IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal filed under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

SC (CHC) Appeal No. 24/2008
HC Colombo Case No: HC (Civil) 7/2006(1)

Sampath Bank Limited,
No. 110, Sir James Peiris Mawatha,
Colombo 2.

PLAINTIFF

Vs

1. Gamini Seneviratne

2. Sujith Nishantha Senevirathne

Both at Salawa Road,
Udahamulla, Nugegoda.

DEFENDANTS

And now between

1. Gamini Seneviratne

2. Sujith Nishantha Senevirathne

Both at Salawa Road,
Udahamulla, Nugegoda.

DEFENDANTS – APPELLANTS

Vs

Sampath Bank Limited,
No. 110, Sir James Peiris Mawatha,
Colombo 2.

PLAINTIFF – RESPONDENT

Before: **Murdu N. B. Fernando, PC, CJ**
Yasantha Kodagoda, PC, J
Arjuna Obeyesekere, J

Counsel: Faisz Musthapha, PC, with Thushani Machado for the 1st and 2nd Defendants – Appellants

Pununuwan Wickremasekera with Chinthaka Fernando for the Plaintiff – Respondent

Argued on: 28th September 2022

Written Submissions: Tendered on behalf of the 1st and 2nd Defendants – Appellants and the Plaintiff – Respondent on 14th December 2022

Decided on: 8th July 2025

Obeyesekere, J

This is an appeal arising from a judgment delivered by the High Court of the Western Province holden in Colombo [the Commercial High Court]. By the said judgment, the Commercial High Court held that the Defendants – Appellants [**the Defendants**] are liable, in their capacity as sureties/guarantors, for the repayment of two loans granted by the Plaintiff – Respondent [**the Plaintiff**] to M/s Seneviratne Trading Company (Private) Limited [the Principal Debtor].

The submissions of the learned President's Counsel for the Defendants give rise to two questions of law. The first is, where the Principal Debtor is in default, whether the guarantee that the Defendants have executed in favour of the Plaintiff [**P11**] require the Plaintiff to proceed against the Principal Debtor in the first instance, and if so, whether the Plaintiff can proceed against the Defendants only after the Principal Debtor has been excussed.

The second question is whether Clause 18 in the guarantee P11, by which the Defendants had renounced their right to raise certain defences available to a surety including the defence that the Principal Debtor be pursued and excussed [*beneficium ordinis seu excussionis*], is valid and enforceable in terms of the law. The basis for this second question of law is twofold. The first is that Clause 18 does not contain an express or specific renunciation of the defence of *beneficium ordinis seu excussionis.*

The second is that Clause 18 only contains a '*general renunciation*' of the said defence, and as the Defendants were not made aware of the effect and/or consequence of such renunciation by the Plaintiff at the time P11 was executed, such a general renunciation is not valid and enforceable. Although it may appear that these two bases are but two sides of the same coin, they are distinct questions of law and must be raised and addressed separately.

Credit facilities granted to the Principal Debtor

The Plaintiff is a licensed commercial bank. The Principal Debtor, a company registered under the Companies Act, No. 17 of 1982 as amended had been a long standing customer of the Plaintiff, and had availed itself of credit facilities running into large sums of money. The 1st Defendant Gamini Seneviratne, in his capacity as Chairman and the 2nd Defendant, Sujith Nishantha Seneviratne in his capacity as a Director of the Principal Debtor had transacted with the Plaintiff on behalf of the Principal Debtor.

The Principal Debtor had faced financial difficulties in 2003 and had requested the Plaintiff to re-schedule two loans granted to it. This request had been acceded to by the Plaintiff. Accordingly, by an offer letter dated 3rd September 2003 [**P5**], the Plaintiff had agreed to reschedule the existing credit facilities granted to the Principal Debtor under two new credit facilities.

Under the first, the capital sum was fixed at Rs. 211,506,290 with payment to be made in equated monthly instalments during a period of 4 years. The repayment of the loan was to be secured *inter alia* by a primary mortgage over immoveable property and a promissory note signed by the Defendants. The second credit facility was in a sum of Rs. 8,942,267 to be repaid within a period of 15 years. Repayment was to be secured by a promissory note signed by the Defendants and the hypothecation of stock in trade of the Principal Debtor.

In their capacity as Chairman and Director of the Principal Debtor, the Defendants had acknowledged the receipt of the said offer letter P5 and had placed their signatures on P5 signifying their agreement to the terms of the said offer letter. The Principal Debtor and the Plaintiff had accordingly entered into two separate loan agreements [**P6** and **P7**] on 25th February 2004 in respect of each of the above two credit facilities, with the two Defendants signing on behalf of the Principal Debtor.

Guarantee P11 signed by the Defendants

The Plaintiff had stipulated in the said offer letter P5 that the two term loans shall be further secured by a joint and several guarantee of the Directors of the Principal Debtor, that being a reference to the Defendants, in a sum of Rs. 220.5 million which was the aggregate of the monies lent and advanced under the two loan agreements P6 and P7. In addition to acknowledging the necessity to execute the said guarantee by placing their signature at the bottom of P5, the consent of the Defendants to guarantee the said credit facilities is further reflected in the loan agreements P6 and P7 signed by the Defendants.

On 25th February 2004, the Defendants had executed, (a) a hypothecation bond [**P10**] as required by the loan agreement P7, and (b) the joint and several guarantee P11 as required by the loan agreements P6 and P7. The releasing of the monies under P6 and P7 had however been delayed as a result of an application being filed to wind up the Principal Debtor. But with the said application having been withdrawn, the Plaintiff had released the said sums of money on 20th July 2004, as evidenced by the statement of account [**P11a**] and the proceeds thereof had been utilised to settle the previous loans granted to the Principal Debtor.

Default by the Principal Debtor and action in the Commercial High Court

The Principal Debtor had defaulted payment after having repaid part of the monies due under P6 and P7. The reason for the default on the part of the Principal Debtor appears to have been triggered by a further application made in August 2004 to wind up the Principal Debtor. The order for winding up had been made by the District Court of Mount Lavinia on 3rd January 2005. Having credited the proceeds realised from the liquidation of the securities offered under P6 and P7 towards reducing the capital, a sum of Rs. 164,723,061 under P6 and a sum of Rs. 8,645,267 under P7 were due as at 19th December 2004, together with interest.

By letters dated 10th May 2005 [**P14** and **P15**], the Plaintiff, acting in terms of the guarantee P11 had demanded from the Defendants the repayment of the aforementioned outstanding sums of money. As the Defendants neither responded to the said letters of demand nor repaid the outstanding sums of money or part thereof,

the Plaintiff filed action against the Defendants in the Commercial High Court on 18th January 2006 seeking to recover the following sums of money:

(a) Under the first loan agreement P6, a sum of Rs. 164,723,061 as capital, a further sum of Rs. 30,589,783 being the interest outstanding as at 20th December 2005, and interest from that date at the rate of 10% per annum on the capital outstanding; and

(b) A sum of Rs. 8,645,267 as capital under the second loan agreement P7.

Answer, Issues and Judgment

In their answer, the Defendants denied most of the above factual averments and took up the position that the plaint had not disclosed a cause of action against them, and that the Principal Debtor should have been named as a party to the said action. With the parties having admitted that an order to wind up the Principal Debtor has been made by the District Court, the Plaintiff had raised sixteen issues while the Defendants had raised the following four issues:

"17. චිත්තිකරුවන්ට විරුද්ධව නඩු නිමිත්තක් පැමිණිල්ලෙන් අනාවරණය වේද?

18. සිවිල් නඩු විධාන සංග්‍රහයේ අනුගම්‍ය පුතිපාදනයන්ට, විශේෂයෙන් 40, 43, 45 සහ 46 වගන්තියන්ට අනුකූල නොවන නිසා මෙම පැමිණිල්ල නීතියෙන් අයහපත්ද?

19. කෙසේ වෙතත්, උද්දේශිත ප්‍රධාන ණයකරු වන "සෙනෙවිරත්න ට්‍රේඩිං කම්පනි (ප්‍රයිවට්) ලිමිටඩ්" නම් ආයතනය පාර්ශ්වකරුවෙකු නොකොට පැමිණිලිකරුට මෙම නඩුව චිත්තිකරුවන්ට එරෙහිව පවත්වා ගෙන යා හැකිද?

20. ඉහත සඳහන් කල විසඳිය යුතු ප්‍රශ්න එකකට හෝ කිපයකට චිත්තිකරුවන්ගේ වාසියට පිළිතුරු සැපයෙන්නේ නම් පැමිණිලිකරුට මෙම නඩුව පවරා පවත්වා ගෙන යා හැකිද?"

Although the Defendants did not raise before the Commercial High Court any issue/s with regard to the aforementioned two questions of law raised before this Court, the learned President's Counsel for the Defendants submitted that both questions are pure questions of law and therefore can be raised for the first time in appeal. I am not entirely in agreement that the said questions are *pure questions of law* and that they satisfy the test laid down in **Dona Podi Nona Ranaweera Menike v Rohini Senanayake** [(1992) 2 Sri LR 180], **Leechman & Company Limited v Rangalla Consolidated Limited**

[1981] 2 Sri LR 373], **Sirimewan Maha Mudalige Kalyani Sirimewan v Herath Mudiyanselage Gunarath Menike** [SC Appeal 47/2017; SC minutes of 10th May 2024] and referred to in **Seeni Pakeer Abdul Raheem and another v Seeni Pakeer Hayath Mohammed and others** [SC Appeal No. 214/2014; SC Minutes of 19th July 2024] for determining if a question is a pure question of law. Be that as it may, one of the matters that I shall consider during the course of this judgment is whether in view of the nature of the defence of *beneficium ordinis seu excussionis* the failure to raise the first question of law at the first available opportunity [*initio litis*] is fatal to the case of the Defendants.

Pursuant to the raising of issues, the Plaintiff had led the evidence of Harsha Sakalasuriya, an Executive Officer of the Plaintiff, while the 2nd Defendant gave evidence on behalf of the Defendants. By its judgment delivered on 12th February 2008, the Commercial High Court held with the Plaintiff and granted the relief prayed for in the plaint. Aggrieved, the Defendants filed this appeal on 7th April 2008 seeking to set aside the said judgment of the Commercial High Court.

Suretyship and Guarantee

I would at the outset briefly identify the essence of a suretyship or guarantee by reference to Sri Lankan, English and South African texts.

K. Balasingham in **Institutes of the Laws of Ceylon** [The Law of Obligations, Volume 2 (Part I) (1913), pages 253 and 254] citing Voet and Grotius states that, "*The engagement of a surety is a contract, by which a person obliges himself on behalf of a debtor to a creditor for the payment of the whole or part of what is due from such debtor and by way of accession to his obligation*."

According to **Law of Guarantees** [Geraldine Andrews and Richard Millett, 6th Edition 2011, pages 1 and 2]:

> "*Suretyship is the generic term given to contracts by which one person (the surety) agrees to answer for some existing or future liability of another (the principal) to a third person (the creditor), and by which the surety's liability is in addition to, and not in substitution for, that of the principal…*

Contracts of suretyship fall into two main categories: contracts of guarantee and contracts of indemnity. Guarantees and indemnities have many similar characteristics, and similar rights and duties arise between the parties. Consequently, it is not unusual to find the term 'guarantee' used loosely to describe a contract which is in reality an indemnity (and vice versa)".

In **Vossloh AG v Alpha Trains (UK) Ltd** [(2010) EWHC 2443 (Ch)] it was observed that:

"A contract of suretyship is in essence a contract by which one person, the surety, agrees to answer for some existing or future liability of another, the principal (or principal debtor), to a third party, the creditor, and by which the surety's liability is in addition to, and not in substitution for, the liability of the principal." [paragraph 21]

"A contract of guarantee, in the true sense, is a contract whereby the surety (the guarantor) promises the creditor to be responsible for the due performance by the principal of his existing or future obligations to the creditor if the principal fails to perform them or any of them." [paragraph 23]

In an indemnity, on the other hand, and generally speaking, a primary liability would fall upon the surety, with liability being wholly independent of any liability which may arise as between the principal and the creditor.

In **Caney's The Law of Suretyship** [5th Edition, 2002, page 27] the author describes a suretyship in the following manner:

"*Suretyship is an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor) primarily, that the principal debtor, who remains bound, will perform his obligation to the creditor and secondarily, that if and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor*.".

The author thereafter proceeds to point out [supra; page 32] that the concepts of suretyship and guarantee have been referred to interchangeably in its 1st and 2nd editions but had stated that this usage has been subjected to growing and justified criticism. The author thereafter discusses the differences between a guarantee and a

surety bond and points out that "*it remains difficult to tell them apart particularly where the event guaranteed is the performance of a contractual obligation.*"

A similar view has been expressed in **Vossloh AG v Alpha Trains (UK) Ltd** [supra; paragraph 20] in the following manner:

> "*Contracts of suretyship … are an area of law bedevilled by imprecise terminology and where therefore it is important not to confuse the label given by the parties to the surety's obligation (although the label may be indicative of what the parties intend) with the substance of that obligation. Because the parties are free to make any agreement they like, each case must depend upon the true construction of the actual words in which the surety's obligation is expressed. This involves 'construing the instrument in its factual and contractual context having regard to its commercial purpose', a task which the court approaches 'by looking at it as a whole without any preconception as to what it is.'*"

The above position has been clearly laid down in **People's Bank v Fawzia Nizam and others** [SC (CHC) Appeal No. 5/2007; SC Minutes of 2nd August 2024] where Janak De Silva, J stated that, "*Accordingly, the true nature of the relationship between the Appellant and the Respondents and their respective rights and liabilities must be determined by an examination of the Guarantee. In construing the Guarantee, we must not apply to it merely technical rules but must interpret it so as to reflect what may fairly be inferred to be the parties' real intention and understanding as expressed by them in the agreement [Peerylease Ltd. v. Imecar AG [(1988) 1 WLR 463 at 469H-470A]. It must be construed by looking at it as a whole without preconceptions as to what it is.*"

Thus, irrespective of the terminology used, the essence of the arrangement is that the surety gives an undertaking to a third party [creditor] on behalf of another party [debtor] that it will perform the obligations owed by the debtor to the creditor in the event of the debtor not fulfilling its obligations to the creditor.

P11 – Guarantee

Thus, while the nomenclature is not determinative of its true character, it is noted that P11 which is titled 'Guarantee', identifies Seneviratne Trading Company (Private) Limited as the debtor, and goes on to record in page 3 as follows:

> *"In consideration of the Bank at our request agreeing* ***not to require immediate payment of such of the moneys*** *herein mentioned as may be now due and/or in consideration of any moneys herein mentioned which the Bank may hereafter advance or pay or which may hereafter become due, we the undersigned*
>
> *(a) Gamini Seneviratne*
> *of Shalawa Road, Udahamulla, Nugegoda.*
>
> *(b) Sujith Nishantha Seneviratne*
> *of Shalawa Road, Udahamulla, Nugegoda.*
>
> *hereby agree (to) pay to the Bank in Colombo the moneys herein mentioned* ***ten days after demand in writing*** *is made on us*
>
> *Provided always that the total liability ultimately enforceable against us under this guarantee shall not exceed Rupees Two Hundred and Twenty Million Five Hundred Thousand Only (Rs. 220,500,000/-), together with all interest thereon computed from the date on which such demand in writing shall have been made by the Bank and at such rate or rates as may be fixed or determined from time to time by the General Manager of the Colombo office of the Bank or other officer duly authorized in that behalf from time to time and such further sums by way of handling charges, commitment charges, Bankers' charges and expenses as shall accrue all in accordance with the bank's usual course of business and also all legal costs, charges and expenses incurred by the Bank*."[emphasis added]

Two things are clear from the above provision. The first is that the Defendants have undertaken to honour the liabilities of the Principal Debtor under and in terms of P6 and P7. The second is that the Defendants have acknowledged that while *immediate payment of such of the moneys* is not required, they are obliged to pay within *ten days after [the] demand in writing*. This provision has a direct nexus to the first question of

law raised as to whether the Plaintiff cannot proceed against the Defendants until and unless the Principal Debtor has been excussed.

Evolution of the principle of excussion

Bearing in mind that both questions of law revolve around excussion and that Clause 18 of P11, to which I shall advert to later, contains a renunciation on the part of the Defendants of the privileges or defences that a surety is entitled to, I shall briefly refer to the evolution of the principle of excussion under Roman Law culminating with its position under the Roman Dutch law.

In **Millman and another v Masterbond Participation Bond Trust Managers (Pty) Limited (under curatorship) and others** [1997 (1) SA 113 (C)], the Cape Provincial Division has traced the roots of excussion as follows:

> *"In Roman law – as Professor R Zimmermann explains in The Law of Obligations, Roman Foundations of the Civilian Tradition at 130:*
>
> > *'(T)hroughout the classical period and up to the time of Justinian, the debtor and his surety were liable on an equal footing and not the one only if satisfaction could not be obtained from the other: in other words, the creditor was free to choose whom of the two he wanted to sue first. And yet, this statement has to be qualified to a certain extent: it is correct, as far as the strictly legal side of things was concerned; in actual practice, however, the surety was what he was (arguably) only intended to be, namely a subsidiary debtor.'*
>
> *The Emperor Justinian went further and, by an enactment contained in Novellae 4,1 introduced the so-called benefit of excussion, or order (beneficium excussionis vel ordinis), which enabled a surety to insist that the creditor sue the principal debtor first before seeking to recover from him. As Professor Zimmermann (op cit at 129) points out, 'with this enactment the liability of the surety became subsidiary'. Roman law appears to have recognised the power of a surety, by pact, to renounce the benefits to which he was entitled:*

De Groot deals with the matter in a passage in his Inleiding tot de Hollandsche Rechtsgeleertheyt 3.3 27-29, which reads as follows (Lee's translation at 319):

> *'27. By a law of the Emperor Justinian a surety acquired the right to keep the creditor at arm's length until he had excussed the principal debtor; provided that, in case the principal debtor is outside the jurisdiction, the surety shall have a reasonable time appointed him to bring the principal debtor before the Court; and in case after excussing the principal debtor the creditor's claim is not entirely satisfied he may then have recourse against the surety.*
>
> *29. Both these benefits, viz under the law of Justinian and under the law of Hadrian, do not avail those who, **with full knowledge**, have renounced them, or who have neglected to plead them. '*

<u>The present position on excussion</u>

In **Wessels' Law of Contract in South Africa** [Volume II, 2nd ed., 1951], the author has set out the present position as follows [pages 1011 – 1014]:

> "*When the debtor is in default the creditor is entitled to demand payment from the surety.*
>
> *... the mere default of the debtor does not as a rule entitle the creditor to proceed against the surety. **The principal debtor must not only first be sued, but he must also be excussed, and only after this can the surety be called upon to pay the balance due.** Hence, if a surety is sued before the principal debtor, he may advance as an exception or defence the beneficium ordinis seu excussionis – that the principal debtor be first excussed before payment is demanded of the surety*." [emphasis added]

It has been pointed out in **Wille's Principles of South African Law** [9th edition, 2007, page 1023] that, "*The surety **may claim** that the principal debtor be first 'excussed', i.e. that the creditor, before suing the surety, exhaust the creditor's legal remedies against the principal debtor for performance or payment, up to execution against the principal debtor's property. [Grotius 3.3.27; Voet 46.1.14].*" [emphasis added]

In **Maasdorp's The Institutes of Cape Law** [Volume I, The Law of Obligation, at page 359], it is stated that:

> "*The benefit of excussion, as known to our law, is the right of exception to which a security is entitled, who is being sued before the principal debtor, to demand that the principal shall first be sued and excussed; [Voet 46:1:14; Grotius 3:3:27] and, where there are more than one principal debtor, that all shall be excussed. It further entitles the surety, where an obligation has been secured as well by the giving of sureties as by a mortgage on immovable property, to claim that the immovable property shall also be excussed before he is himself proceeded against*."

The following useful description of the defence of *beneficium ordinis seu excussionis* is found in **Caney's The Law of Suretyship** [supra; at page 119]

> "*The benefit of excussion, or discussion as it is sometimes called (beneficium ordinis seu excussionis), is the right of the surety against the creditor to have him proceed first against the principal debtor with a view to obtaining payment from him, if necessary by execution upon his assets, before turning to the surety for payment of the debtor or of so much of it as it remains unpaid.*
>
> *The word 'ordinis' in the term beneficium ordinis seu excussionis relates to the order in which the creditor may pursue his remedies, first against the principal debtor and thereafter against the surety. That the creditor is to excuss the assets of the debtor before turning to the surety is expressed in the word 'excussionis,' which sometimes appears as 'discussionis'.* "

The resultant position then is that under the Roman Dutch law, the creditor's first recourse is to the principal debtor, and the surety becomes liable only once the principal debtor has been excussed. Where that has not been done, and subject to certain limitations, the surety shall be entitled to take up the defence that the principal debtor be excussed prior to proceeding against the surety. What is significant however is that this defence can be renounced by the surety. It is the legal basis of such renunciation and whether the renunciation as contained in Clause 18 [and Clause 19] in P11 is valid and enforceable that forms the basis for the aforementioned second question of law.

Winding up of the principal debtor

In **Wille's Principles of South African Law** [supra; page 1020], the author has referred to three instances where the defence of *beneficium ordinis seu excussionis* shall not succeed.

The first is, if the principal debtor's estate has been sequestered, or likewise, where the principal debtor, being a company, has been liquidated on the ground that it is unable to pay its debts. I have already referred to the fact that an order for the winding up of the Principal Debtor has been made by the District Court of Mount Lavinia prior to the filing of this action in the Commercial High Court. The question of pursuing and excussing the principal debtor therefore does not arise, and this appeal is liable to be rejected, on that ground alone.

Dilatory plea and *litis initio*

The second instance cited in **Wille's** where the defence would shall not succeed, based on the works of Grotius and Voet, is where in an action by the creditor against the surety, the latter fails to plead the benefit before *litis contestatio* – i.e., before the close of the pleadings.

K. Balasingham in **Institutes of the Laws of Ceylon** [supra; pages 262-263] has stated as follows:

> "*The beneficium ordinis seu excussionis whereby a surety may throw the creditor, when he demands payment, first upon the goods of the principal debtor. This privilege, however is in general expressly renounced by the surety in the deed itself, and it is also held to be tacitly renounced when he constitutes himself surety as principal.*
>
> *A surety who has not renounced the benefit, can take the exception when sued.* ***The exception is of the class of dilatory exceptions and only tends to put off the action of the creditor against the surety until after the time of discussion****. After the principal debtor has been excussed, recourse may be had against the surety for any balance that may not have been recovered from the principal.* ***The exception ought to be taken before the litis contestatio.***

> ***The creditor is only obliged to discuss the principal debtor before he proceeds further against the surety, when the surety demands it*** *and* ***opposes the exception of excussion****; therefore, although the creditor has not discussed the principal debtor, his demand and his pursuits against the surety are regular, until the surety opposes the exception.*" [emphasis added]

In **Wijeyewardene v Jayawardene** [19 NLR 449; at page 460] Justice De Sampayo stated that:

> "***The benefit of excussion furnishes only a dilatory plea, and is lost if it be not pleaded before the litis contestatio****, which with us may be for this regarded as taking place on the filing of the answer.* ***The creditor is not wrong in bringing the action against the surety in the first instance****, since he is not supposed to know whether the plea will be taken or not, and consequently* ***the result of a successful plea will be only to suspend further proceedings*** *until the principal debtor is sued and his property discussed."* [emphasis added]

This position is elaborately set out in **Caney's The Law of Suretyship** [supra; page 121] in the following manner:

> "*Although sureties have the benefit of excussion the creditor is not obliged to proceed first against the principal debtor unless the surety avails himself of the benefit; it is a dilatory defence which the surety may elect to set up if the creditor first sues him. If the surety intends to raise the defence, he must do so in initio litis; it is too late to raise it after litis contestatio. It certainly cannot be raised for the first time on appeal.* ***If the surety disputes liability as a surety, denying the very existence of a suretyship contract, he should nevertheless raise in initio litis*** *the plea of non-excussion; … If the defence of non-excussion succeeds, the court may postpone the proceedings pending excussion of the principal debtor or, in a proper case, grant absolution against the creditor*." [emphasis added]

The rationale for this requirement has been explained in **Wessels'** in the following manner: [supra; page 1015-1016]

"The surety's obligation to the creditor is not conditional but an absolute one, and the benefit of excussion is a privilege. It is therefore incumbent on the surety to claim this privilege in limine litis [Voet 46.1.15]. If he fails to do so, he will be condemned to pay, but if he claims the benefit the creditor is bound to excuss. A defendant therefore cannot demand absolution from the instance merely because the plaintiff has not proved that the benefit was renounced. But if the benefit is claimed, the Court may grant absolution.

All our law requires is that the surety shall signify that he intends to avail himself of his privilege.

***It follows from the rule that the exception must be taken initio litis**, that a surety who has not claimed the benefit of excussion in the court of first instance cannot take advantage of it on appeal.*" [emphasis added]

The defence of *beneficium ordinis seu excussionis* is therefore not an absolute prohibition that prevents a creditor from pursuing a surety prior to pursuing the principal debtor. It is only a dilatory plea, and must therefore be raised at the earliest stage of an action. It being so, it is clear from the issues raised by the Defendants, to which I have already referred, that the questions of law raised before this Court were not raised before the Commercial High Court.

The first question of law raised by the learned President's Counsel for the Defendants was whether in terms of the law relating to sureties/guarantors and the provisions of the guarantee P11, the Plaintiff was required to proceed against the Principal Debtor in the first instance, and if so, whether the Plaintiff can proceed against the Defendants only after the Principal Debtor has been excussed. Having taken into consideration the matters that I have referred to and provided the order for the winding up of the Principal Debtor had not been made, I am of the view that it was open to the Plaintiff to have filed action against the Defendants without having excussed the Principal Debtor. It was thereafter the responsibility of the Defendants to have taken up *initio litis* the defence of *beneficium ordinis seu excussionis,* which would have enabled the Court to lay by the case until the Principal Debtor had been excussed. The Defendants did not do so and given the fact that the said defence is a dilatory plea, I am of the view that the Defendants cannot raise the first question of law at this stage of the case.

I must perhaps state at this point that the necessity for the Plaintiff to have first proceeded against the principal debtor does not arise where a surety undertakes liability as co-principal debtor, as well. While this is the case in terms of P11 and is a matter that I shall discuss at the end of the judgment, on this basis too, the first question of law must be answered against the Defendants.

Renunciation of the defence of *beneficium ordinis seu excussionis*

This brings me to the third instance cited by **Wille's** where the defence of *beneficium ordinis seu excussionis* shall not succeed. This ground, which too is based on the works of Grotius and Voet, is where the benefit has been renounced by the surety either expressly, or impliedly, **e.g.,** where the surety becomes, or signs the suretyship agreement as 'surety and principal debtor' or as 'surety and co-principal debtor'.

A further situation, which probably can be described as an *implied renunciation*, has been cited by **Wessels'** [supra; page 1019] as follows:

> "*The benefit may, however, be renounced tacitly, but this tacit renunciation must not be confused with a general renunciation.* ***If the circumstances show that the surety must have intended to renounce this particular benefit****, it is as effective a renunciation as if he had done so in express terms (Voet, 46.1.16). If, therefore, it appears from the suretyship bond that its very object was that the creditor should have recourse to the surety the moment the debtor made the default, then the Court will infer a tacit renunciation of the benefit*." [emphasis added]

The obligation on the part of the Defendants in terms of P11 to pay *within ten days after the demand in writing* is evidence of a tacit renunciation and negates the need to excuss the principal debtor prior to proceeding against the Defendants.

I shall now consider if Clause 18, which forms the basis for the second question of law, contains an express and/or general renunciation, as well as whether Clause 18 and/or Clause 19 of P11 and/or the provisions of P11 taken as a whole, amounts to an implied or tacit renunciation of the defence of *beneficium ordinis seu excussionis.*

Clause 18 of P11 and its validity

Clause 18 reads as follows:

> "*We specifically agree that the Bank shall be at liberty either in one action to sue the debtor and us and each any one of us jointly or severally or to proceed in the first instance against me/us only, and further that* ***we hereby renounce the right to claim that the debtor should be excussed or proceeded against by action in the first instance****, and (where this guarantee is given by more than one person) the right to claim that the Bank should divide its claim against us and bring actions against us, each for his portion pro rata, and the right to claim in any action brought against all of us that the Bank should only recover from each of us a pro rata share of the amount claimed in that action, and all other rights, privileges and benefits whatsoever nothing excepted to which sureties are or may be entitled to at law or equity.*
>
> *IT BEING AGREED that we and each of us are and is liable in all respects hereunder not merely as surety or sureties or guarantor or guarantors but as sole or principal debtor or where this guarantee is signed or executed by more than one person as sole or principal debtors jointly and severally, to the extent aforementioned, including the liability to be solely sued, before recourse is had against the debtor, or without any recourse whatsoever being had to the debtor for any reason or cause whatsoever and in the absolute discretion of the Bank*."

The learned President's Counsel for the Defendants whilst conceding that the above Clause *amounts to a renunciation*, submitted that the said renunciation is not valid, for the following reasons:

(a) A renunciation must be expressly stated, and must be specific;

(b) A general renunciation would not suffice;

(c) A renunciation must be explained to the surety and it is the responsibility of the beneficiary to ensure that the surety has full knowledge of such renunciation.

The learned President's Counsel relied on two judgments of this Court in support of his submissions.

Wijeyewardene v Jayawardene

The first is **Wijeyewardene v Jayawardene** [supra]. In that case, the plaintiff Wijeyewardene sued for the recovery of a sum of money alleged to be due to him from the Ceylonese Union Company Limited whose debt to the plaintiff was secured by the defendant under a deed. The defendant pleaded as a matter of law that the action was not maintainable unless and until the plaintiff had sued, and had failed to recover the amount claimed from the Ceylonese Union Company Limited.

After reciting the indebtedness of the company to the plaintiff, clause 4 of the deed provided that, *" In order to give full effect to the provisions of this guarantee, the said (defendant) doth* ***hereby expressly waive all suretyship and other rights inconsistent with such provisions, and which he might otherwise be entitled to claim and enforce****."* [emphasis added]

The District Court held in favour of the defendant and ordered the plaintiff's action to stand out of the trial roll till he had sued the Ceylonese Union Company and failed to recover from the said company the amount of his claim. On appeal to the Supreme Court, the question was whether clause 4 was a sufficient waiver of the defence that was available to the defendant that the principal debtor be excussed prior to proceeding against the defendant. The case was heard before a bench comprising of Chief Justice Wood Renton and Justice Thomas De Sampayo, who delivered separate opinions, with both upholding the objection raised by the defendant.

Judgment of Chief Justice Wood Renton

Although lengthy but in order to give context to the submissions of the learned President's Counsel for the Defendants, I re-produce below in its entirety the discussion that Chief Justice Wood-Renton engaged in, in considering whether clause 4 was a sufficient waiver of the said defence.

> *"The question then arises whether, assuming that deed No. 5279 is only a contract of guarantee,* ***and that the defendant has not bound himself as co-principal debtor****, he is debarred from relying on the beneficium ordinis by the*

stipulation in the deed that he expressly waives all suretyship and other rights which are inconsistent with its terms, and which he might otherwise be entitled to enforce. ***The learned District Judge has held that, as there is in the stipulation just mentioned no express renunciation of the beneficium ordinis, the defendant has not effectually renounced that privilege****, and, therefore, that the plaintiff cannot proceed with his action against the defendant till he has discussed the Ceylonese Union Company. The District Judge has accordingly directed that the present action shall stand out of the trial roll until the plaintiff has sued the principal debtors and has failed to recover from them the amount of his claim. I may say at once that, if the view taken by the District Judge of the law applicable to this part of the case is correct, I see no objection to the present action being allowed to stand over till the plaintiff's action against the company has been determined.*

There is little, if any, local authority upon the question of the form in which in this Colony the special privileges accorded by the law to sureties must be renounced, and it may be convenient, therefore, to consider the subject on general lines. The three main privileges which a surety, ***who is not also a co-principal debtor****, enjoys are the beneficium ordinis seu excussionis, by which he is entitled to claim that, as his liability is of an accessory character, it shall not be enforced against him until the creditor has unsuccessfully endeavoured to obtain satisfaction from the principal debtor; the beneficium divisionis, which provides for the apportionment of liability among the co-sureties; and the beneficium cedendarum actionum, which secures the right of a surety who has discharged his principal's indebtedness to a cession of any rights of action against the principal debtor that the creditor may possess. The beneficium ordinis, restoring, as he alleged, the older law on the subject, which had fallen into disuse, was conceded by Justinian. The beneficium divisionis was introduced by Hadrian. The beneficium cedendarum actionum is recognized both in the Digest and in the Code. There is a conflict of opinion among jurists as to the mode in which these privileges, which were duly incorporated into Roman-Dutch law, should be renounced.* ***According to Voet an express and special renunciation was necessary*** *… "*

It was not sufficient that the surety should renounce one of the beneficia by name… The same view is taken by Grotius, by Van Leeuwen, and by Perezius. In

Censura Forensis Van Leeuwen deals with the matter thus: "But ought these renunciations to be made expressly and specifically? Although some think that they are sufficiently renounced by a general clause, including all the privileges, or the individual privileges, which accrue to sureties, and can accrue to them; ***in practice, nevertheless, it has been accepted that a general renunciation of all privileges is not sufficient, but that they must be expressly and specifically given up****, since they are of the nature and substance of the act itself; and inasmuch as general clauses of renunciation of this kind are generally, according to the custom of unskilled notaries, inserted where they do not belong in their documents, without the knowledge of, and notice to, the parties.*

"And therefore these renunciations, although they have been expressly and specifically made, ***do not hold good unless the sureties*** *(because they are looked upon as of difficult and recondite law, and as easily escaping the notice of any one)* ***have been informed of them, and had them explained****. This is so much the case that the omission to give the information vitiates the renunciation. Especially is this so with us, with whom these privileges are almost useless and of no effect, owing to the customary form used by our notaries, who scarcely ever omit to say that the surety has renounced the beneficium ordinis divisionis et excussionis."*

A different view of the law, however, commended itself to Van der Keessel… "

Burge, in his treatise on Suretyship, associates himself with this statement: "In the writings of many jurists, and amongst them J. Voet, it is said that a general renunciation of all privileges is not sufficient; but the better opinion seems to be that, where the renunciation is expressed to be of all privileges competent to sureties, it extends to this as well as the other privileges on which the surety would be otherwise entitled to insist."

In spite, however, of the opinion of Van der Keessel and Burge, Kotze, C.J., in his note on the relevant passage in Van Leeuwen's Commentaries says that the weight of authority is on the other side, and that view appears to have been adopted in the South African Courts.

Speaking for myself*, I think that we should follow in this Colony the general rule affirmed by Voet, Grotius, Van Leeuwen, and Perezius, and sanctioned by South*

African practice, that ***the ordinary privileges of suretyship must be specially renounced.*** *In that case the renunciation by the defendant in deed No. 5279 of his rights as a surety would clearly be inoperative. But even if we adopt the view of Van der Keessel the present appeal would still fail. For the efficacy of the general renunciation depends on whether the surety, not being peritus juris, is proved affirmatively to have understood the nature of the right or rights renounced, …, I would hold that the surety's knowledge on that vital point must appear on the face of the deed of suretyship itself."*[page 456; emphasis added]

It was therefore the position of Chief Justice Wood Renton that an express waiver of all suretyship rights by specific reference to such rights is required, and that even if a general renunciation is to be accepted as being sufficient, it must be established that the surety renounced his rights knowingly.

Judgment of Justice De Sampayo

The opinion expressed by Justice De Sampayo is set out below, and is further illustrative of this issue:

"*The defendant has taken the legal exception that the plaintiff cannot sue him unless and until the plaintiff has sued and failed to recover the sum claimed from the company. This in effect is the plea of beneficium ordinis seu excussionis available to a surety under the Roman-Dutch law. … But two other questions have to be considered, namely, (1) whether, in view of the nature of the objection undertaken by the defendant, it was necessary, in order to sue the defendant, without first suing the principal, the company, that he should have renounced the benefits competent to sureties; and (2) whether, if so, there is a sufficient renunciation of them in the bond."* [pages 457 and 458; emphasis added]

*"****A renunciation being stricti juris will not be presumed, but must be express.*** *This is a proposition universally accepted****. But all the Roman-Dutch jurists draw a distinction between a tacit and an express renunciation****. The principal example of tacit renunciation is the case where the surety binds himself tanquam principalem.* ***The first question in this case, then, is whether the defendant though surety has bound himself to the plaintiff as principal co-debtor****. Having*

carefully read the whole instrument, I have come to the conclusion that he has not done so."[page 458; emphasis added]

"Whether the property of the principal debtor has been sufficiently excussed is a question of fact, on the determination of which the court may overrule the plea taken by the surety…

*The remaining question is whether the privileges allowed by law to sureties have been sufficiently renounced by the defendant**. It will be noticed that none of them are specified in the surety bond**, and that there is only a general renunciation, as the fourth clause puts it, of "all suretyship and other rights." There appears to be some difference of opinion among Roman-Dutch jurists as to the effect of a general renunciation. **The general principle appears to be that, when a surety makes a renunciation, he must do so deliberately and with full knowledge of his rights**, and so Voet (46.1.16), Van Leeuwen's Commentaries (4.4.12), and other jurists lay down an inflexible rule that **the privileges must be renounced specifically and by name.** Kotze's Note to Van Leeuwen, of his translation, Nathan's Common Law of South Africa and Maasdorp's Institutes, (Vol. Ill,, p. 364), show that in South Africa this rule has been adopted as expressing the weightier opinion among jurists. On the other hand, Burge on Suretyship citing Herengius de Fidej says that the better opinion is that, where the renunciation is expressed to be of all privileges competent to sureties as distinguished from privileges simpliciter, the privilege of excussion and the other privileges of sureties are sufficiently renounced. But I am not aware of any local decision or established practice contrary to the rule laid down by the authorities above referred to, and I think that we should follow the law accepted in modern times by so many eminent Roman-Dutch lawyers and commentators. Van der Keessel's Thesis, to which also Burge refers, does not seem to me to go so far as Burge himself, …." **Van der Keessel appears to me to allow the validity of a general renunciation, provided that the surety who makes it is himself a lawyer, or declares that he has full knowledge of the rights he is so renouncing**. Van der Keessel undoubtedly is one of the greatest exponents of the Roman-Dutch law, and his opinion is of special value to us, as his Theses were published at the very time when Ceylon passed into British hands. But, in order to give effect to his view, the condition on which he insists should at least be fulfilled. The defendant in this*

case is not a lawyer, nor has he made any declaration that he knew the privileges which he waived. It was said at the argument that he must be presumed to have known them, inasmuch as the notary who drew up and attested the bond must be taken to have explained these things. This, even if it happened, would not satisfy the condition which seems to require that ***the surety should actually understand the matter and make a declaration to that effect****. … I do not think that the plaintiff is able to rely upon the authority of Van der Keessel."* [pages 459-460; emphasis added]

Amerasinghe v Perera

The judgment in **Wijeyewardene** was followed in **Amerasinghe v Perera** [35 NLR 306]. In that case, by a bond bearing No. 5612 dated 18th July 1928, the 1st defendant as principal and the 2nd and 3rd defendants as sureties bound themselves to pay to the plaintiff and one Cecilia Fernando or either of them the sum of Rs. 1,750 with interest at 13.5 per cent, per annum. The bond shows that the 2nd and 3rd defendants bound themselves in terms "*as sureties hereto for further securing the payment of principal and interest,* ***we hereby renouncing the benefits which sureties are legally entitled to*** *and also without distinction as to debtor or surety.*"

Commenting on the said clause, Senior Puisne Justice Garvin stated as follows:

"*The passage is not well drafted but it is reasonably clear that though the 2nd and 3rd defendants bound themselves as sureties they renounced all the benefits appertaining to persons who become sureties so that there should be in the matter of the obligation created by the bond no distinction between the principal debtor and the sureties. It is apparently in this view the District Judge held that the 2nd and 3rd defendants were in effect principal debtors on the bond.*

Although the interpretation of the language employed discloses an intention on the part of the sureties to renounce all the benefits to which sureties are entitled, ***it is well settled that such a general renunciation is insufficient in law unless the surety who makes it is himself a lawyer or declares in the writing that he has full knowledge of the rights he is so renouncing*** *- vide Wijeyewardene v. Jayawardene [19 NLR 449].*

There is here no such declaration nor have the privileges been specifically renounced. There is therefore nothing to prevent the 2nd and 3rd defendants claiming all or any of the benefits to which they as sureties are in law entitled." [emphasis added]

The above judgment was followed by Soertsz, AJ, in **Pandithan Chettiar v. Singhappuhamy** [37 NLR 310].

The position since Wijeyewardene

I must state that the above judgment of Chief Justice Wood Renton (and Justice De Sampayo) was set aside by the Privy Council in **Wijeyewardene v Jayawardene** [26 NLR 193] on the basis that the defendant was liable as a co-debtor and not only as a surety, and hence there was no need to have excussed the principal debtor. However, the opinion of the Privy Council has not commented upon the aforementioned findings on *beneficium ordinis seu excussionis*.

The findings of Chief Justice Wood Renton and Justice De Sampayo have gradually lost its significance, with the first step in that regard being taken by Justice De Sampayo himself in **Singer Sewing Machine Co. v Silva** [5 CWR 205], delivered less than one year after the judgment in **Wijeyewardene**. In that case, the defendant who had guaranteed the repayment of the monies due under a hire purchase agreement had pleaded that no action is maintainable against him unless the principal debtor is first sued. The question was whether the defence of *beneficium ordinis seu excussionis* available to a surety had been sufficiently renounced by the defendant.

Justice De Sampayo held as follows:

"*The law bearing on this matter has been fully discussed in Wijeyewardene v Jayawardene [19 NLR 449], from which it will appear that in order to entitle the creditor to go in the first instance against the surety, the privilege in question must be expressly and specifically renounced by the surety. In the present instance the contract contains a clause by which the defendant as guarantor agrees "that the owners (the plaintiff company) are* ***at liberty to sue at their option either the hirer or guarantor jointly or severally*** *for their dues."*

This of course necessarily means that the plaintiff company may at their option sue the defendant, though he is only surety, without or before suing the hirer or principal debtor, and clearly amounts to an express and specific renunciation of the beneficium ordinis seu excussionis. I think the Commissioner is right in deciding the legal issue against the defendant." [emphasis added]

The express reference to the creditor's right to sue either the principal debtor or guarantor jointly or severally at his option, was thus held by Justice De Sampayo to be sufficiently specific.

Chief Justice H.N.G. Fernando had the opportunity of considering both judgments of Justice De Sampayo in **Mercantile Credit Ltd v B.H. Silva** [76 NLR 193], where he held as follows:

"*The 2nd defendant also pleaded in his answer that he did not know that he was expressly renouncing the benefits to which sureties are entitled, and if this plea is to succeed, there cannot be recourse against the 2nd defendant except if recourse against the 1st defendant does not satisfy the plaintiff's claim. The learned District Judge does not reach a finding on this plea, but the context in which he cites from the judgment in Wijeyewardene v. Jayawardene (19 NLR 449), indicates that he might have been inclined to uphold this plea. In that case de Sampayo J referred to an argument that a surety must be presumed to have known the effect of his declaration in a bond, as the Notary who drew up the Bond must be taken to explain these things, and then observed "this, even if it happened, would not satisfy the condition which seems to require that the surety should actually understand the matter and make a declaration to that effect."*

The Agreement in the instant case contains the following declaration: –

> *'The Guarantor hereby renounces the rights to claim that the Hirer should be excussed in the first instance and all other benefits to which sureties are by law entitled, it being agreed that he is liable, in all respects under this Agreement, to the same extent and in the same manner as the Hirer including the liability to be sued before recourse is had to the Hirer.'*

But there is no declaration in the Agreement to the effect that the 2nd defendant actually understood the nature of the right which he purported to renounce*. To that extent the Agreement does not appear to satisfy the test laid down by de Sampayo J.* ***Nevertheless the same Judge, only a short while after the previous decision, considered the terms of a guarantee in a hire-purchase contract*** *(Singer Sewing Machine Co. v. Silva, 5 CWR 205).* ***Having referred to the full discussion of the subject in the earlier decision, de Sampayo J. in the later case pointed out that the contract contained a clause by which the defendant agrees "that the owners are at liberty to sue at their option either the hirer or guarantor jointly or severally for their dues," and he proceeded to hold that this was an express and specific renunciation of the beneficium ordinis seu excussionis.***

It seems to me that the later decision distinguished the earlier case of Wijeyewardene v. Jayawardene*. In the earlier case there was no clause in the bond corresponding to that which was contained in the hire-purchase agreement in the Singer Sewing Machine Co. case.* ***In the instant case, the 2nd defendant did not give evidence, and there was no ground upon which to counter the natural inference that he understood the meaning of the declaration which he signed. Moreover, the renunciation clause is in clearer terms than the clause in the Singer Sewing Machine Co. case. As at present advised therefore, I think we should apply the later decision of de Sampayo J."*** [pages 201 and 202; emphasis added]

The final judgment that I wish to refer in arriving at the present position of the law is the minority opinion of Chitrasiri,J in **Sri Lanka Insurance Corporation v People's Bank** [SC (CHC) Appeal No. 18/2009; SC Minutes of 17th March 2017], where he has summarised in the following manner the validity of a renunciation of the defence of *beneficium ordinis seu excussionis*:

"*Accordingly, the question on which this appeal should be decided is to ascertain whether the Surety has, in fact, renounced the aforesaid right of excussion and/or accepted liability as a Principal Debtor and/or agreed that the Creditor may sue the Surety for the recovery of the monies due without proceeding against the Principal Debtor,* ***knowing the effect of the renunciation****. I do not see any*

material in this instance to show that the surety namely the defendant Insurance Corporation has made such a renouncement of its right of excussion and/or accepted liability as a Principal Debtor and/or agreed that the Creditor may sue the Surety for the recovery of the monies due, without proceeding against the Principal Debtor, knowing the effect of the renunciation. Therefore, the Plaintiff Bank will have to first file action against the principal debtor namely BAT International Company, before proceeding against the Insurance Corporation, it being the guarantor."

The present position regarding the renunciation of the defence of *beneficium ordinis seu excussionis* could therefore be summarised as follows:

(1) A renunciation which is express or specific shall be valid;

(2) A general renunciation would also be valid where:

   (a) the surety himself is an Attorney-at-Law; or

   (b) the effect of such renunciation has been explained to the surety by the beneficiary, or in the alternative, the knowledge of the surety of such renunciation is clear from the face of the document itself, with the burden of proving otherwise being with the surety. I must perhaps add that there is no need for a renunciation clause to be explained to the sureties by an Attorney-at-Law.

(3) There is an implied or tacit renunciation where *inter alia* the surety signs as a co-principal debtor or undertakes to pay any sum on demand or agrees to action being filed against the principal debtor and the surety together.

I shall now consider if the Defendants have renounced the defence of *beneficium ordinis seu excussionis* in one or more of the above modes.

<u>P11 – express and specific renunciation</u>

I have already stated that the first basis for the second question of law raised by the learned President's Counsel for the Defendants that P11 is not valid and enforceable is that there is no express and specific renunciation of the defence in P11. It might

perhaps be important to bear in mind that the impugned clause in **Wijeyewardene v Jayawardene** [supra] only provided that all suretyship and other rights which sureties are entitled to claim and enforce are being waived, and that there was neither a reference to such rights by name nor an explanation as to what those rights might be.

Having carefully considered Clause 18 of P11, I am of the view that the use of the following words in Clause 18 makes it abundantly clear that the Defendants have expressly and specifically renounced their right that the Plaintiff must proceed against the Principal Debtor in the first instance:

(a) *The Bank shall be at liberty … to proceed in the first instance against us only*;

(b) *We hereby renounce the right to claim that the debtor should be excussed or proceeded against by action in the first instance;*

(c) *We and each of us are liable in all respects hereunder … [not merely as surety or sureties or guarantor or guarantors but as sole or principal debtor …, including the liability to be solely sued,] before recourse is had against the debtor, or without any recourse whatsoever being had to the debtor for any reason or cause whatsoever and in the absolute discretion of the Bank.*

My view is fortified by Clause 19, re-produced below, by which the Defendants had agreed that the Plaintiff shall be at liberty to sue the Defendants directly, without suing the Principal Debtor:

> "***As separate and independent stipulation/s*** *we and each of us jointly and severally or separately hereby agree and undertake that the moneys herein mentioned or such part thereof which may not be recoverable from us or any of us on the footing of the instrument above written whether by reason of any disability or incapacity on or of the debtor or any other fact or circumstance whatsoever and whether known to the Bank or not or by reason of the operation of any rule or law or equity relating to sureties or guarantors* ***shall nevertheless be recoverable from us*** *and each of us jointly and severally or separately* ***as sole or principal debtor or debtors*** *in respect thereof and shall be payable by me/us and each of us jointly and severally or separately to the Bank at Colombo* ***ten days after demand in writing as aforesaid*** *and for the purpose of the Bank enforcing*

the liability created by this cause, the Bank shall be entitled to exercise and adopt all or any of the rights, powers, privileges and benefits conferred on the Bank by the other provisions contained in this instrument." [emphasis added]

In these circumstances, I see no merit in the submission that P11 does not contain an express or specific renunciation of the defence of *beneficium ordinis seu excussionis.* Accordingly, the first basis for the second question of law must necessarily fail.

P11 – general renunciation

In addition to the above express and specific renunciation, Clause 18 contains a general renunciation to the effect that "*all other rights, privileges and benefits whatsoever nothing excepted to which sureties are or may be entitled to at law or equity*" are being renounced. If Clause 18 was limited to this general renunciation, and in the absence of Clause 19, and given that none of the Defendants are Attorneys-at-Law, this Court would have to be satisfied that the Defendants properly understood what was being renounced. This was the second basis for the second question of law presented by the learned President's Counsel for the Defendants that the renunciation of the defence is not valid or enforceable, with the Defendants taking up the position that they were not made aware of such renunciation by the Plaintiff at the time P11 was executed.

Creating awareness on the part of the Defendants of such renunciation can be done in one of two ways. The first is for the explanation of the renunciation of the defence to be clearly set out in the guarantee itself, as was the case in **Seneviratne and Seneviratne v State Bank of India** [SC (CHC) Appeal No. 53/2006; SC Minutes of 11th December 2014]. The second is by having the relevant provision in plain and simple language, as has been done in this case. Clauses 18 and 19, which are the relevant provisions, do not refer to the defences by their Latin terminology but are in plain and simple English which is easily understandable by any person and especially the Defendants who had executed guarantees prior to P11. The Defendants were men of commerce who had transacted with the Plaintiff for a long period of time, and the effect and consequence of the renunciation is clearly borne out by P11.

Burden of proof

In any event, it is safe to assume that the Defendants had the requisite knowledge of the effect and consequences of such renunciation. The burden of proving that, (a) they were not made aware of such renunciation, and (b) they did not understand the effect of such renunciation is therefore with the Defendants.

This issue was considered by the Court of Appeal in **Mercantile Credit Ltd. v Thilakaratne** [(2002) 3 Sri LR 206] where it was held as follows:

> *"It was also the contention of the plaintiff-appellant that the learned District Judge had also erred in concluding that the clause relating to the renunciation of the benefits to which guarantors are entitled to by law, which is known by the term 'beneficium sui divisionis excussionis,' has not been explained to the guarantors." [page 208]*
>
> *"The burden of proving that the clauses relating to the renouncing of all benefits and privileges to which sureties are entitled to by law were not understood by him is a special fact within the knowledge of the person alleging it and by virtue of section 101 of the Evidence Ordinance the burden of proving that fact is with the person who asserts that fact. In this case since it was the position of the 2nd defendant-respondent that the conditions of the agreement relating to renunciation of the rights and the benefits of the guarantors were not understood by him, the burden of proof of that fact lies with the 2nd defendant-respondent who alleges it." [page 209]*
>
> *"Despite his admission in evidence that he was a businessman in whose names the businesses are registered and he is a payee of income tax, he took up the position in cross-examination that he was not aware of the nature of the contract to which he entered into. He is a person who has taken loan facilities offering guarantors as security. Therefore, his evidence that he did not understand or did not care to see what he was required to sign and that he did not know the meaning of the word guarantor in its colloquial sense makes his testimony unacceptable." [page 211]*

I am satisfied that the Defendants had the required knowledge that they were renouncing the defence available to sureties that the Principal Debtor be proceeded with in the first instance, and that the Defendants have failed to establish otherwise. I say this for the following four reasons:

(a) The provisions of Clauses 18 and 19 are in clear and unambiguous language;

(b) It is admitted that the Defendants did not respond to the letters of demand P14 and P15 sent to them by the Plaintiff in May 2005. The Defendants being the Chairman and a Director of the Principal Debtor, respectively, would have been fully aware of the action that the Plaintiff had or had not taken against the Principal Debtor. If it was their position that the said defence was available to them or that the waiver of such defence was not explained to them or that they had no knowledge in that regard, the Defendants should have taken it up at the first available opportunity, which the Defendants failed to do;

(c) The answer filed on their behalf has no mention of this fact, although the Guarantee P11 formed part and parcel of the plaint;

(d) The Defendants did not raise an issue in this regard.

It is only in the affidavit filed before the Commercial High Court that the 2nd Defendant, for the first time, stated that although his signature and that of the 1st Defendant were obtained on P11 and the related documents, the Plaintiff failed to explain the contents of those documents to them. This explanation cannot be accepted since the need for a guarantee was stated in the offer letter P5, which the Defendants had acknowledged and signed, as well as in the loan agreements P6 and P7, which too has been signed by the Defendants. Furthermore, the 2nd Defendant had admitted in cross examination that P11 is a personal undertaking to pay the monies due to the Plaintiff [vide evidence of 21st September 2007], which clearly demonstrates that he had knowledge of what P11 entailed.

Having considered the evidence of the 2nd Defendant, the High Court has arrived at the following conclusion, with which I agree:

"2 වන විත්තිකරු විසින් දී ඇති මෙම සාක්ෂියෙන් හොඳින්ම පැහැදිලි වන්නේ, පැ. 11 දරණ ඇපකරයට විත්තිකරුවන් අත්සන් තබා ඇති බවත් එසේ අත්සන් තැබීමේදී, එම ඇපකරයේ කොන්දේසි ඔවුන් හොඳින් අවබෝධ කරගෙන සිටි බවත්ය. ඊට අමතරව එම ඇපකරය අත්සන් කිරීමත් සමගම ප්‍රධාන ණයකරු වෙනුවෙන් විත්තිකරුවන් අත්සන් තබා ඇති කලින් ඇපකර අවලංගු කර ගැනීමේ අදහසින් යුක්තව පැ.11 දරණ ඇපකරය අත්සන් තබා ඇති බවයි. එසේනම්, විත්තිකරුවන් දෙදෙනා පැ.11 දරණ ඇපකරයේ කොන්දේසිවලින් බැඳි සිටින බවට තීරණය කරමි.

පැ.11 දරණ ඇපකරයේ කොන්දේසි අනුව "සෙනෙවිරත්න ට්‍රේඩිං කම්පනි (ප්‍රයිවට්) ලිමිටඩ්" යන ආයතනය විසින් ගෙවීමට නියමිත මුදල් එම සමාගම නොගෙවා සිටියහොත්, විත්තිකරුවන් දෙදෙනා පෞද්ගලිකව එම ණය ගෙවීමට බැඳි සිටින බවට පැහැදිලිව සඳහන් කර ඇත. එසේනම්, එම ණය මුදල් ගෙවීමට විත්තිකරුවන් දෙදෙනා බැඳි සිටින බට තීරණය කරමි."

I am therefore of the view that, (a) the burden of proving that they did not understand or did not know that they were renouncing the defence of *beneficium ordinis seu excussionis* or were not made aware of such fact is with the Defendants, and (b) the Defendants have failed to discharge the said burden. The second basis for the second question of law too must therefore fail.

P11 – implied or tacit renunciation

The final issue to be considered is whether a renunciation can be implied from the terms of P11, or whether there has been a tacit renunciation of the defence as a result of the Defendants having undertaken liability not only as sureties but as co-principal debtors, as well. This issue relates to both questions of law that I have referred to at the beginning.

There are two clauses in P11 which points towards this position.

The first is Clause 18 itself where the Defendants have agreed that, "***each of us are liable*** *in all respects hereunder* ***not merely as surety or sureties*** *or guarantor or guarantors* ***but as sole or principal debtor*** *or where this guarantee is signed or executed by more than one person as sole or principal debtors jointly and severally, to the extent aforementioned…. "*.

The second is Clause 19 where the Defendants have agreed to be bound, "*separately as sole or principal debtor or debtors in respect thereof*".

Thus, the Defendants are not only sureties in terms of P11 but are co-principal debtors.

In **Millman and another v Masterbond Participation Bond Trust Managers (Pty) Limited (under curatorship) and others** [supra], in tracing how the concept of co-principal debtor came about, reference was made to *Van der Iyver v De Wayer and Others (1861-1863) 4 Searle 27 at 29* where it was observed that, "*We find ... in the Roman law no distinct explanation of the import of the words "co-principal debtor", but must seek this explanation in the practice of the Dutch Courts."*

Reference has thereafter been made to *Voet (46.1.16)* which states that, *' ... (T)here is no reason why sureties should not by a tacit renunciation lose the beneficium ordinis. This is especially so if a man has bound himself for the debt as principal. For since it is clear law that a principal debtor, as such, has not the advantage of the benefit of order, it follows that either the sincere and specific statement of the surety, whereby he binds himself as principal, must be null and void, or else, if it be of effect, such a surety should not be allowed to avail himself of the benefit of order, that words which bear a specific meaning may not in an agreement be idle and of no effect.'*

Simon van Leeuwen discusses the point in *Censura Forensis* 1.4.17 .23 as follows:

> *'(A) surety bound as principal debtor is understood to have undertaken the payment of the debt as his own, and is exactly in the same position as if he had renounced all the benefits, and is sued, not as surety, but as principal debtor, without any excussion of any other person. Because in contracts words are not understood to be meaningless.'*
> *(Watermeyer J's translation in Van der Iyver's case supra at 31.)*

The position of a person who has undertaken the liabilities of a surety and co-principal debtor was discussed in **Union Government v Van der Merwe** [1921 TPD 318 at 322], where Wessels JP pointed out that:

> *'We must give some meaning to the words "co-principal debtor". That the addition of these words operate(s) as a renunciation of the benefits of the surety is clear, but they have a still greater force. The addition of these words shows that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor.'*

In **Business Buying & Investment Co Ltd v Linaae** [1959 (3) SA 93 (T) at 95H-96A], Boshoff, J stated that, "*A person who signs as surety and co-principal debtor is both a surety and debtor. As far as the creditor is concerned he is a co-debtor; his obligation is co-equal in extent with that of the principal debtor and is thus of the same scope and nature as that of the principal debtor.*"

Closer to home, in **Wijeyewardene v Jayawardene** [supra], both Chief Justice Wood Renton and Justice De Sampayo acknowledged that the surety being liable as a co-principal debtor amounts to a renunciation of the defence of *beneficium ordinis seu excussionis.* A similar view was expressed in **Sri Lanka Insurance Corporation v People's Bank** [supra], where Chitrasiri, J stated that, *"… if the Surety has **renounced this right either expressly**, by agreeing to a specific renunciation of this right **or impliedly**, by accepting liability as a Principal Debtor and agreeing to be sued without the Debtor excussing the Principal Debtor, the Surety cannot claim this right or insist that, the Creditor must proceed against the Principal Debtor before proceeding against the Surety.* [emphasis added]

In **Caney's The Law of Suretyship** [supra; page 128], the author points out that, "*A surety who has not the benefit of excussion is in the same situation as an ordinary debtor, indeed as the principal debtor; a fortiori this is the case where a surety has assumed liability as surety and co-principal debtor. He may be sued as soon as the principal debtor is in default*."

This position has been confirmed by **Wessels'** [supra; page 1020] as follows:

> "*A person who binds himself as surety and co-principal debtor is both surety and debtor. As far as the creditor is concerned, he is a co-debtor; as far as the debtor and co-sureties are concerned, he is a surety. He differs from the principal debtor in that he has a right of recourse against him."*
>
> *"Hence a renunciation of the benefit of excussion is always implied when a surety binds himself as "surety and co-principal debtor" or as "surety and co-debtor*."

I am therefore of the view that by undertaking liability as co-principal debtor, the Defendants have impliedly as well as tacitly renounced their right to plead the defence of *beneficium ordinis seu excussionis.* Having done so, the Defendants cannot now claim that the Plaintiff must proceed against the Principal Debtor in the first instance or that they have not renounced the defence of *beneficium ordinis seu excussionis* or that Clause 18 is not valid or enforceable in terms of the law.

Conclusion

For the reasons set out above, I see no merit in the two questions of law raised by the learned President's Counsel for the Defendants. The judgment of the Commercial High Court is accordingly affirmed and this appeal is dismissed. The Plaintiff shall be entitled to costs, both before this Court and the Commercial High Court.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, PC, CJ

I agree.

CHIEF JUSTICE

Yasantha Kodagoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT