRACT – MONIES BORROWED FOR THE BENEFIT OF INTERRELATED COMPANIES – EACH COMPANY RECEIVING A SEPARATE PORTION OF THE LOAN WITH OBLIGATION TO REPAY THAT PORTION WITH INTEREST – CORPORATE AND CROSS GUARANTEES SIGNED BY EACH COMPANY – SEPARATE PERSONAL GUARANTEES ALSO PROVIDED FOR THE SAID LOAN BY TWO INDIVIDUALS – LOAN IN DEFAULT – GUARANTORS CALLED ON BY THE BANK TO HONOUR THE GUARANTEE – LOAN REPAYED BY ONE GUARANTOR – ONE INDIVIDUAL GUARANTOR SEEKING TO CLAIM FROM THE OTHER AN INDEMNITY UNDER THE GUARANTEE – WHETHER GUARANTOR OBLIGED TO SUE THE PRINCIPAL DEBTORS FIRST – WHETHER LOAN WAS INDIVIDUAL DEBT OR GROUP DEBT – WHETHER PRINCIPAL DEBTOR SOLVENT**

**EDWARDS, J**

## **Background**

- [1] Suresh and Raju Khemlani are brothers and former business partners. Unfortunately, a civil dispute has arisen between the two, which has resulted in a plethora of litigation in these courts, and this is just one of the many that is extant between the two. For ease of reference only and meaning no disrespect, I will refer to the parties in the way they have been referred by their attorneys throughout this hearing, as Suresh and Raju.
- [2] The gravamen of this claim is that sometime in or around 1997, the National Commercial Bank (NCB) agreed to repay the liabilities of the Khemlani Group of Companies to CIBC. The Khemlani Group of Companies at the time was comprised of several limited liability companies namely: Kaymart Limited, Issar Jewellers Limited (Jewellerama), Lord & Baron Limited (Lord and Lady), Issar Company Limited, Topaz Investments Limited and Public Supermarket Limited. In that same year, pursuant to a letter dated the 26 May 1997 from NCB, additional banking facilities in the amount of \$52,500,000.00 was approved and granted to Topaz Investments Limited, Issar Company Limited, Lord and Lady Limited, Issar Jewellers Limited and Topaz Jewellers Limited. The latter company was not in the Khemlani group but Raju was the majority shareholder of that company. Both Suresh and Raju provided personal guarantees for this loan, while the companies provided corporate guarantees and also cross guaranteed

the loan. The loan was also secured, by debenture over fixed and floating assets of several properties belonging to the various companies.

- [3] This arrangement appears simple enough. Unfortunately, the issue has been complicated by the arrangement entered into by the companies, facilitated by the bank, as to how the loan was to be treated amongst the companies.
- [4] According to the version postulated by Suresh the loan of \$52,500,000 was not a single loan but was divided amongst all the companies in fixed proportion so that each was responsible for repaying the sum designated to it. Each company was therefore, an individual debtor in the amounts apportioned to it. Suresh claims that Topaz Jewellers Limited, a company which he claims that Raju has been solely responsible for and for which, he Suresh had never been a director, defaulted on the payments towards its portion of the loan. The end result was that the interest on that loan escalated to the extent that Topaz Jeweller Limited's debt to NCB skyrocketed. According to Suresh, Topaz Jewellers' portion of the debt spiralled to a staggering \$1,028,437,852.70 and US\$40,000, which it could not repay. The bank exercised its power of sale over the property which was put up as collateral for the loan by Topaz Jewellers Limited but this was not sufficient to discharge the debt. The bank then called on the guarantees, one of which was provided by Suresh, and Suresh further alleged that, through his efforts, he arrived at a compromise with the bank, the terms being that if the sum of \$17,000,000.00 was paid, the bank would forego the balance that was owed. Suresh stated that he paid this amount from his personal funds. On this basis he is now suing Raju and Topaz Jewellers' Limited to recover that sum of money, or a portion thereof.
- [5] Raju, however, tells a different tale. He contends that neither he nor Topaz Jewellers Limited is indebted to Suresh. He asserts that Topaz Jewellers Limited had fulfilled its entire obligation to NCB, as approximately \$9,600,000.00 was repaid to settle Topaz Jewellers Limited's portion of the loan and that further to this, the property located at 81b King Street, which was owned by Topaz

Jewellers Limited, was sold by the bank for \$37,000,000.00 and the proceeds were applied to the debt. In his estimation, these sums represented an adequate contribution to the loan by Topaz Jewellers Limited, and as such, in his estimation, it is the other companies that were parties to the loan from NCB, that are now indebted to Topaz Jewellers Limited.

[6] Raju is also of the view that the payments made by Suresh did not come from his personal funds, but rather from the companies under his directorship. Therefore, in this regard, neither he, Raju, nor Topaz Jewellers Limited, owes Suresh any money. He further claims that, as it relates to the repayment of the sums borrowed, the loan amount was treated as one loan, thus if one entity defaulted, the result was that they all defaulted.

[7] The brothers' inability to come to a compromise and Suresh's vehement belief that Raju and Topaz Jewellers' Limited is indebted to him, has led to the filing of this claim.

### **The Fixed Date Claim Form**

[8] Suresh, by way of a fixed date claim form, filed 4 May 2017 and later amended on the 23 January 2018 without objection, claims for restitution jointly and/or severally against Topaz Jewellers Limited and Raju Khemlani. Suresh claims that, pursuant to the call on his personal guarantee, he paid the sum of \$17,000,000.00 as settlement of Topaz Jewellers Limited's debt to NCB, thus he solely incurred the burden of suretyship, notwithstanding the fact that both he and Raju issued unlimited personal guarantees in respect of Topaz Jewellers Limited's debt. The orders and declaratory relief sought, as they appear in the amended fixed date claim form are as follows -

1. "A declaration that at all material times, the 2<sup>nd</sup> defendant, Raju Khemlani, was the principal and majority shareholder of the 1<sup>st</sup> Defendant, whose actions and/or omissions throughout the period 1997-2012, served to increase the amount of the 2<sup>nd</sup> Defendant's

indebtedness to the National Commercial Bank of Jamaica Limited.  
(This order was abandoned by amendment on 23 January 2018).

2. A declaration that, the Claimant, Mr. Suresh Khemlani, having solely assumed the burdens of suretyship in respect of the 1<sup>st</sup> Defendant's debt, be entitled to recover the sum of Seventeen Million Dollars (\$17,000,000.00) from the 1<sup>st</sup> Defendant Topaz Jewellers Limited and/or 2<sup>nd</sup> Defendant Raju Khemlani who were the principal debtors of the same. (The underlined words added by amendment 23 January 2018)
3. An order that Topaz Jewellers Limited and Raju Khemlani pay the sum of Seventeen Million Dollars (\$17,000,000.00) to the Claimant on such terms as this Honourable Court thinks fit, inclusive of 12% interest thereon per annum, from the 10<sup>th</sup> of May 2013 until the date of payment. (The underlined words added by amendment 23 January 2018)
4. In the alternative, a declaration that the Claimant, Mr. Suresh Khemlani, having solely assumed the burdens of suretyship in respect of the 1<sup>st</sup> Defendant's debt, be entitled to recover the sum of Eight Million Five Hundred Thousand Dollars (\$8,500,000.00) from the 2<sup>nd</sup> Defendant, as co-surety of the 1<sup>st</sup> Defendant's debt. (The underlined words added by amendment 23 January 2018)
5. An order that the 2<sup>nd</sup> Defendant pay the sum of Eight Million Five Hundred Thousand Dollars (\$8,500,000.00) to the Claimant on such terms as this Honourable Court thinks fits, inclusive of 12% interest thereon per annum, from the 10<sup>th</sup> of May, 2013 until the date of payment.
6. Any other relief this Honourable Court deems fit

## 7. Cost.

### The Ancillary Claim

[9] On the 1<sup>st</sup> June 2017, Topaz Jewellers Limited and Raju filed an Ancillary Fixed Date Claim Form against Topaz Investments Limited, Issar Company Limited, Lord and Lady Limited and Jewellerama Limited (The Ancillary Defendants). The essence of their Ancillary Claim was an indemnity from liability and/or a contribution in relation to the claim brought by Suresh. The following Declarations and Orders were sought in the ancillary claim:

1. "A Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Ancillary Defendants were parties along with the 1<sup>st</sup> Ancillary Claimant to a loan agreement with National Commercial Bank for the entire sum of Fifty-Five Million Five Hundred Thousand Dollars (\$55,500,000.00;
2. A Declaration that the beneficiaries of the said loan agreement in the sum of Fifty-Five Million Five Hundred Thousand Dollars (\$55,500,000.00) were the following companies in the following amounts:
  - i. Issar Company Limited (2<sup>nd</sup> Ancillary Defendant) \$13,000,000.00;
  - ii. Lord & Lady Limited (3<sup>rd</sup> Ancillary Defendant) \$14,000,000.00;
  - iii. Jewellerama Limited (4<sup>th</sup> Ancillary Defendant) \$13,000,000.00;
  - iv. Topaz Jewellers Limited (1<sup>st</sup> Ancillary Claimant) \$12,500,000.00;

**Total** \$52,500,000.00
3. A Declaration that the sum of Seventeen Million Dollars (\$17,000,000.00) purported to have been paid by the Claimant in respect of the 1<sup>st</sup> Defendant's debt was paid in respect of the combined debt of the 1<sup>st</sup> Defendant/1<sup>st</sup> Ancillary Claimant along with the 2<sup>nd</sup> Ancillary Defendant, the 3<sup>rd</sup> Ancillary Defendant and the 4<sup>th</sup> Ancillary Defendant and for the benefit of the 1<sup>st</sup> Ancillary Defendant who was a party to the loan agreement together with the 1<sup>st</sup> Defendant/1<sup>st</sup> Ancillary Claimant and the 2<sup>nd</sup> Ancillary Defendant for which the Claimant and the 2<sup>nd</sup> Defendant acted as Guarantors;

4. An order that the 2<sup>nd</sup> Defendant be indemnified by the principal debtors being the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Ancillary Defendants herein in respect of all sums paid in respect of the debt of the Ancillary Defendants, which debts the 2<sup>nd</sup> Defendant along with the Claimant signed on behalf of the said debtors as Guarantor;
5. An order that the Claimant account to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/1<sup>st</sup> and 2<sup>nd</sup> Ancillary Claimants as to the source of the said payment of Seventeen Million Dollars (\$17,000,000.00) paid in respect of the settlement of the debts of the Ancillary Defendants.”

**[10]** Both Topaz Jewellers Limited and Raju also requested that this court determines the questions listed below, not only between the Claimant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, but also between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Ancillary Defendants. The questions are as follows:

1. “Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the principal beneficiaries of the loan which was settled in the sum of seventeen million dollars (17,000,000.00);
2. Whether the debt being the subject of the Claimant’s claim is the 1<sup>st</sup> Defendant’s debt solely, or the combined debt of the 1<sup>st</sup> Defendant as well as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Ancillary Defendants;
3. Whether the 2<sup>nd</sup> Defendant was the principal beneficiary of the debt being the subject of the Claimant’s claim.”

**[11]** They also sought:

1. An indemnity and/or contribution;
2. Interest on damages pursuant to the Law Reform (Miscellaneous Provisions) Act;
3. Costs;
4. Such further and/or other relief as this Honourable Court deems just.

## **A Preliminary Issue**

**The Claimant’s and the 1<sup>st</sup> to 4<sup>th</sup> Ancillary Defendants Application for Court Orders**

**[12]** On the 27<sup>th</sup> July 2017, the Claimant as well as the 1<sup>st</sup> to 4<sup>th</sup> Ancillary Defendants by way of a Notice of Application for Court Orders sought the following Orders:

1. "That the first hearing of the Fixed Date Claim Form filed on the 4<sup>th</sup> of May 2017, set for the 31<sup>st</sup> of July be treated summarily as the trial of the Claim.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Defence to the Fixed Date Claim Form herein be struck out as it discloses no reasonable ground for defending the Claim.
3. That the ancillary claim filed herein be struck out as it discloses no reasonable ground for bringing the Claim.
4. That the Claimant be permitted to rely on his Affidavit dated the 28<sup>th</sup> of April 2017 in support of the Fixed Date Claim Form filed on the 4<sup>th</sup> of May 2017.
5. Costs in the Claim to be awarded to the Claimant
6. Such further reliefs that this Honourable Court deems fit."

**[13]** This Notice of Application for Court orders was heard on the 31<sup>st</sup> of July 2017. At that time this Honourable Court made certain orders including that the trial of the Fixed Date Claim Form filed by the Claimant and the Ancillary Fixed Date Claim Form and Notice of Application to Strike Out is to take place in Chambers for 2 days on the 23<sup>rd</sup> and 24<sup>th</sup> January 2018 and that the Notice of Application for striking out should be treated as a preliminary issue in the trial. The court therefore, embarked on a full trial.

**[14]** The relevant points as outlined in Suresh's Affidavit dated the 27<sup>th</sup> July 2017 are as follows:

1. In the year 1997 various banking facilities were granted to the companies which comprised the Khemlani Group of companies and Topaz Jewellers Limited, a company which is distinct from the Khemlani group, and one such liability was the payment of \$52,500,000.00 by the NCB Trust & Merchant Bank Limited in respect of liabilities which were owed to CIBC by the Khemlani Group's Issar



Company Limited and Topaz Investments Limited, as well as Topaz Jewellers Limited. The payments were apportioned as follows:

- a. Topaz Jewellers Limited: \$21,000,000.00
- b. Issar Company Limited \$24,000,000.00
- c. Topaz Investment Limited \$7,500,000.00

2. NCB took security in the form of an unlimited joint and several guarantees from Suresh, Raju, Topaz Jewellers Limited and the Khemlani Group of Companies (i.e. the Ancillary Defendants herein), and in further consideration of other credit facilities being granted to Topaz Jewellers Limited and the Khemlani Group NCB secured a debenture over the fixed and floating assets of Topaz Jewellers Limited, Topaz Investments Limited, Issar Company Limited, Lord & Baron Limited (now Lord & Lady Limited) and Issar Jewellers Limited (now Jewellerama Limited) as well as through the registration of first legal mortgages endorsed on the various properties of each company;
3. At all material times, NCB treated the administration of each loan facility for each company separately;
4. He paid off Topaz Jewellers Limited's and Raju's personal credit card debts in the amount of \$17,000,243.00 on the 10 May 2013;
5. He signed as an authorized agent of Topaz Jewellers Limited in order to facilitate the process, however he was never appointed director of the company;
6. The Manor Centre property was put up for auction in 1995 scheduled to take place on October 18, 1995, and Topaz Investments filed an injunction and secured temporary relief on condition that certain sums were paid;
7. In 1991 he had no personal assets and the only assets owned by the group of companies were the properties located at the Manor Centre, Belmont Road and the Abbey Court Apartments which were all subject to liens in favour of other institutions (i.e. other than Mutual Security Bank);
8. In 1996 Mutual Security Bank (MSB) merged with NCB and continued to operate as NCB;
9. On the 16<sup>th</sup> April 1997 he finalized the compromise negotiations for the refinancing of the MSB debt and both himself and Raju were required

to sign the compromise agreement in which the bank reduced the groups indebted amount of approximately \$360,000,000.00 to \$280,000,000.00;

10. Prior to the finalization of this agreement the revenue of Jewellerama at Mall Plaza and Lord & Lady were being used to keep up with the \$3,500,000.00 monthly interim payments and as a result had to take out loans to keep up with inventory purchases;
11. The various companies' financial obligations to CIBC were being neglected due to the strain on all of the revenues and the several pending lawsuits against Public Supermarket;
12. In early 1997 CIBC called in their loan and immediately locked all three Jewellerama stores, the two Lord & Lady, and the building owned by Issar Company Limited located at 16 Belmont Road, and CIBC began putting these companies into receivership;
13. During his meeting with NCB for the MSB compromise agreement he raised the issue of the difficulty he was having in order to service both the interim payments towards the MSB debt and the outstanding payments which were owed to CIBC, and NCB offered further assistance to facilitate the servicing of the CIBC debts of the Khemlani Group of Companies;
14. Topaz Jewellers Limited's debt amounted to \$165,438,219.00 and US\$83,097.00 by September 22, 2004 and through negotiation NCB offered to reduce the debt to \$35,000,000.00;
15. On June 9, 2006 NCB sold the 1<sup>st</sup> Defendant's property which was contained on two certificates of title for \$11,000,000.00 and \$26,000,000.00 (i.e. a total sum of \$37,000,000.00);
16. By the year 2012 Topaz Jewellers Limited's was in arrears to NCB in the amounts of \$1,028,437,852.70 and US\$13,292.50;
17. That as guarantor he was legally compelled to discharge the debt on behalf of Topaz Jewellers Limited for the significantly reduced amount of \$17,000,243.00 and he asserts that this debt related solely to Topaz Jewellers Limited's debts and Raju's credit card debt;
18. Every individual company maintained their separate debt servicing.

**[15]** Raju, in denying the assertions contained in Suresh's affidavit dated 27 of July 2017, made the following averments in his affidavit dated 31 October 2017:

1. Suresh is also a director of Topaz Jewelers Limited and has acted in his capacity as far back as 1997;
2. He has acted in his business activities to make a profit;
3. He was responsible for appointing Suresh to the position of managing director of the Khemlani Group companies because he thought the claimant's flair for marketing would be beneficial to the companies however Suresh has betrayed his trust;
4. The loan for which Suresh settled the amounts was not just the loan of Topaz Jewellers Limited but also the loan of all the ancillary defendants, and for which both himself and Suresh as well as the ancillary defendants and Topaz Jewellers Limited all provided guarantees, and as a guarantor he is entitled in law to seek an indemnity and/or contribution from the principal debtors and/or co-guarantors and that Suresh was obligated to pursue the principal debtors who are principally liable for the debt which he (Suresh) failed to do based on his desire to set off costs awarded to him (Raju) in previous proceeding;
5. The loan was granted to the following companies in the following amounts:

a. Issar Company Limited	\$13,000,000.00
b. Lord & Lady Limited	\$14,000,000.00
c. Jewellerama Limited	\$13,000,000.00
d. Topaz Jewellers Limited	<u>\$12,500,000.00</u>
	<u>\$52,500,000.00</u>

6. That the sums apportioned to each company by NCB for repayment purposes was arbitrarily done based on the real estate which was being used to secure the debt based on the loan to value ratio of the properties and is not reflective of the sum each company borrowed or was responsible for and the mortgage was placed on real estate consisting of the following:
  - e. 81B King Street (owned by Raju)
  - f. 16 Belmont Road (owned by Issar Company Limited)
  - g. 53B and 54B Abbey Court Kingston 10 (owned by Topaz Investments Limited)

7. The loan was treated as one for recovery purposes, and this meant that in the event that any of the companies fell down on its repayment obligations it would place all the companies in default and all the guarantors, and it is false that the loan was the sole loan of Topaz Jewellers Limited;
8. NCB as a condition of issuing the loan facility to the companies deemed that the collateral security was insufficient for a payout of \$40,000,000.00 in terms of their loan to value ratios and it was after a number of frantic calls from Suresh that Raju agreed to include 81B King Street based on the fact that he (Raju) was also a shareholder in all the other companies and wished to see them recover;
9. The requirement for personal guarantees was a standard requirement of the loan and was a precondition of same being granted and neither of them had a choice, and Suresh after being appointed managing director proceeded to exclude him from the affairs of the companies in the Khemlani Group and isolated him financially from same, eventually stripping him of his powers as a Director;
10. Prior to the 81B King Street property being auctioned Topaz Jewellers Limited paid the sum of approximately \$9,600,000.00 towards the interest to NCB;
11. Suresh withheld payments due on the loan by the Khemlani Group Companies which were apportioned to it, and secured by the property owned by Topaz Jewellers Limited which caused the loan to fall into arrears and the 81B King Street property to be sold;
12. The contents of the **September 8, 1997** letter confirm that Topaz Jewellers Limited was not yet trading, and the credit card was used for the normal travel and business of the Khemlani Group of companies and was placed on the Topaz Jewellers Limited's account;
13. The Khemlani group of companies have never been insolvent;
14. Suresh was not honouring the debt payments in a timely manner and this is confirmed by letter dated April 10, 2000 from Refin Trust (see RK-16);
15. NCB has never provided any accounting to establish how they arrive at the sum claimed after the sale of the 81B King Street property;

16. Based on Suresh's declared earning in his tax returns same would not allow him to pay the sum of \$17,000,243.00 from his own resources and the said sums were accessed from the principal debtors being the ancillary defendants and/or contributed to from the said ancillary defendants.

[16] It is clear therefore, that this matter could not be determined summarily and the application to strike out and for summary judgment could not succeed.

### **The Issues**

[17] The principal issues which arise for final determination are as follows -

1. was Topaz Jewellers Limited the principal debtor for the loan which went into default? If so
2. whether Suresh Khemlani is entitled to recover the sum of \$17,000,000.00 from Topaz Jewellers Limited and Raju Khemlani, or from the ancillary defendants insofar as he has solely assumed the burdens of suretyship in respect of the debt of Topaz Jewellers Limited; and if so
3. whether Topaz Jewellers Limited and Raju Khemlani are to be indemnified by the ancillary defendants.

[18] These issues beg for an assessment of the following questions:

1. Who were the parties to the loan agreement and what, if any; were their obligations under the agreement?
2. The solvency or insolvency of the principal debtor and the guarantors.

### **The submissions at trial**

#### **I. The Claimant's Submissions**

[19] Counsel representing the Claimant, Mr. Kevin Williams and Mr. David Ellis, in their submissions stated that the recital in paragraph 1 of the Guarantees that

make up exhibits SK-8A to SK-8F makes it clear that Topaz Jewellers Limited was the debtor and that the other Guarantees attached to the further Affidavit of Raju Khemlani filed on the 22<sup>nd</sup> January 2018 and marked RK-3 are irrelevant to the matters being considered by the Court. Counsel opined that the Release and Discharge issued in favour of Topaz Jewellers Limited shows clearly that it was the Guarantees issued in favour of Topaz Jewellers Limited that was affected and grounded the payment of the \$17,000,000.00.

[20] Having highlighted which company was solvent and which were not, counsel proposed two methods of determining the amount that should be repaid to Suresh; the first being that, on the established evidence, the order ought to be that Raju should be made to refund the Claimant the full \$17,000,000.00; the second being that, in the alternative, the \$17,000,000.00 should be apportioned in equal shares between all the co-sureties that can satisfy the amount. This, according to counsel, would be Suresh, Raju, Topaz Investments Limited and Issar Company Limited. On the latter account, Raju would be liable to repay Suresh the sum of \$4,250,000.00.

[21] Counsel commended the case of **Bernard Norman Segal and Pauline Lorna Segal v Raymond John Rattle Freddie Jacob Ezekiel Ninkiel Property Company Limited** [1991] WL 11780397 to this court. In that case, Nicholls J stated at page 2 that –

*“A right of contribution between co-sureties is well established. The law is conveniently summarized in Snell's Principles of Equity, 29th edition, at page 475:*

*Where there are two or more sureties for the same debt, and one of them pays the whole debt or more than his proportion of it, he has a right to contribution from his co-surety or co-sureties if he cannot obtain indemnity from the principal debtor.*

*(a) Right independent of contract. This right of contribution ‘is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it.’*

[22] Counsel also referenced the case of **Turner v Davis** (1796) 170 E.R. 425 where Lord Kenyon stated as follows –

*“I have no doubt, that where two parties became joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-security for contribution: but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security. This is the case here: Davies the defendant became security, at the instance of Turner the plaintiff, to Brough; and there is still less pretext for Turner to call on the defendant in this action, as he took the precaution to secure himself by a bill of sale. I am of opinion the defendant ought to have a verdict.”*

[23] Counsel conceded the point that a co-surety's right to contribution is not triggered automatically and is secondary to a co-surety's attempts to seek reimbursement from the principal debtor. According to counsel, the evidence in this matter is that Topaz Jewellers Limited, the principal debtor, has no means of satisfying any judgment in this claim rendered against it. Counsel submitted that the evidence is that since December 2006, when NCB sold and transferred the King Street property, Topaz Jewellers Limited had no further asset, as this property was the sole asset possessed by it. In this regard, counsel pointed out, although Topaz Jewellers Limited is named as the 1<sup>st</sup> Defendant in this claim, the evidence shows that it would be futile to pursue it, in circumstances where the company is either insolvent or without any asset against which enforcement proceedings could be taken. For this reason, counsel submitted that the co-sureties, including Raju, should be made liable for the payment made by Suresh, prorated.

[24] Counsel submitted that Suresh's payment of the \$17,000,000.00 was as a result of the numerous demands made under the Guarantees since January 1998 and culminated in a final demand made on him on 6 December 2012. The content of the several demands made were highlighted by counsel in the list of letters below:

**1. Letter dated 26<sup>th</sup> January 1998**

This letter was from NCB and addressed to Suresh Khemlani in his capacity as Director of Khemlani. The letter advised that NCB Trust & Merchant Bank made a demand for the sum of \$24,012,784.02, this sum being full repayment of Topaz Jewellers Limited' debt that they had guaranteed.

**2. Letter dated the 16<sup>th</sup> January 2004**

Demand letter from Attorneys representing NCB addressed to the Directors of Lord & Lady Limited. This letter outlined that Topaz Jewellers Limited is indebted to the bank in the sum of \$146,250,999.00 and US\$77,249.00 and formally demanded from it the liquidation of all sums guaranteed by the company.

**3. Letter dated the 9<sup>th</sup> January 2006**

Letter from Attorneys representing NCB addressed to Topaz Jewellers Limited and copied to Issar Company Limited, Lord & Lady Limited, Jewellerama, Topaz Investments Limited and Suresh. This letter was a demand to Topaz Jewellers Limited and all parties copied, for repayment within one month of the service of the notice of all monies secured by the debenture and mortgage (No. 980919 on land entered at volume 1391 Folio 495 and 496 of the Register Book of Titles) dated June 30, 1997.

**4. Letter dated the 6<sup>th</sup> December 2012**

Letter from Attorneys representing NCB addressed to Suresh. This letter outlined that as of 5 December 2012, Topaz Jewellers Limited was indebted to NCB in the amount of \$1,028,437,852.70 and US\$13,292.50, plus any additional interest that may accrue until payment. This letter was a formal demand on Suresh as he had



guaranteed the liabilities of Topaz Jewellers Limited by virtue of a personal Guarantee dated the 30<sup>th</sup> June 1997.

#### **5. Letter dated the 25<sup>th</sup> April 2013**

Letter to NCB from Attorneys representing Suresh offering to pay the sum of \$17,000,000.00 in full and final settlement of all alleged guarantee obligations in respect of Raju and his company Topaz Jewellers Limited.

- [25] Pursuant to the letters above, counsel submitted that the Claimant was under a compulsion of law in making the payment of \$17,000,000.00 and, as such, has fully satisfied the principles of law relating to the circumstances under which a guarantor may pursue a principal for repayment of sums paid in circumstances where the principal has defaulted on its payment. Counsel cited **Owen v Tate** [1976] QB 402 and **Musson (Jamaica) Ltd v Claude Clarke** [2016] JMCA Civ 44.
- [26] Counsel also submitted that even though Raju has, on more than one occasion, admitted that Topaz Jewellers Limited had voluntarily repaid \$9,600,000.00 to NCB, that payment could not discharge the debt.

#### **II. The defendants' submissions**

- [27] Counsel representing Topaz Jewellers Limited and Raju – Mrs Georgia Gibson Henlin Q.C. and Mr S Tennyson Hanson – argued in their written submissions that, all the companies, apart from being principal debtors, were also co-guarantors.
- [28] Counsel submitted that the wording of clause 1 of the Guarantee puts it beyond a shadow of a doubt that each “Principal” was acknowledged as being both a principal and a surety (“the Principal either as principal or surety”), and the debt guaranteed was confirmed as being joint and several (“solely or jointly”). Counsel formed the view that the cumulative effect of the terms of the Debenture, the

Guarantee and the mortgages, confirm that the debt for all intents and purposes was one debt, and regardless of any demand on one of the principal debtors or guarantors by NCB, the liability of all the borrowers/principal debtors/guarantors for the repayment of the debt was never compromised.

- [29] Counsel directed this court's attention to an excerpt from Professor R.M. Goode, O.B.E., L.L.D text entitled "Legal Problems of Credit and Security" in which he stated at pages 63 -64 that –

*"A guarantee may be given in respect of a fixed indebtedness, in which case the guarantee is discharged on a satisfaction of that indebtedness even if the creditor then proceeds to make fresh advances, or it may guarantee a fluctuating balance on a current account, in which event the surety's liability, unless terminated by him as to future advances by notice to the creditor or by some legal event such as the surety's bankruptcy, continues until the account has been closed and the ultimate debit balance then struck has been discharged.*

**So long as a continuing guarantee remains in force, the order of receipts and payments passing through the debtor's account is of little significance, for the surety's indebtedness relates not to a specific drawing by the debtor but to a balance of account, and the rule in Clayton's case does not apply. The position is otherwise where an event occurs which causes the guarantee to come to an end. Unless the guarantee otherwise provides, termination of the guarantee fixes the moment at which the debit balance must be struck.**

- [30] Counsel further submitted that in the case at bar, the liability of the guarantors/principal debtors is based on the terms of the debenture and for these purposes, the guarantees executed by them. They are each liable in respect of the whole debt. Counsel argued that the internal apportionment or application of payments or other treatment of that debt, by the bank, is irrelevant for the purpose of liability under the respective instruments. It was submitted that the arguments by the Claimant in support of a contrary conclusion rely on a legal and factual fallacy and that they disregard the true legal effect of the guarantees. Counsel added that the Claimant's selective disclosure of documents and the

creditor's apparent complicity in focusing on one debtor for recovery or internal accounting purposes cannot, will not and does not alter the legal effect of the documents. Counsel submitted that the bank was aware of this fact, and for this reason they did not release their hold on the security, until the secured debt of \$52,500,000.00 was discharged on terms acceptable to it.

[31] Counsel further added that the cross-guarantees and mortgages which Suresh chose not to disclose and only admitted to in cross-examination, shows that the bank had a proper basis for holding onto the security, even though the Claimant claimed that he had repaid his and the Group's portion of the debt. Counsel submitted that the security documents, including the guarantees, do not have the effect that Suresh suggested and that his claims should fail or he should be required to pay Topaz Jewellers Limited a rateable portion of the amount paid by it, consequent on the exercise of the powers of sale over 81A and 81B King Street.

[32] Counsel argued further, that the arguments being advanced on Suresh's behalf in attempting to treat Topaz Jewellers Limited's debt as separate from the loan which was issued to the Group are not supported by the evidence. In this regard, it was submitted that Suresh is bound to fail insofar as no document has been tendered which has the legal effect of waiving the terms of the offer letter, Debenture, Guarantees/Cross Guarantees, or the mortgages. Counsel pointed out that the legal effect of the Debenture, Guarantees/Cross Guarantees, and mortgages is borne out when one examines the Release and Discharge which states inter alia as follows:

*"...[I]n full and final satisfaction of all claims and demands whatsoever which NATIONAL COMMERCIAL BANK JAMAICA LIMITED may have against the said SURESH KHEMLANI, RAJU KHEMLANI, TOPAZ JEWELLERS LIMITED, TOPAZ INVESTMENTS LIMITED, ISSAR JEWELLERS LIMITED, ISSAR COMPANY LIMITED AND LORD & BARON LIMITED (hereafter, collectively referred to as "the Customers") in respect of their obligations to NATIONAL COMMERCIAL BANK JAMAICA*

*LIMITED (hereafter referred to as “the Bank”) in respect of Ordinary Loans granted by the Bank...”*

[33] Counsel submitted that the most important documents from which the true meaning and legal effect of the legal relationship between NCB and the principal debtors and guarantors, and between the principal debtors amongst themselves, are the documents at the beginning of the arrangement and the documents at the end of the arrangement. In this regard, counsel pointed out that the transaction commenced with an offer letter which was accepted by Suresh and Raju on behalf of the Khemlani Group of Companies. This letter had certain conditions that should be met in order to advance the sums used to pay out CIBC. The primary and relevant conditions are the provision of security in the form of debenture, mortgages and guarantees. Counsel submitted that, when examined, these documents confirm that there was, for all intents and purposes, one loan to multiple borrowers, for which they all became liable along with Suresh and Raju Khemlani (as guarantors), and the repayment of which they all guaranteed.

[34] Counsel outlined that in determining the issues, the law relating to guarantees inclusive of the following factors must be assessed –

1. The legal effect of a guarantee;
2. A Guarantor’ rights after payment;
3. A Guarantor’s rights against the Principal Debtor; and
4. A Co-guarantor’s right to contribution.

#### **1. The legal effect of a guarantee**

[35] In defining a guarantee, counsel referred this court, again, to the text ‘Legal Problems of Credit and Security London’ Sweet & Maxwell 1982, Professor R.M. Goode, at pages 62 to 63, which reads as follows:

*“...[A]n accessory contract, not a primary contract. That is to say, the surety’s obligations are coterminous with those of the principal*

*debtor, his liability does not arise until the principal debtor has made default, and anything which nullifies, reduces or extinguishes the liability of the principal debtor has the same effect on the liability of the surety...The typical guarantee is a unilateral contract, i.e. there is a promise by one party only, the surety. The creditor does not usually undertake to the surety that he will make an advance to the debtor; it is merely agreed that if the creditor makes an advance, the surety guarantees repayment."*

## **2. The Guarantor's rights after payment**

**[36]** In highlighting the Guarantor's rights after payment, counsel made reference to Halsbury's Laws of England, fourth edition Reissue Lord Hailsham of St. Marylebone Volume 20 Buttersworths, where at paragraph 228 and 229 respectively it is stated that:

*"228 - As soon as the guarantor has paid to the creditor what is due to the creditor under the guarantee, he is entitled, unless he has waived them, to be subrogated to all the rights possessed by the creditor in respect of the debt, default or miscarriages to which the guarantee relates.*

*Thus on payment, but not before, the guarantor has the right to the benefit of all the securities (whether known to him or not at the time of he became guarantor) which the creditor has received from the principal debtor before, contemporaneously with or after the creation of the guarantee, and whether or not they existed at the time the guarantee was given.*

*229 - The guarantor's right to the creditor's securities on payment of the guaranteed debt is derived from the obligation imposed on the principal debtor of indemnifying the surety, which makes it inequitable for a creditor, by electing not to avail himself of the securities for the guaranteed debt, to throw the whole liability on the guarantor."*

**[37]** Counsel also pointed to the fact that the right of the guarantor after payment of the debt extends to a transfer of the mortgage security to him, upon payment of the sum due by the principal debtor to the creditor. Counsel further referred to Halsbury's Laws of England, fourth edition where at paragraph 232 the following was said:

*“Where the guaranteed debt is secured by a mortgage executed by the principal debtor the guarantor is, on payment of the debt, entitled to a transfer of the mortgage, even though he was not originally aware of its existence. Prior to the transfer a guarantor for the payment of the mortgage debt itself has, on payment of any portion of it, an equitable charge on the mortgaged property arising automatically, which is not, however, regarded as being an interest in the mortgaged land.”*

### **3. The Guarantor’s rights against the principal debtor**

**[38]** Counsel again pointed the court to Halsbury’s Laws of England, fourth edition at paragraph 238 which describes the guarantor’s rights against the principal debtor as follows:

*“The implied rights possessed by a guarantor against the principal debtor are not identical with those which the creditor has against the principal debtor, but are somewhat similar to those possessed by one guarantor against another. They are available whenever the guarantee has been undertaken at the principal debtor’s actual or constructive request. Where such a request has been made, the right to indemnity is an incident of the guarantee and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the guarantor under the guarantee as money paid to the use of the principal debtor.”*

Further at paragraph 249-250:

*“A guarantor who has paid the creditor in relief of the principal debtor becomes to that extent a creditor of the principal debtor. The guarantor stands in the place of the original creditor. So, where the guaranteed debt arose under a contract made by deed, the guarantor becomes a specialty creditor of the principal debtor. A guarantor who makes a payment on account of a debt which is a preferential debt in bankruptcy, the administration of an insolvent estate or the winding up of a company is entitled to the same priority as the creditor who would have enjoyed in respect of the amount so paid. A guarantor who has paid the amount secured on the principal debtor’s property is entitled to a lien on it.*

*The guarantor’s right to indemnification is a right to be reimbursed the amount which he has actually paid for the principal debtor with*

*interest, to which he is entitled because of his right to full indemnification from the principal debtor.”*

- [39] Counsel submitted, in short, that in order to succeed in pursuing Topaz Jewellers Limited and Raju, Suresh must first pursue the principal debtors, being the ancillary Defendants. Counsel also submitted that because of the sale of 81B King Street, Topaz Jewellers disproportionately bore the brunt of the debt, as distinct from the Ancillary Defendants. Counsel opined that Topaz Jewellers Limited was entitled to the contribution of its co-guarantors who were in any event, like Topaz Jewellers Limited, principal debtors.

#### **4. The co-guarantor’s right to contribution**

- [40] Counsel pointed to the Halsbury’s Laws of England, fourth edition which states the following at paragraphs 261 – 264:

*“A guarantor who has paid more than his share of the common liability is entitled to compel contribution from his co-guarantors, whether they are bound jointly and severally or severally, and by the same or different instruments, and whether he guarantor claiming contribution did or did not know, when he became bound as such, that he was co-guarantor with others.*

*The right to contribution is not founded on contract, but is the result of a general equity arising at the inception of the contract of guarantee on the ground of equality of burden and benefit...*

*In general, a guarantor’s right to contribution from his co-guarantors after payment does not arise until the guarantor has paid more than his total proportion or share of the common liability. He may not therefore sue his co-guarantors for a rateable proportion of what he has paid as soon as he has paid any part of the debt. However, where the guaranteed debt is payable by instalments, and each instalment is to be regarded as a separate debt, a guarantor who has paid the whole of one instalment may, it seems, be entitled to recover contribution from his co-guarantors in respect of such payment to the common creditor.*

*A guarantor may also claim contribution if the creditor has accepted his payment, even though not exceeding the guarantor’s share of the liability guaranteed, in full and final settlement of the guaranteed liability. In those circumstances, the guarantor has paid all that he*

*can ever be called upon to pay, and there is then an equitable debt for contribution upon which even a bankruptcy petition can be founded. A guarantor who has paid his full share of the guaranteed debt has a right of action against his co-guarantors whenever he pays anything further...*

*The amount recoverable by a guarantor from each co-guarantor is always regulated by the number of solvent guarantors.*

*Where each guarantor is liable for an equal amount, all contribute equally towards the common debt, and, if not equally liable, then proportionately to the amount for which each is liable. Where guarantors are bound by separate deeds and unequal amounts, no one of them can be called upon to contribute beyond the sum for which he is liable under his own particular deed. Interest is recoverable by a guarantor on the sum due to him for contribution from the date when he paid the common creditor...*

*In an action by a guarantor for contribution from his co-guarantors the principal debtor and each of the co-guarantors (or their personal representatives) should all be made parties unless the fact of their insolvency is admitted or clearly proved. Even in such a case the plaintiff has apparently, the right to elect whether he will bring the insolvent co-obligor or his representative before the court."*

- [41] Counsel submitted that the guarantor's first recourse is against the principal debtor(s) and between co-guarantors. Reference was made to para 12-001 of the text 'Law of Guarantees' fourth edition, by Geraldine Mary Andrews Q.C. and Richard Millet Q.C., where it was said that:

*"Where two or more persons guarantee the same debt, whether jointly, severally or jointly and severally, they are co-sureties. In general, the law of restitution permits co-obligees such as co-contractors, co-insurers and co-trustees to recover contributions from each other should one of them be required by the creditor to pay more than their due share of a common obligation for which they are all liable."*

- [42] Counsel asked the court to note that this principle was affirmed in the case of **Stimpson v Smith** [1999] 2 WLR 1292 where it was held that:

*"[T]hat where co-sureties were jointly and severally liable under a guarantee, one of them was entitled to a contribution from the other for a payment made without the co-surety's knowledge and in the*



*absence of a written demand provided the amount of the liability was ascertained or ascertainable, that a demand in accordance with the formal terms of the guarantee could realistically be anticipated in the absence of a negotiated settlement and that the arrangement reached with the creditor was not disadvantageous to the co-surety; that, although the plaintiff had acted without the defendant's knowledge, the company's debt, though fluctuating, was ascertained or ascertainable by looking at the amount of the overdraft, the bank had required the company in December 1991 to make immediate payment of at least part of its debt by demanding a reduction in the overdraft and therefore an immediate right to serve a demand on the co-sureties or either of them to meet their liabilities under the guarantee at the time when the plaintiff negotiated the release of the guarantee and the extinction of the guarantee in return for the payment benefitted the defendant; that, assuming that the guarantee required service of a written demand the requirement was only evidentiary of procedural and not a precondition of liability under the guarantee and, being for the surety alone, could be waived by a surety even where two co-sureties jointly and severally guarantees liabilities; and that, accordingly, the plaintiff had the right to waive the requirement of a written demand without losing his entitlement to contribution from the defendant for his share of the payment to the bank."*

**[43]** Counsel submitted that the following facts distinguished the case at bar and raises the issue of whether Raju is entitled to the indemnity from the various companies who were the principal debtors as claimed in the Ancillary claim –

1. The debt was as a result of loans granted to the various companies;
2. The Claimant is the Managing Director of the majority of the various companies;
3. The Claimant's source of income is from the companies;
4. The 2<sup>nd</sup> Defendant has denied that the Claimant paid the creditor from his own resources, and asserts that he paid the creditor from resources sourced from the companies who were responsible for the principal debt. This is another circumstance in favour of the 2<sup>nd</sup> Defendant not being liable as guarantor, as the source of the funds to discharge the debt would have been the principal debtors', and as such the Claimant as co-guarantor would not be able to sustain a claim against the 2<sup>nd</sup> Defendant in his capacity as guarantor;

5. Topaz Jewellers Limited the 1<sup>st</sup> Defendant has paid in excess of the rateable share of the debt based on the size of the loan, and the sums repaid as a result of the proceeds from the sale of the 81b King Street property being applied towards the loan in full;
6. The debt was not only the debt of Topaz Jewellers Limited as the Claimant has pleaded, and he did not act as guarantor along with the 2<sup>nd</sup> Defendant for a debt owed by Topaz Jewellers Limited alone. As aforesaid, the Claimant is not being frank with the Court and failed to put forward information that would enable the Court to deal with the case justly.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to an indemnity from the companies who were the principal debtors/guarantors and which were co-guarantors along with the Claimant, and unless the Ancillary Defendants are proven to be insolvent the claim against the 2<sup>nd</sup> Defendant who is only a guarantor ought properly to be dismissed;
8. The principal debtors ought to be called upon to repay the debt before any guarantor is called upon to repay same and the guarantors are entitled to an indemnity from the principal debtors or in the Claimant's case to be refunded by them for sums paid if the said sums or any part thereof are found to have been paid from his personal funds.

**[44]** Counsel further submitted that, in this case, there are five principal debtors; Topaz Jewellers Limited, Topaz Investment Limited, Issar Company Limited, Lord and Lady Limited and Jewellerama Limited. Counsel argued that Suresh is bound to pursue all five principal debtors, unless they are shown to be insolvent, before he looks to Raju in his capacity as Guarantor. Counsel opined that Suresh's failure to do so runs afoul of the legal principles governing recovery by a Guarantor of sums paid in settlement of a demand by a creditor. Counsel submitted that there is support for this position in the 'Law of Guarantees', Fourth Edition by Geraldine Mary Andrews Q.C. and Richard Millett Q.C., London Sweet & Maxwell 2005 at paragraph 12-008, where it was said that:

*"There is one crucially important condition which must be satisfied before the surety can claim contribution from his co-sureties. This is that the surety must demonstrate at least by inference that a claim against the principal would be futile because he is insolvent or otherwise not worth pursuing. This was laid down in Hay v Carter [1935] Ch.397, where the Court of Appeal held that in action for*

*contribution between co-sureties, the principal should be made a party unless it can be proved or inferred that the principal is insolvent or that there is good reason why he should not be joined.”*

[45] Counsel submitted that, it is apparent on Suresh’s evidence in cross-examination that, Topaz Investment Limited, and Issar Company Limited are solvent, income earning companies, with significant real estate assets. That, insofar as they are both principal debtors, the sum paid by Suresh, or a rateable portion thereof, may be recovered from them. Counsel pointed out that Suresh had not shown that Lord and Lady Limited and Jewellerama Limited had no assets from which sums may be recovered and as such they should not be absolved of liability. It was submitted that, in these circumstances, Raju and Topaz Jewellers Limited are entitled to an indemnity from the Ancillary Defendants and that the principal debtors must be dealt with before the Guarantors are pursued. It was also submitted that the fact that Topaz Jewellers Limited, being a principal debtor, has on the evidence had its sole property sold to repay a part of the debt, and never commenced trading, is evidence that it is not solvent, and not worth pursuing any further. Counsel cited **Brown v Coughlin et al** (1914) 50 SCR 100 and **Meates v Westpac** [1991] NZLR 385).

[46] It was further submitted that none of the letters being relied on by Suresh, insofar as they are demands written by NCB to Topaz Jewellers Limited, have the legal effect of varying the Debenture, the Guarantees/Cross Guarantees, or the mortgages. Neither, counsel argued, does the Release and Discharge which was executed upon the payment by Suresh, lead to such a conclusion. Counsel submitted that it was clear that up until the payment by Suresh, all the principal debtors and guarantors remained liable for the debt, and despite his insistence that the ancillary defendants had settled parts of the debt attributable to them, there is no evidence of this. Counsel argued that even if this was accepted as true it would have no effect on the liability pursuant to the Debenture, Guarantees and Mortgages.

**[47]** Counsel submitted that the letters of September 8, 1997 and September 22, 2004, relied on by the claimant, essentially confirm the following:

1. The debt was the debt of the Group of companies (i.e. the companies are the principal debtors) and not just Topaz Jewellers Limited (the 1<sup>st</sup> Defendant);
2. The debt was incurred to repay liabilities of the Group of companies to CIBC;
3. The debt was secured by properties owned by three of the companies, and mortgages were held in respect of the said properties based on NCB's apportionment of the debt between the three properties based on the value of the properties;
4. The Companies were each principal debtors;
5. The companies guaranteed the repayment of the debt for each other and are co-guarantors in respect of same;
6. The directors of the companies being the Claimant and 2<sup>nd</sup> Defendant also guaranteed the repayment of the debt.

**[48]** Counsel also stated that there appears to be an inconsistency between the letter of May 26, 1997 and the debenture of June 30, 1997 and the Guarantees dated June 30, 1997. Counsel pointed out that the letter and debenture identify the debt as that of the Group and of the Companies, however, the Guarantees confine "the Principal" (the debtor) to Topaz Jewellers Limited. Counsel submitted that on the basis of the documents presented, it is not clear that the parties were at all material times dealing with an existing group indebtedness of \$52,500,000.00 as set out in the letter of the 26<sup>th</sup> May 1997. Counsel stated that it failed to refer to the cross-collateralisation arrangement that the group entered into with NCB which was reinforced in the letter of the debenture. Counsel submitted that Suresh failed to exhibit the other cross guarantee that would have given the complete picture and demonstrate that, as the authorities show, Topaz Jewellers Limited is out of pocket as it relates to the proportionate share of the indebtedness of the Ancillary Defendants.

## **Analysis of the evidence**

**[49]** This analysis will seek to answer the following questions-

1. Whether there was one loan to the group or individual loans to individual companies secured by several guarantees and the debenture.
2. The extent, if any, of the 1<sup>st</sup> Defendant's default under the loan and whether the 1<sup>st</sup> Defendant was the only party that had defaulted on its payments.
3. The extent of the solvency of the principal debtor and the guarantors of the loan.

**[50]** The claimant swore to 3 affidavits in this matter, which were all entered into evidence and he was duly cross-examined. Raju swore to 4 affidavits in this matter, all of which were also entered into evidence and he too was duly cross-examined.

### **1) Evidence Relating to the Terms of the Agreement**

**[51]** The terms governing the loan and its repayment may be ascertained from the following documents -

1. The offer letter dated 26 May 1997 from A.S. Shirley to Raju and Suresh Khemlani;
2. Letter dated 8 September 1997 from NCB to Raju & Suresh Khemlani;
3. Letter dated 22 September 2004 from NCB to Mr. Suresh Khemlani;
4. The mortgages which were all registered on 8 July 1997;
5. The Debenture dated the 30 June 1997;
6. The Guarantees dated the 30 June 1997; and
7. The Release and Discharge dated the 10 May 2013.

These documents will be looked at individually.

**The offer letter dated 26 May 1997**

[52] The salient points outlined in the letter dated the 26 May 1997 are as follows-

*“Dear Messrs Khemlani*

*We are pleased to advise that your application for additional banking facilities of \$52,500,000.00 (Fifty-Two Million Five Hundred Thousand Dollars) have been approved. Facilities now being enjoyed by the Group are detailed below:*

....

*TOPAZ INVESTMENTS LTD./ISSAR CO. LTD.*

*TOPAZ JEWELLERS LTD.*

<i>GUARANTEE</i>	<i>J\$52,500,000.00</i>	<i>To secure</i>
<i>facilities extended</i>		
<i>In favour of NCB Trust &amp;</i>	<i>to Topaz Investments</i>	
<i>Ltd.</i>	<i>Issar Co. Ltd., Topaz</i>	
<i>Merchant Bank</i>	<i>Jewellers Ltd</i>	

.....

<u><i>Security</i></u>	<u><i>Registered</i></u>	<u><i>Stamped</i></u>
<u><i>Value</i></u>		

<i>Joint &amp; Several Debenture over Fixed &amp; Floating Assets of Topaz Jewellers Ltd. Topaz Investment Ltd., Issar Co. Ltd., Lord and Baron Ltd., and Issar Jewellers Ltd.</i>	<i>\$55,500,000</i>	
--	---------------------	--

...

*b) 1<sup>st</sup> Legal Mortgage over Commercial Property, Belmont Road in the name of Issar Co. Ltd.*

*c) 1<sup>st</sup> Legal Mortgage over Commercial Property, 89 King Street, in the name of Topaz Jewellers Ltd.*

*d) 1<sup>st</sup> Legal Mortgage over two 3-bedroom Penthouse*

*Apartments, Abbey Court, in the name of Topaz*

*Investments Ltd. ...*

*...*

*...*

*...*

*5. Unlimited unsupported Guarantee from Suresh And Raju Khemlani in favour of all companies In the Group (Kaymart Ltd, Issar Jewellers Ltd, Lord & Baron Ltd., Issar Co. Ltd, Issar [Topaz] Investment and Topaz Jewellers*

*6. Cross Guarantee for all companies in the Group (Lord & Baron Ltd., Issar Co. Ltd., Issar Jewellers Issar [Topaz] Investments and Topaz Jewellers)."*

**The Letter dated 8 September 1997**

*"Dear Messrs. Khemlani*

*We are pleased to advise that your application for additional banking facilities of J\$4,500,000.00 and US\$40,000.00 have been approved.*

*Facilities now being enjoyed by the Group are detailed below:*

*Facilities*

<i>Terms of Repayment</i>	<i>Limit</i>	<i>Purpose</i>
---------------------------	--------------	----------------

*.....*

*TOPAZ JEWELLERS LTD*

*ORDINARY LOAN/*

<i>COMMERCIAL PAPER</i>	<i>J\$4,500,000.00</i>	<i>Refinance of Issar Co. Ltd</i>
-------------------------	------------------------	-----------------------------------

<i>Repayable \$75,000 per month</i>		<i>And Card Centre debt</i>
-------------------------------------	--	-----------------------------

*Plus interest over 60 months*

*Facilities &*

<i>Terms of Repayment</i>	<i>Limit</i>	<i>Purpose</i>
---------------------------	--------------	----------------

<i>BUILDING LOAN/</i>	<i>J\$6,500,000.00</i>	<i>To complete construction</i>
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<i>COMMERCIAL PAPER</i>		<i>81 King Street</i>
-------------------------	--	-----------------------

*Principal repayable*

*\$135,416.67 per month over*

*48 months plus moratorium*

*Of 6 months on principal.*

*Interest payable in the interim.*

*REVOLVING LOAN            US\$40,000.00            Working Capital*

*Interest monthly*

*GUARANTEE            J\$21,000,000.00    To secure mortgage extended  
In favour of NCB Trust            extended in favour of NCB Trust  
& Merchant Bank            Merchant Bank*

*TOPAZ INVESTMENTS LTD/*

*PUBLIC SUPERMARKET/GALLERIA LTD.*

*...*

*GUARANTEE            J\$7,500,000.00    To secure mortgage  
extended by NCB Trust &*

*(Topaz Investments Ltd.)            Merchant Bank*

*In favour of NCB Trust &*

*Merchant Bank*

*ISSAR CO. LTD*

*GUARANTEE            J\$24,000,000.00    To secure mortgage ex  
In favour of NCB Trust            extended by NCB Trust*

*& Merchant Bank            & Merchant Bank”*

**The Letter dated the 22<sup>nd</sup> September 2004**

**[53]** The letter dated 22 September 2004, provides, inter alia, as follows-



*“We write with reference to your letter dated April 1, 2004 and our meeting on April 29, 2004, when we undertook to research and respond to certain statements made by you regarding the subject debt:*

*Our investigations reveal the following: -*

*In 1997 National Commercial Bank Jamaica Limited agreed to repay liabilities of \$52.5 Million for the Khemlani Group at CIBC via Mortgages through NCB Trust & Merchant bank Limited; the Bank’s 54 King Street branch provided a Guarantee to NCB Trust & Merchant Bank Limited for the entire advance under this arrangement and took security in the form of Joint & Several Debentures over the fixed and floating assets of Topaz Jewellers Limited; Topaz Investments Limited; Issar Co. Limited; Lord & Barron Limited and Issar Jewellers Limited, stamped and registered in the sum of \$55.5 million collaterally to first Legal Mortgage over commercial property at 81B King Street in the name of Topaz Jewellers Limited and residential properties at 16 Belmont Road in the name of Issar Company Limited; and Penthouse Apartments, 53B and 54B Abbey Court in the name of Topaz Investments Limited.*

*Unlimited Cross Guarantees by Issar Company Limited; Topaz Jewellers Limited; Lord & Baron Limited; Issar Jewellers Limited; Topaz Investments Limited. Unlimited Personal Guarantees by Suresh Khemlani and Raju Khemlani.*

- 1) Of the \$52.5 Million repaid to CIBC on behalf of the Khemlani Group:
  - \$21 million was paid for the liabilities of Topaz Jewellers Limited;*
  - \$24 million was paid for the liabilities of Issar Company Limited; and*
  - \$7.5 million was paid for the liabilities of Topaz Investments Limited.**

*2) As at September 7, 2004 the Topaz Jewellers debt was as follows:-*

<i>Jamaican Dollar Debt</i>	<i>Principal</i>	<i>-</i>	<i>J\$31,122,105.00</i>
	<i>Interest</i>	<i>-</i>	<i><u>134,316,144.00</u></i>
	<i>Total</i>		<i>J\$165,438,219.00</i>

<i>United States Dollar Debt</i>	<i>Principal</i>	-	<i>US\$40,000.00</i>
	<i>Interest</i>	-	<u><i>43,097.00</i></u>
	<i>Total</i>		<i>US\$83,097.00</i>

*In light of the foregoing, by letters dated 10<sup>th</sup> February, 2003, the Bank made formal demand on Topaz Jewellers Limited and all guarantors for the amounts owing as 28<sup>th</sup> January, 2003..."*

**The mortgages which were all registered on the 8 July 1997**

**[54]** The mortgages in question refers to those which were placed on properties owned by three of the companies, namely, commercial property owned by Topaz Jewellers Limited located at 81b King Street, commercial property owned by Issar Company Limited located at 16 Belmont Road and two three-bedroom penthouse apartments located at 53B and 54B Abbey Court Kingston 10 owned by Topaz Investments Limited.

The Debenture dated the 30<sup>th</sup> June 1997

**[55]** The Debenture confirms the following-

- i) Loan and credit facilities were provided to the companies by NCB at the request of the Companies being namely:
  - (a) Topaz Jewellers Limited;
  - (b) Topaz Investments Limited;
  - (c) Issar Company Limited;
  - (d) Lord & Barron Limited;
  - (e) Issar Jewellers Limited;
  
- ii) The terms were secured by the following:
  - (a) *The Joint and several securities of this Debenture.*
  - (b) *Mortgages under the Registration of Titles Act collateral thereto over certain real property vested in some of the Companies.*
  - (c) *Collateral Bills of Sale over stock in trade.*

- (d) *Assignment of Life Policies on the lives of Raju Khemlani and Suresh Khemlani.*
  - (e) *Counter Indemnity from Directors Raju Khemlani and Suresh Khemlani.*
  - (f) *Unlimited unsupported Guarantee from Suresh Khemlani and Raju Khemlani in favour of the companies.*
  - (g) *Cross Guarantee for all companies.*<sup>1</sup>
- iii) Clauses 4, 4 (1)(f), 4 (3), 6, 8, 8(a), 11.1(n), 33 of the Debenture outlines the following-

***“(4) AND WHEREAS a trading and inter-company relationship exists between the Companies pursuant to which moneys disbursed to the one Company by a creditor may be on-lent or may otherwise enure to the benefit or go to promote the prosperity of another or others...”***

*“4 (1)(f) In this Debenture where the context so admits:*

*(f) the expression “the Companies Mortgaged Property” shall include TJL’s Mortgaged Property as hereinafter referred to and defined, TIL’s Mortgaged Property as hereinafter referred to and defined, ICL’s Mortgaged Property as hereinafter referred to and defined, LBL’s Mortgaged Property as hereinafter referred to and defined, IJL’s Mortgaged Property as hereinafter referred to and defined...”*

*“4 (3). The Companies and each of them will at all times during the continuance of this security keep up, preserve and maintain in good and substantial repair and in good order and condition all and singular their respective lands, buildings, machinery, equipment, motor vehicles, plant, stocks, apparatus, tools, plants, fixtures, furniture and all other property of every kind...”*

*6(i-v) outlines that “TJL”, “TIL”, “ICL”, “LBL” and IJL” as beneficial owners hereby charges with the payment of the NCB facility, all advances, loans, moneys and interest thereon and all moneys and liabilities hereby agreed to be paid and intended to be hereby secured (including any expenses or charges arising out of or in*

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<sup>1</sup> This is consistent with the requirement for cross guarantees in the letter of the 26<sup>th</sup> May 1997

*connection with the Companies Act or any matter or thing referred to in Clause 17 or in Clause 20 hereof) and so that the charges hereby created shall be a continuing security in favour of NCB, the undertaking and all the property and assets of [“TJL”, “TIL”, “ICL”, “LBL” and IJL”] both present and future and the goodwill and uncalled capital and the book and other debts of [“TJL”, “TIL”, “ICL”, “LBL” and IJL”] both present and future (including but not limited to all credit balances and deposit of the company with NCB or any other bank or financial institution) accounts receivables and securities for money now and from time to time due or owing to or purchased or otherwise acquired by the company and the full benefit of all guarantees, indemnities, debentures, mortgages, charges and other security of whatsoever nature and rights and remedies in respect of the same all patents, patent application, trademarks, trade names, registered designs, copyrights, licence and ancillary connected rights, both present and future, of the company, (hereinafter sometimes referred to as the [“TJL”, “TIL”, “ICL”, “LBL” and IJL”] Mortgaged Property”. The charge hereby created shall be fixed charge on the freehold and leasehold property, fixed plant and motor vehicles machinery, equipment, furniture, furnishings and fixtures (including trade fixtures), goodwill and uncalled capital of [“TJL”, “TIL”, “ICL”, “LBL” and IJL”] but so that of [“TJL”, “TIL”, “ICL”, “LBL” and IJL”] shall not thereafter without the previous consent in writing of NCB had and obtained create or attempt to create any mortgage, debenture or charge upon any of its property and undertaking and so that no lien shall in any case or in any manner arise on or affect the same or any part thereof and NCB shall have absolute and uncontrolled discretion as to giving or refusing such consent.”*

*“8 The Companies and each of them shall not be at liberty without the express consent in writing of NCB and on terms and conditions satisfactory to NCB:*

*“8 (a) To create or suffer to subsist any mortgage charge or other encumbrance on or over any of its property or assets for the time being subject to the charge hereby created ranking in priority to or pari passu with this Debenture...”*

*“11.1 The Companies and each of them hereby jointly and severally covenant with NCB as follows: -*

*11.1 - (n) that within twenty-one (21) days of the signing hereof each of the Companies shall deliver or cause to be delivered to the Registrar of Companies those particulars and documents required*

*to be delivered by Section 93(1) of the Companies Act in respect of this Debenture and any other relevant collateral security and each of the Companies will at all times during the continuance of this security comply with all the requirements of the said Act which are applicable to the Companies...”*

*“33 - NCB may from time to time and at any time whenever it thinks expedient in its absolute discretion expressly waive either conditionally or unconditionally or on such terms and conditions as it may in its absolute discretion deem fit any breach by the Companies or any of them of any of the covenants, undertakings, stipulations, terms and conditions in this Debenture or in any securities collateral thereto contained and any modification thereof but without prejudice to any powers, rights and remedies for the enforcement thereof...” (Emphasis mine)*

### **The Guarantees dated the 30<sup>th</sup> June 1997**

**[56]** Raju, in his affidavit evidence filed on 22 January 2018, outlined that although it is not denied that Topaz Jewellers Limited was a principal debtor, it was not the only Principal debtor. He stated that the ancillary defendants were also principal debtors, and as such, cross guarantees were also executed by the Ancillary Defendants in which each Ancillary Defendant was identified as “the Principal” in a similar manner to Topaz Jewellers Limited. He opined that this is proof that the debt was not solely that of Topaz Jewellers Limited. He revealed that upon a search of the Record of Appeal - for the matter before the Court of Appeal – he found some of the cross guarantees in which the Ancillary Defendants are described as “The Principal”. These are as follows –

1. Guarantee Topaz Investments Limited (Principal) Guarantor Suresh Khemlani
2. Guarantee Issar Company Limited (Principal) Guarantor Suresh Khemlani
3. Guarantee Lord & Baron Limited (Principal) Guarantor Topaz Jewellers Limited.

**[57]** Upon examination, the guarantees/Cross-Guarantees all state as follows in clauses 1, 2 and 6 -

- 1 *“.../we the undersigned hereby guarantee to you the payment of and undertake on demand in writing made on the undersigned by you or any of your Directors Local Directors Managers or Acting Managers to pay to you all sums of money which may now be or which hereafter may from time to time become due or owing to you anywhere from or by **the Principal either as principal or surety and either solely or jointly** with any other person upon current banking account bills of exchange or promissory notes or upon loan or any other account whatsoever or for actual or contingent liability including all usual banking charges.*
  
2. *This Guarantee is to be a continuing Guarantee for the **whole amount now due or owing to you or which may hereafter at any time become due or owing to you as aforesaid by the Principal** (including any further advances made by you to the Principal during the three calendar months period next hereinafter referred to and all interest and bank charges on and in connection with such further advances) ...*
  
- 6 *This Guarantee is to be **applicable to the ultimate balance that may become due to you from the Principal**, and until payment of such balance the undersigned shall not be entitled to participate in any security held or money received by you on account of such balance or to stand in your place in respect of any such money and security.”*

## **2) Evidence relating to the Indebtedness of each principal debtor.**

**[58]** Evidence relating to Topaz Jewellers Limited was as follows-

### **1. Letter dated the 30<sup>th</sup> December 1997**

Letter from NCB addressed to Raju outlining Topaz Jewellers Limited arrears (liabilities) to the bank. At that time the arrears were \$1,807,518.27.

### **2. Letter dated 21<sup>st</sup> January 1998**

This letter was from NCB Trust and Merchant Bank and addressed to NCB and constituted a formal demand on NCB for the payment of the

outstanding sums owed by Topaz Jewellers Limited. At his time the amount owed was \$24,012,784.00

**3. Letter dated 26<sup>th</sup> January 1998**

This letter was from NCB and addressed to Suresh Khemlani in his capacity as Director of the Khemlani group. The letter advised that NCB Trust & Merchant Bank made a demand for the sum of \$24,012,784.02, this sum being full repayment of Topaz Jewellers' debt that the group had guaranteed.

**4. Letter dated the 16<sup>th</sup> January 2004**

Demand letter from Attorneys representing NCB addressed to the Directors of Lord & Lady Limited, this letter outlined that Topaz Jewellers Limited is indebted to the bank in the sum of \$146,250,999.00 and US\$77, 249.00 and formally demanded from it the liquidation of all sums guaranteed by the company.

**5. Letter dated September 22<sup>nd</sup> 2004**

Letter from NCB address to Suresh highlighting the surrounding circumstances relating to the debt and outlining that as at the 7<sup>th</sup> September 2004 Topaz Jewellers indebtedness to NCB stood at \$165,438,219.00 and US\$83,097.00

**6. Letter dated the 3<sup>rd</sup> March 2005**

Letter from NCB addressed to Suresh in which NCB presented an offer to reduce Topaz Jeweler's Debt up to 8 December 2004 which at the time was \$179,263,154.00. The debt was slated to be reduced to \$35,000,000.00. This offer later lapsed.

**7. Letter dated the 9<sup>th</sup> January 2006**

Letter from Attorneys representing NCB addressed to Topaz Jewellers Limited and copied to Issar Company Limited, Lord & Lady Limited, Jewellerama, Topaz Investments Limited and Suresh. This letter was a demand to Topaz Jewellers and all parties copied for repayment within one month of the service of the notice of all monies secured by the debenture and mortgage (No. 980919 on land entered at volume 1391 Folio 495 and 496 of the Register Book of Titles) dated June 30, 1997. The letter advised that a failure to settle would result in NCB exercising the power of sale over the 81b King Street property.

**8. Letter dated the 6 December 2012**

Letter from Attorneys representing NCB addressed to Suresh, this letter outlined that as of December 5, 2012 Topaz Jewellers Limited was indebted to NCB in the amount of \$1,028,437,852.70 and US\$13,292.50 plus any additional interest that may accrue until payment. This letter was a formal demand on Suresh, as guarantor, as he had guaranteed the liabilities of Topaz Jewellers Limited by virtue of a Guarantee dated the 30<sup>th</sup> June 1997.

**9. Letter dated the 25 April 2013**

Letter to NCB from Attorneys representing Suresh offering to pay the sum of \$17,000,243.00 in full and final settlement of all alleged guarantee obligations in respect of Raju and his company Topaz Jewellers Limited.

**[59]** Evidence relating to Topaz Investments Limited was as follows:

**1. Letter Dated April 10, 2000**

This letter is a demand letter from Refin Trust, a wholly owned subsidiary of Finsac Limited. It outlined that as of March 2000 Topaz



Investments Limited was indebted to NCB in the amount of \$335,333,953.48 with interest accruing.

## **2. Letter dated September 13, 2010**

This letter is a demand letter from NCB addressed to Raju outlining that as of September 8, 2010 Topaz Investments Limited was indebted to NCB in the amount of \$15,536,723.79 with interest accruing.

There was no evidence presented for Issar Company Limited.

## **3) Evidence Relating to the Solvency or lack thereof of each alleged principal debtor**

**[60]** In his Affidavit evidence filed on the 19<sup>th</sup> January 2018, Suresh highlighted the following information relating to the Ancillary Defendants -

- a. The 1<sup>st</sup> Ancillary Defendant, Topaz Investments Limited, is the entity which owns the portion(s) of the Manor Center that have not been disposed of.
- b. The 2<sup>nd</sup> Ancillary Defendant, Issar Company Limited, has not been wound up but has one asset in the form of the Belmont Road property;
- c. The 3<sup>rd</sup> Ancillary Defendant, Lord and Lady Limited has not been wound up but has no assets and is not trading in any form;
- d. The 4<sup>th</sup> Ancillary Defendant, Jewellerama Limited, has not been wound up but has no assets and is not trading in any form.

**[61]** Suresh's affidavit evidence is that the ancillary defendants are not worth pursuing for a contribution in order to facilitate the reimbursement of the \$17,000,243.00 that he paid towards Raju and Topaz Jewellers Limited's debt to NCB. He outlined that, with the exception of Topaz Investments Limited, the others are impecunious and have no means of making any contribution towards the repayment of the \$17,000,000.00. He further lamented that given his fiduciary duty as managing director of the Khemlani Group. During cross examination Suresh admitted that the property at 16 Belmont Road, owned by Issar Company

Limited is tenanted and that the last valuation of the Belmont Road property was \$40,000,000.00 or \$50,000,000.00 in or around late 2006.

### **Findings of Fact**

**[62]** Upon conducting a systematic review of all the documents and the evidence presented to this court, the following facts appear to be proved. Topaz Jewellers Limited and individual entities in the Khemlani Group of Companies received banking facilities from CIBC. These entities went into default on the payments on these loans, which resulted not only in a huge indebtedness to CIBC but also resulted in a breakdown in business relationship between CIBC and the entities. Suresh, on behalf of the Khemlani group and later Raju, on behalf of Topaz Jewellers, approached NCB for loan refinancing. NCB agreed to repay the sums owed by the entities in the Khemlani Group to CIBC as well as that of Topaz Jewellers Limited. At the time of the agreement, the total requested (after adding all that was owed by the entities) amounted to \$52,000,500.00. In order to lend this amount, NCB had to have the loan underwritten by NCB Trust and Merchant Bank to whom it provided a guarantee for the entire sum required to be advanced.

**[63]** The offer letter of May 26, 1997, indeed highlights, what the parties agreed to and how the loan was to be structured. It is addressed to both Suresh and Raju. It indicates that the loan facility was to Topaz Investments Ltd, Issar Company Limited and Topaz Jewellers Limited. It also indicates that the facility, totalling \$52,500,000.00 was to be guaranteed in favour of NCB Trust & Merchant Bank. It required security in the form of a debenture from the entities in the Khemlani group and from Topaz Jewellers Limited and a mortgage over property owned by the three named entities for whom the facility was secured. It also required unlimited guarantees by Suresh and Raju and cross guarantees for all the companies in the group. Based on this letter, it suggests that the loan facility was for Topaz Jewellers, Issar Company Limited and Topaz Investment.

- [64]** The letter of the 8 September 1997 indicates that additional banking facilities of \$4,500,000.00 and US\$40,000.00 were granted to Topaz Jewellers Limited. It shows the purpose of the additional facilities and the amount of loans to Topaz Jewellers guaranteed to date. A breakdown of the manner in which these facilities were apportioned to Topaz Jewellers Limited was also given.
- [65]** The letter of 22 September 2004, appears to have been written in response to a request for a breakdown of the loan facility. Paragraph 2 of that letter indicates that \$21 million dollars was paid to CIBC on behalf of Topaz Jewellers liabilities to CIBC, \$24 Million was paid for the liabilities of Issar Company Limited owed to CIBC and \$7.5 million was paid for the liabilities of Topaz Investments Limited owed to CIBC. Therefore, regardless of how it was agreed that the loans would be guaranteed or secured, they were individual loans to the three named entities to discharge their individual liabilities to CIBC. This was recognised by NCB in its treatment of the repayments and by Suresh and Raju at the time, in their correspondence with NCB.
- [66]** The evidence indicated by paragraph 3 of the letter of 22 September 2004, is that Topaz Jewellers Limited was delinquent in its payments towards the loan amounts paid to CIBC on its behalf and the additional facilities later granted to it. It shows that as at & September 2004 Topaz Jewellers was in debt totalling \$165,438, 219.00 and a further US\$83,097.00.
- [67]** The evidence, which I have accepted as true therefore, is that Topaz Jewellers Limited failed to honour its repayment obligations on the facilities extended to it, which forced Suresh, in his capacity as a guarantor, to settle the outstanding amount, with his payment of \$17,000,000.00.
- [68]** It should be noted that the Defendants have long denied being indebted to NCB. Raju in his affidavit evidence filed on the 31 October 2017, asserted that the sums apportioned to each company were done arbitrarily by NCB, based on the loan to value ratio of the properties which were mortgaged and is not reflective of

the sum each company had borrowed or was responsible for. He said further that, as such, the mortgage was placed on real estate consisting of 81 B King Street, which at the time was owned by Topaz Jewellers Limited, 16 Belmont Road owned by Issar Company Limited and 53B and 54B Abbey Court owned by Topaz Investments Limited. In his Affidavit filed on the 06<sup>th</sup> June 2017, he made the following assertion-

*“During the year 1997 the relationship with CIBC and the Khemlani Group of Companies became strained as a result of the way the Jewellerama and Lord and Lady accounts in the group were being managed, and at this time Suresh was the manager of both Jewellerama and Lord and Lady at the Mall Plaza on Constant Spring Road, and as a result the Khemalani Group of Companies approached National Commercial Bank to take over the accounts held at CIBC in light of the fact that with the compromise agreement which had been arrived at with Mutual Security Bank Limited which became National Commercial Limited they were now the primary bank for the Group and Mutual Security Bank Limited accepted the proposal on condition that they would be secured by the real estate owned by companies in the group which included real estate owned by Topaz Jewellers Limited ...”*

**[69]** Despite the above assertions the Defendants have failed to present any evidence before this court that, substantiates the claims by Raju. It is clear, even in the statements quoted above, that the accounts of the entities in the group were separate and not one single account. Raju has already admitted that Topaz Jewellers Limited was not a part of the group, therefore its account must have, invariably, also been separate. Therefore, the refinancing arrangement to pay off the loans of each entity could not be one payment to cover all, as the accounts were admittedly separate. It is to be noted also, that on 27 March 2006 in Claim No. 2006HCV01127, both Topaz Jewellers Limited and Raju had filed a suit against NCB, challenging the alleged indebtedness by Topaz Jewellers Limited. However, this claim was ultimately struck out by this court on the basis that the limitation period for bringing the claim had elapsed. This court can only make a decision based on the evidence presented and that evidence indicates, that on a balance of probabilities and on the preponderance of the evidence, NCB

apportioned separate banking facilities to three companies; Topaz Jewellers Limited, Issar Company Limited and Topaz Investments Limited. For whatever reason best known to NCB and Suresh and Raju, these facilities were guaranteed by all the entities in the group as well as Suresh and Raju. Collateral was provided by way of mortgages by the three borrowers. Topaz Jewellers Limited failed to honour his portion, forcing Suresh in his capacity as a guarantor to settle the debt with his payment of \$17,000,000.00.

**[70]** It follows from the above that pursuant to the Guarantor agreements and NCB's offer letter dated the 26 May 1997 and the letter dated the 8 September 1997, the parties to the agreement may be broken down into two groups, principal debtors and parties in their capacity as guarantors. They are as follows –

**Principal Debtors:**

1. Topaz Jewellers Limited - \$21,000,000.00;
2. Issar Company Limited - \$24,000,000.00; and
3. Topaz Investments Limited - \$7,500,000.00

**Guarantors:**

- a. Lord and Baron Limited;
- b. Issar Company Limited;
- c. Issar Jewellers Limited;
- d. Topaz Investments Limited;
- e. Topaz Jewellers Limited;
- f. Suresh Khemlani; and
- g. Raju Khemlani.

## Mortgagees

- a. Topaz Jewellers Limited;
- b. Issar Company Limited;
- c. Topaz Investments Limited.

[71] It may also be discerned from the Offer Letters and Guarantees that it was NCB's intention that the facilities granted would not only be separate loans to separate entities but equally that based on the guarantees, the Guarantors would be liable for the total sum lent to all three entities. This is evidenced by the cross guarantees that were given by the various companies wherein clause 2 and 6 reads as follows –

*“2. This Guarantee is to be a continuing Guarantee for the whole amount now due or owing to you or which may hereafter at any time become due or owing to you as aforesaid by the Principal (including any further advances made by you to the Principal during the three calendar months period next hereinafter referred to and all interest and bank charges on and in connection with such further advances) ...*

*6. This Guarantee is to be **applicable to the ultimate balance that may become due to you from the Principal**, and until payment of such balance the undersigned shall not be entitled to participate in any security held or money received by you on account of such balance or to stand in your place in respect of any such money and security.”*

[72] It was also intended that Suresh and Raju would also be liable for any one of the principal's default, as they too stood as guarantors. The effect of the guarantee is that it ensures that the liabilities of all the debtors will be met, it safeguards the bank's money, thus, if one party defaulted on the loan, the guarantors, including Suresh and Raju would be liable. As a result, whilst each borrower was liable for its individual loan, for which security was provided in the form of mortgages over property owned by each, the guarantors agreed to be liable for the total sums. The letters referred to above, the terms of the guarantors, the debentures and

mortgages all show what it was the parties agreed to and what was facilitated by NCB.

**[73]** Counsel for the Defendants submitted that the cumulative effect of the terms of the Debenture, the Guarantee and the mortgages confirm the conclusion that the debt, for all intents and purposes, was one debt, and regardless of any demand on one of the principal debtors or guarantors by NCB, the liability of all the borrowers/principal debtors/guarantors for the repayment of the debt was never compromised. I disagree with counsel's submissions in this regard. It was not a single loan. It was mortgaged as separate loans but guaranteed on the total sum. This may very well be an unusual arrangement, but when men of business, of full mental capacity enter into contractual arrangement, they are to be held to their bargain, whether it is unusual or not. Clause 4 of the debenture provides an explanation for the unusual arrangement, where it refers to the recognition of the parties of the inter-relatedness of the companies' operations.

**[74]** The law dictates that where a party to a loan agreement has defaulted on its payments, forcing the guarantor to clear its debt, the guarantor has a right to pursue a contribution from the principal debtor. In circumstances where there are multiple guarantors and one assumes the liability for the entire debt or for more than his portion, he is entitled to a contribution from the co-guarantors – provided that they are all solvent- if the principal debtor has failed to indemnify him. See the Halsbury's Laws of England, fourth edition Reissue Lord Hailsham of St. Marylebone Volume 20 Buttersworths where at paragraph 228 and 229 respectively, it is stated that -

*“228 - As soon as the guarantor has paid to the creditor what is due to the creditor under the guarantee, he is entitled, unless he has waived them, to be subrogated to all the rights possessed by the creditor in respect of the debt, default or miscarriages to which the guarantee relates.*

*Thus on payment, but not before, the guarantor has the right to the benefit of all the securities (whether known to him or not at the time of he became guarantor) which the creditor has received from the*

*principal debtor before, contemporaneously with or after the creation of the guarantee, and whether or not they existed at the time the guarantee was given”*

*229 - The guarantor’s right to the creditor’s securities on payment of the guaranteed debt is derived from the obligation imposed on the principal debtor of indemnifying the surety, which makes it inequitable for a creditor, by electing not to avail himself of the securities for the guaranteed debt, to throw the whole liability on the guarantor.”*

[75] In Halsbury’s Laws of England, fourth edition at paragraph 238, it is also stated as follows:

*“The implied rights possessed by a guarantor against the principal debtor are not identical with those which the creditor has against the principal debtor, but are somewhat similar to those possessed by one guarantor against another. They are available whenever the guarantee has been undertaken at the principal debtor’s actual or constructive request. Where such a request has been made, the right to indemnity is an incident of the guarantee and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the guarantor under the guarantee as money paid to the use of the principal debtor.”*

The following was highlighted at paragraph 249-250 –

*“A guarantor who has paid the creditor in relief of the principal debtor becomes to that extent a creditor of the principal debtor. The guarantor stands in the place of the original creditor. So, where the guaranteed debt arose under a contract made by deed, the guarantor becomes a specialty creditor of the principal debtor. A guarantor who makes a payment on account of a debt which is a preferential debt in bankruptcy, the administration of an insolvent estate or the winding up of a company is entitled to the same priority as the creditor who would have enjoyed in respect of the amount so paid. A guarantor who has paid the amount secured on the principal debtor’s property is entitled to a lien on it.*

*The guarantor’s right to indemnification is a right to be reimbursed the amount which he has actually paid for the principal debtor with interest, to which he is entitled because of his right to full indemnification from the principal debtor.”*



[76] Halsbury's Laws of England, fourth edition stipulates the following at paragraphs 261 – 264 –

*“A guarantor who has paid more than his share of the common liability is entitled to compel contribution from his co-guarantors, whether they are bound jointly and severally or severally, and by the same or different instruments, and whether he guarantor claiming contribution did or did not know, when he became bound as such, that he was co-guarantor with others.*

*The right to contribution is not founded on contract, but is the result of a general equity arising at the inception of the contract of guarantee on the ground of equality of burden and benefit...*

*In general, a guarantor's right to contribution from his co-guarantors after payment does not arise until the guarantor has paid more than his total proportion or share of the common liability. He may not therefore sue his co-guarantors for a rateable proportion of what he has paid as soon as he has paid any part of the debt. However, where the guaranteed debt is payable by instalments, and each instalment is to be regarded as a separate debt, a guarantor who has paid the whole of one instalment may, it seems, be entitled to recover contribution from his co-guarantors in respect of such payment to the common creditor.*

*A guarantor may also claim contribution if the creditor has accepted his payment, even though not exceeding the guarantor's share of the liability guaranteed, in full and final settlement of the guaranteed liability. In those circumstances, the guarantor has paid all that he can ever be called upon to pay, and there is then an equitable debt for contribution upon which even a bankruptcy petition can be founded. A guarantor who has paid his full share of the guaranteed debt has a right of action against his co-guarantors whenever he pays anything further...*

*The amount recoverable by a guarantor from each co-guarantor is always regulated by the number of solvent guarantors.*

*Where each guarantor is liable for an equal amount, all contribute equally towards the common debt, and, if not equally liable, then proportionately to the amount for which each is liable. Where guarantors are bound by separate deeds and unequal amounts, no one of them can be called upon to contribute beyond the sum for which he is liable under his own particular deed. Interest is recoverable by a guarantor on the sum due to him for contribution from the date when he paid the common creditor...*

*In an action by a guarantor for contribution from his co-guarantors the principal debtor and each of the co-guarantors (or their personal representatives) should all be made parties unless the fact of their insolvency is admitted or clearly proved. Even in such a case the plaintiff has apparently, the right to elect whether he will bring the insolvent co-obligor or his representative before the court.”*

- [77] The principles stated above were also relied on in the case of **Bernard Norman Segal and Pauline Lorna Segal v Raymond John Rattle Freddie Jacob Ezekiel Ninkiel Property Company Limited**, unreported, (judgment delivered 11 April 1991) where Nicholls J stated at page 2 that –

*“A right of contribution between co-sureties is well established. The law is conveniently summarized in Snell's Principles of Equity, 29th edition, at page 475:*

*“Where there are two or more sureties for the same debt, and one of them pays the whole debt or more than his proportion of it, he has a right to contribution from his co-surety or co-sureties if he cannot obtain indemnity from the principal debtor.*

*(a) Right independent of contract. This right of contribution ‘is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify.’*

- [78] The case of **Hay v Carter** [1935] Ch 397 is also instructive, as the English Court of Appeal made the following point that:

*“When a surety sues his co-sureties for contribution he must make the principal debtor a party to the action unless the principal debtor's insolvency is proved or can be reasonably inferred by the Court from the facts of the case.”*

- [79] In this case I have found that the principal debtor for whom the payment by Suresh was made under the guarantee was Topaz Jewellers Limited. I am cognizant that it may appear at odds to say, the debt was individual but the guarantee was total, but the guarantee is to pay on the balance. The balance paid for by Suresh was that of Topaz Jewellers Limited.

- [80] Counsel for the Claimant advanced two possible options as to how this matter may be dealt with, firstly that Raju should bear the responsibility for refunding the

full amount of the monies spent by Suresh (on the basis of lifting the corporate veil to find Raju and Topaz Jewellers Limited were one and the same) or secondly, the \$17,000,000.00 should be apportioned in equal shares between all co-sureties. Counsel for the Defendants maintain that as Topaz Jewellers Limited proportionately bore the brunt of the debt, as distinct from the ancillary defendants, it was entitled to a contribution from its co-guarantors, who were, like Topaz Jewellers Limited, also principal debtors.

**[81]** Raju has on several occasions admitted that approximately \$9,600,000.00 was repaid to settle Topaz Jewellers Limited's portion of the loan and that the sale of the property at 81 King Street for \$37,000,000.00 was applied to Topaz Jewellers Limited's Loan. In his estimation, these sums are an adequate contribution from Topaz Jewellers Limited. However, as shown by counsel representing Suresh, Topaz Jewellers Limited principal indebtedness to NCB was \$32,000,000.00 and US\$40,000.00. This \$32,000,000.00 is derived at by adding all the local currency amounts detailed in the letter dated the 8<sup>th</sup> September 1997. That is \$21,000,000+\$6,500,000.00+\$4,500,000 = \$32,000,000.00. Topaz Jewellers portion of the loan went into default and as a consequence, default interest was applied and compounded in accordance with the terms and conditions set out in the letter dated the 8 September 1997, which was signed and accepted by the Defendants on the 12 September 1997. In this regard, I agree with counsel for the claimant's submissions that, even if \$9,600,000.00 had been repaid to NCB by Topaz Jewellers Limited, that amount could not discharge the debt, unless this was expressly agreed. Likewise, following the sale of the 81b King Street property for \$37,000,000.00 in 2006, when the proceeds of sale were applied to Topaz Jewellers Limited indebtedness, it was not sufficient to discharge the debt.

**[82]** Having accepted the demand letters from the bank as proof that the debt was indeed that of Topaz Jewellers Limited, and having accepted, as I have, that Topaz Jewellers Limited, being the principal debtor went into default, I cannot give any credence to the position advanced by Counsel for the defendants, that Topaz Jewellers Limited is entitled to a contribution from the co-debtors.

**[83]** I have also taken into account the letters referred to in Raju's affidavit filed the 31 October 2017. These are the letters dated the 10 April 2000 and the 13 September 2010 which evidences the fact that there were instances where Topaz Investments Limited was also indebted to the bank. Raju in his affidavit filed the 31 October 2017 stated that Topaz Investments Limited owed the bulk of the debt and was consistently in arrears with payments and that the income tax returns of the company do not support the payments allegedly made. However, whilst this evidence shows that there were instances where Topaz Investments Limited was also in arrears, the evidence of the state of affairs prior to and at the time the release and discharge was issued is important. The Release and Discharge was issued on the 10 May 2013, the same day Suresh had written a manager's cheque for the sum of \$17,000,000.00 to settle the debt. According to NCB's letter of the 6 December 2012 and by letter dated the 26 April 2013, Suresh had offered to pay the sum of \$17,000,000.00 in full and final settlement. It is to be noted that NCB's letter highlighting Topaz Investments Limited indebtedness pre-dates the letter of 6 December 2012 and Suresh's offer to settle. The reasonable inference to be drawn from these letters is that no reference is made of Topaz Investments Limited in these letters because at that time Topaz Investments Limited arrears had been settled and at this point the only account that was hindering the issuing of the Release and Discharge was that of Topaz Jewellers Limited.

**[84]** In light of the above, I believe the second course of action advanced by counsel for the claimant should be adopted, that is, the \$17,000,000.00 should either be repaid by Topaz Jewellers Limited or be apportioned in equal shares between all co-sureties. Primarily, Topaz Jewellers Limited being the principal debtor in arrears, should have been first pursued by Suresh, followed by the co-sureties, if Topaz Jewellers Limited was insolvent and unable to pay.

**[85]** Given the evidence from Raju, which I accept as true, that Topaz Jewellers Limited is insolvent, having never traded and having lost its only asset, in

keeping with the law of guarantees, Suresh would have to pursue all the co-guarantors, not only Raju, provided that they are all solvent.

- [86] Lord Justice Scarman in **Owen v Tate** [1976] QB 402 outlined the basis on which a court will determine whether one party is entitled to be indemnified by another, due to that party's payment of the other's debt. Scarman LJ considered two general rules. The first general rule, at page 406 of the judgment, being: "**...If the payment is regarded by law as being voluntary, it cannot be recovered.**" And the second general rule, at page 407 of the judgement, being: "**...one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter**". (My emphasis). Scarman LJ went on to state, at page 407, as follow:

*"When one turns to the second general rule, namely, the rule that where a person is compelled by law to make a payment for which another is primarily liable he is entitled to be indemnified, notwithstanding the lack of any request or consent, one again finds that the law recognises exceptions. This rule has been subjected to very careful treatment in Goff and Jones, The Law of Restitution (1966), p. 207. The authors say, after stating the rule in general terms:*

*'To succeed in his claim, however, the plaintiff must satisfy certain conditions. He must show (1) that he has been compelled by law to make the payment; (2) that he did not officiously expose himself to the liability to make the payment; (3) that his payment discharged a liability of the defendant; and (4) that both he and the defendant were subject to a common demand by a third party, for which, as between the plaintiff and the defendant, the latter was primarily responsible.'*"

- [87] Scarman LJ opined further at pages 409 – 410 of his judgment that -

*"For myself, I think the reconciliation (if that is what is needed) of the two general rules is easily achieved. I doubt whether it is necessary to consider in any case, and certainly I do not think it necessary to consider in this case, at what moment the volunteer guarantor becomes compellable at law to make the payment on behalf of the principal debtor. **A right of indemnity is a right of restitution. It can arise, as the cases reveal, notwithstanding***

**the absence of any consensual basis. For instance, in *Moule v. Garrett* (1872) L.R. 7 Ex. 101 an original lessee, who was of course in privity of contract with his lessor, was compelled to pay for breach of a repairing covenant by a subsequent assignee. He was held to be entitled to an indemnity notwithstanding the absence of any privity of contract between him and the subsequent assignee.**

*In the two cases to which I have already referred, *Exall v. Partridge*, 8 Term Rep. 308 and *England v. Marsden*, L.R. 1 C.P. 529 the courts were faced with the owner of goods who had deposited them on the land of another, and that other had failed to pay either rates or rent, with the result that a distraint was levied, and the owner in order to release his goods paid their value to the distrainer. In *Exall v. Partridge* Lord Kenyon C.J. was at pains to discover in the circumstances an implied request or authority from the mere fact that the goods were on the land with the consent of the occupier. In *England v. Marsden* no such consent was spelt out by implication by the court. But in *Edmunds v. Wallingford*, 14 Q.B.D. 811 Lindley LJ said it should have been. **We can, therefore, take that class of case as an illustration of where the law will grant a right of indemnity notwithstanding the absence really of any consensual basis.** In the *Brook's Wharf* case a warehouseman who paid import duties for which his customer—the owner of the goods—was primarily liable, and did so because of an obligation imposed by statute and without any prior request from the owner of the goods, was also held to be entitled to an indemnity.*

*These cases, to my mind, amply support the proposition that a broad approach is needed to the question whether in circumstances such as these a right of indemnity arises, and that broad approach requires the court to look at all the circumstances of the case. **It follows that the way in which the obligation came to be assumed is a relevant circumstance.** If, for instance, the plaintiff has conferred a benefit upon the defendant behind his back in circumstances in which the beneficiary has no option but to accept the benefit, it is highly likely that the courts will say that there is no right of indemnity or reimbursement. **But (to take the other extreme) if the plaintiff has made a payment in a situation not of his own choosing, but where the law imposes an obligation upon him to make the payment on behalf of the principal debtor, then clearly the right of indemnity does arise.** Not every case will be so clear-cut: the fundamental question is whether in the circumstances it was reasonably necessary in the interests of the volunteer or the person for whom the payment was made, or both, that the payment should be*

*made—whether in the circumstances it was "just and reasonable "that a right of reimbursement should arise."*  
(Emphasis added).

[88] There is sufficient evidence to show that Suresh is entitled to step into the shoes of the former creditor NCB and seek indemnification from all solvent co-guarantors, as stipulated in **Owen v Tate**. I find that Suresh has satisfactorily proven that:

1. He was compelled by law to make the payment;
2. That he did not officiously expose himself to the liability to make the payment;
3. That his payment discharged Topaz Jewellers Limited liability; and
4. That both he and Topaz Jewellers Limited were subject to a common demand by a third party, for which, Topaz Jewellers Limited was primarily responsible.

[89] Therefore, in keeping with the law relating to guarantors, an assessment will now be conducted to establish which of the co-guarantors are solvent and as such should reimburse Suresh a portion of the money that he has spent. The evidence presented to this court reveals that; Topaz Investments Limited owns the portion of the Manor Center that has not been disposed of, Issar Company Limited owns the property at 16 Belmont Road and that it is tenanted and Lord and Lady Limited and Jewellerama have no assets and is not trading. No evidence has been presented relating to whether or not Raju is insolvent, neither is there any information in the evidence that suggests that he is. Therefore, the following co-guarantors are equally responsible for reimbursing Suresh with a portion of the money that he has spent; Topaz Investments Limited, Issar Company Limited and Raju. The \$17,000,000.00 is to be divided amongst these three guarantors including Suresh, thus each party is responsible for the sum of \$4,250,060.00, as well as all interest that has accrued.

## The Ancillary Fixed Date Claim

[90] I have considered that on Suresh's claim, Topaz Investments Limited and Issar Company Limited were not made parties. However, they are properly placed before this court by virtue of the Defendants' Ancillary Claim where the orders sought included, *inter alia* –

- a. A Declaration that the sum of \$17,000,243.00 purported to have been paid by the Claimant in respect of the 1<sup>st</sup> Defendant's debt was paid in respect of the combined debt of the 1<sup>st</sup> Defendant/1<sup>st</sup> Ancillary Claimant along with the 2<sup>nd</sup> Defendant Ancillary Defendant, the 3<sup>rd</sup> Ancillary Defendant and the 4<sup>th</sup> Ancillary Defendant and for the benefit of the 1<sup>st</sup> Ancillary Defendant who was a party to the loan agreement together with the 1<sup>st</sup> Defendant/1<sup>st</sup> Ancillary Claimant and the 2<sup>nd</sup> Ancillary Claimant and the 2<sup>nd</sup> Ancillary Defendant for which the Claimant and the 2<sup>nd</sup> Defendant acted as Guarantors.
- b. An order that the 2<sup>nd</sup> Defendant be indemnified by the principal debtors being the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Ancillary Defendants herein in respect of all sums paid in respect of the debt of the Ancillary Defendants, which debts the 2<sup>nd</sup> Defendant along with the Claimant signed on behalf of the said debtors as Guarantor.

[91] As has already been found above, the evidence as presented is that the principal debtors were Topaz Jewellers Limited, Topaz Investments Limited and Issar Company Limited, and that Topaz Jewellers was the sole company that failed to clear its arrears with NCB, which resulted in Suresh paying \$17,000,000.00 to settle the debt. In this regard, there is no basis for granting the orders and declarations as sought in the Ancillary Claim. Raju is not entitled to the indemnity sought as the \$9,600,000.00 and the \$37,000,000.00 which was paid went towards the principal sum that was borrowed and was insufficient to settle the debt itself. Thus in keeping with the spirit of the guarantee agreement, Raju along with the solvent ancillary defendants, Topaz Investments Limited and Issar Company Limited – which, by virtue of Raju's actions are properly before the court- are responsible for reimbursing Suresh with a portion of the \$17,000,000.00.



## **Conclusion**

**[92]** Therefore, Suresh succeeds on his claim to the extent that he is entitled to a reimbursement of a portion of the money he has spent. However, the Defendants brought by him is not the sole parties who are responsible for reimbursing him with the monies spent. All solvent co-guarantors are responsible to reimburse Suresh.

**[93]** The Defendants fail on their ancillary claim, as the evidence shows that the principal debtor in arrears was Topaz Jewellers Limited and that the money paid by the Topaz Jewellers Limited went to its own principal debt. As such Raju in his position as a guarantor is responsible - along with all other solvent guarantors - for reimbursing Suresh.

**[94]** As this matter could not be determined summarily, and a full scale trial was inevitable, the application for summary judgment and striking out fails.

## **Disposition**

**[95]** As a result of my findings and conclusion, I make the following orders:

- i) The claimant's application for summary judgment and for striking out is dismissed, with costs to the defendants to be agreed or taxed.
- ii) Judgment for the claimant on the claim and ancillary claim. The claimant is entitled to 75% cost, to be taxed, if not agreed.
- iii) The court further declares and orders that:
  - (a) Suresh Khemlani is entitled to recover from co-guarantors, (the principal debtor being insolvent), a portion of the payment of \$17,000,000.00 paid by him to NCB, as Guarantor on a pro-rata basis.
  - (b) Raju Khemlani, Topaz Investments Limited and Issar Company Limited do pay to Suresh Khemlani the sum of \$4,250,000.00, with interest at 12 % from 10 May 2013 to 20 December 2018 and 6% thereafter until payment.