COLONY OF MONTSERRAT

IN THE HIGH COURT OF JUSTICE
CIVIL

SUIT No. 86 of 1993

CHARLES MERCER LIMITED
(In Voluntary Liquidation)

Plaintiff

And

ROYAL BANK OF CANADA

Defendant

Appearances:

Mr. John C. Kelsick for the Plaintiff
Mr. Kenneth Allen Q.C. for the Defendant

JUDGMENT

[1] The plaintiff in this originating summons was a limited liability company incorporated and registered under the provisions of the Companies Act of Montserrat with its registered office situate in Plymouth in the said island of Montserrat. In September 1991 the plaintiff went into voluntary liquidation and Wilbur Harrigan of the city of St. John's in the Island of Antigua a chartered accountant and a partner in the accounting firm of Pannel Kerr Foster was appointed liquidator for the purpose of winding up the plaintiff. The defendant is a company registered in the Island of Montserrat and carrying on the business of banking in the said island.

[2] By the originating summons filed in this court the plaintiff claimed from the court, among other things, the following reliefs:

"1. A declaration that the Guarantee purported to have been given by CHARLES MERCER LIMITED by the document captioned "Guarantee and Postponement of Claim" addressed to the ROYAL BANK OF CANADA and executed on 14th June, 1989, under the seal of CHARLES MERCER LIMITED and singed by Cadman Mercer and H.S. Mercer is ultra vires the memorandum and articles of association of CHARLES MERCER LIMITED and is invalid.

2. A declaration that the properties respectively described as Parcel 40 Block 5/7 Plymouth Registration Section located at Strand Street, Plymouth, Montserrat and Parcel 44 Block 5/8 Plymouth Registration Section located at George Street, Plymouth, Montserrat are not subject to any charge by way of legal mortgage under the Debenture executed by CHARLES MERCER LIMITED in favour of the ROYAL BANK OF CANADA on the 29th August, 1989.

3. An order that ROYAL BANK OF CANADA release to the Plaintiff the said properties free of all liens and claims whatsoever."

[3] There was no affidavit filed with the summons; and indeed there was no evidence supplied for the disposition of the matter until nearly three months after the filing of the summons when the barrister-at-law acting for the defendant swore and filed an affidavit on behalf of the defendant. And it would be enlightening if I set out herein the more relevant paragraphs of that affidavit. Those paragraphs are 1,3,5,7,8,9,10,15 and 16.

"1. I am a Barrister-at-Law and Solicitor of the Eastern Caribbean Supreme Court and the Solicitor for the Defendant in the abovecaptioned matter.

3. The foregoing not withstanding, I have on the 10th day of June, 1993 searched the records at the Registry of the High Court in respect of this matter and no affidavits have been filed by or on behalf of the Plaintiff and apart from the Notice of Appointment to hear Originating Summons dated the 21st day of April, 1993 and filed on the 22nd April, 1993, no affidavits or other forms of evidence have been filed by or on behalf of the Plaintiff and no documents in support have been filed, exhibited or exchanged.

5. I rely inter alia on Clause (12) of the objects for which the Company is established which reads:

"12. A Call shall be deemed to have been at the time when the resolution of the Directors authorizing the call was passed, and may be made payable by instalments."

7. I will contend further that apart from those documents which the Company is required by law to file with the Registrar, the records of Charles Mercer Limited in voluntary liquidation are personal to them and the Defendant is under no obligation at any time whatsoever to inquire into the way the said Company's meetings were held, where they were held and what decisions were taken at the said meetings.

8. The Defendant Bank has been the Bankers of Charles Mercer Limited since its incorporation in January 1969 and prior to that has acted for the family business known as Charles Mercer for several years before the said family took the decision to incorporate; This has always been a Company in good standing with good and substantial credit, which had always conducted its affairs in a discrete orderly, and consequently successful manner. The Defendant therefore had no difficulty in dealing with the request of the company, and to the best of my belief acted in good faith throughout.

9. To the best of my information and belief the principle shareholder of Charles Mercer Limited, Mrs. Etienne ne'e Mercer approached the Manager of the Defendant Bank during the existence of the Bank's security with a proposal that the Company would go into voluntary

liquidation and pay off all the debts of the Company and protect or restore the good name of the Company.

10. At the time of such decision, apart from its stock in trade and accounts receivable, the Company owned real estate consisting of the premises in which the business of the Company was mainly carried on at John & Strand Street, Plymouth and another prominent building on George Street, Plymouth valued together at about $1.4 million.

15. As shown in the letter dated 23rd March, 1992, the majority of the shareholders are absentees and the affairs of the company were run by its Directors as provided for by Articles 86 and 87 of the Company's Articles of Association.

16. Regarding the Plaintiffs contention that the shareholders received no notice of a meeting, I say with respect that it would make nonsense of commercial practice generally and banking in particular if whenever there was representation made on the part of the Company for a financial transaction the bank was obliged to inquire from every shareholder whether they had notice of the proposal and consented to it".

[4] The said barrister-at-law later swore and filed another affidavit which corrected a statement that was made in the first affidavit.

[5] Reacting to the affidavit filed on behalf of the defendant the plaintiff then had the liquidator swear and file an affidavit. The relevant paragraphs of the affidavit of the liquidator are 2,3,4,5,6,7 and 8. These paragraphs are in the following terms:

"2. On or about the 17th day of September, 1991, the shareholders of the private limited liability Company known as Charles Mercer Limited of Strand Street, Plymouth, Montserrat, passed a special resolution that the Company be voluntarily wound up and that I be appointed liquidator for the winding up.

3. In pursuance of my duties as liquidator, I, on the 25th day of February, 1992, paid the amount of $842,358.73 to the Defendant in full settlement of monies due and owning by the Company to the Defendant and requested that the Defendant release the charges held by it under the terms of a debenture executed by the Company in favour of the Defendant on the 29th day of August, 1989, on the property, title to which is recorded in the Company's name as follows: Property at the corner Strand and John Streets known as Parcel 40 Block 5/7 Plymouth Registration Section. Property at George Street known as Parcel 44 Block 5/8 Plymouth Registration Section.

4. The Defendant has refused to release the said charges on the basis that the Company guaranteed the repayment of a loan of EC$150,000.00 made by the Defendant to Cadman

Mercer one of the Company's directors for the purpose of purchasing a dwelling house for his private use. The said Cadman Mercer has defaulted on the repayment of the said loan.

5. The Defendant contends that the document entitled "Guarantee and Postponement of Claim" addressed to the Defendant and executed 14th June, 1989, under the seal of the Company and signed by the said Cadman Mercer and Hubert Stuart Mercer, two of its directors, is a valid guarantee on which the Defendant can enforce its claim for the repayment of the said loan to Cadman Mercer.

6. The powers of the Company to give guarantees may arise under subclauses (12), (14), or (16) of clause 3 of the its Memorandum of Association which provide as follows:-

(12) To invest money at interest on the security of Freehold and Leasehold, land stocks, shares, securities, merchandise and other property in the Colony of Montserrat or elsewhere, and generally to lend and advance money, either with or without security, and to such persons or companies, and on such terms as may seem expedient, and to guarantee the performance of contracts by any such persons or companies.

(14) To borrow or raise or secure the payment of money in such manner as the Company shall think fit, and in particular by the issue of debentures or debenture stock, perpetual or otherwise, charged upon all or any of the Company's property (both present and future) including its uncalled capital, and to purchase, redeem, or pay off any such securities.

(16) To enter into partnership, or into any arrangement for sharing profits, union or interest, co-operation, joint adventure, reciprocal concession or otherwise with any person or Company carrying on or engaged in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this Company. And to lend money to, guarantee the contracts of, or otherwise assist any such person or Company and to take or otherwise acquire shares and securities of any such Company, and to sell, hold, reissue with or without guarantee, or otherwise deal with the same.

In addition, Articles 81-83 of the Company's Articles of Association vest the directors with power to raise or borrow money for the purpose of the Company's business and to secure the repayment of any such sums by mortgage or charge or by the issue of debenture upon the whole or any part of the Company's property and up to such terms and conditions and in such manner and for such consideration as they consider for the benefit of the Company.

7. The Defendant was aware when granting the said loan of $150,000.00 to Cadman Mercer that the money was to be used for his personal benefit and not for the Company's purposes or for its benefit.

8. I therefore contend that the Company did not have the capacity or power to guarantee the indebtedness of Cadman Mercer to the Defendant for the following reasons:

   (i) The giving of guarantees was neither an independent object or power reasonably incidental to objects set out in subclauses (12) or (16).
   (ii) The giving of guarantees under subclause (14) was not an independent object and was not reasonably incidental to any object set out in any other subclause.

   I contend that consequently the Guarantee was ultra vires the Company and void ab initio.

   The liability of Cadman Mercer to the Defendant under the Guarantee is therefore not incorporated in the Debenture as a liability by the Company to the Defendant. The charge in the Debenture on the said properties was not in respect to or as a security for the repayment of Cadman Mercer's indebtedness to the Defendant."

[6] The liquidator on behalf of the plaintiff contended that the document which he seemed to have accepted as coming into existence as a guarantee and postponement of claim for a loan to a former director of Charles Mercer Limited was ultra vires the company and void ab initio. There was nothing adduced in the evidence however to show why the plaintiff thought, long after it had allowed the defendant to hold what it may then have accepted as good security, the document was ultra vires.

[7] There was another affidavit sworn by one Cadman Mercer and filed on behalf of the plaintiff. Paragraphs 1,2,3,4,5,6,7 and 8 of that affidavit are relevant and interesting. Those paragraphs are in the following terms:

1. I was a Director and Company Secretary of the private limited liability company known as Charles Mercer Limited and I was the manager of The Company's business until the said company went into voluntary liquidation on the 17th day of September, 1991.
2. On or about the first or second week of June, 1989, I applied to the person who was then Manager of the Montserrat branch office of the Royal Bank of Canada, namely, Gerry Gilbert, for a personal loan for the purpose of making a down payment on the purchase price of a dwelling house located at Foxes Bay, Montserrat. I met with said Gerry Gilbert and discussed the matter with him. Mr. Gilbert subsequently informed me that the Bank would make a loan to me of E.C.$150,000.00 for the purpose requested. My uncle and co-director of Charles Mercer Limited Hubert Stuart Mercer was not present at any of my meetings with Mr. Gilbert.
3. I subsequently received a telephone call telling me to go the offices of Mr. Kenneth Allen, the Bank's Solicitor, to sign the loan documents. I do not remember whether the person who spoke with me was an official of the Bank or a member of Mr. Allen's staff.
4. On or about the 14th June, 1989, I went to the offices of Mr. Kenneth Allen and was given documents purporting to be a company resolution and a Royal Bank of Canada guarantee to sign. I signed both documents. My signature was not witnessed by anyone. Hubert Stuart Mercer was not present with me when I signed the documents. I did not request Hubert Stuart Mercer to sign the said documents and I do not know who requested him to do so. I have

subsequently learned that he signed the said documents but I do not know when, or the circumstances under which, he did so.

5. Said Hubert Stuart Mercer and myself did not hold an ordinary general meeting of Charles Mercer Limited or pass a resolution that Charles Mercer Limited would guarantee the loan by the Royal Bank of Canada to me.
6. I did not prepare the resolution which I signed and I do not know who prepared it.
7. I had no intention of making Charles Mercer Limited responsible of my said personal debt and I did not understand that the effect of the said document referred to in paragraph 4 of this Affidavit would be to do so at the time when I signed them. This was not explained to me either by Gerry Gilbert or by Kenneth Allen.
8. I am upwards of 40 years of age and fully competent to make this affidavit and the facts and matters herein deposed are true to the best of my knowledge and belief.

[8] Counsel for the plaintiff in his presentation of the plaintiff's case submitted that on the basis of what transpired on the coming into being of the guarantee as shown in the affidavit of Cadman Mercer and the lack of power in Charles Mercer Limited to give the kind of guarantee that was purportedly given the papers which the defendant was relying on as a guarantee to hold the property of the plaintiff are null and void. And he cited the English case of Rolled Steel Products Ltd v BSC to support his contention.

[9] Referring to the power of Charles Mercer Limited to give guarantees counsel for the plaintiff contended that notwithstanding what appears in clause 12 of the company's memorandum of association the company had no vires to give the guarantee the defendant claimed. It is clear from the objects of the company however that the company had the power to make loans to such persons as it may seem expedient to lend to and to guarantee the performance of contracts by such persons.

[10] It would strike me that the company had the vires to give guarantees and relevant dicta from the same case cited by counsel for the plaintiff tend to indicate that whether a transaction was ultra vires depended solely on the construction of the memorandum of association and whether the transaction fell within the objects of the company, properly construed. If a transaction was within the objects of the company or was capable of being performed as reasonably ancillary or incidental to the objects it would not be ultra vires merely because the directors carried out the transaction for purposes which were not within the memorandum of association.

[11] From what appears in the affidavits the company had the power to lend Cadman Mercer an amount of $150,000.00 and to guarantee any contract made for him to repay the amount. I should not think it too far removed from that power for the company to have its bank advance the money to lend Cadman Mercer for it and then guarantee Cadman Mercer's contract to repay the bank. That power seemed certainly to have been in the company and it is not for the courts to second guess the directors to see whether it was a proper exercise of the powers.

[12] At the time of the advancement by the defendant of the monies to him Cadman Mercer was a director of the company and the manager of the company's business. He swore in his affidavit that he wanted the money to purchase a dwelling house. It is not an uncommon occurrence for companies to see about helping their management staff secure accommodation. This has not been advanced by the defendant but it can go towards taking a view of why it could be thought that the power under clause 3 (12) of the memorandum could have been used with the guarantee power given the directors under clause 16 of the said memorandum.

[13] Clause 3 (16) of the memorandum gave the company the power to enter any arrangement for union of interest, co-operation or otherwise with any person or company to benefit the company directly or indirectly. And the company could have guaranteed the contracts of or otherwise assist any such person or company with which it treated. It does not strike me that the guaranteeing to its bankers of a loan made by those bankers to its manager and director fell so far out of the range of the two objects in the memorandum as to constitute an ultra vires transaction. The provision of the loan to Cadman Mercer in the position he was represented at the least an indirect benefit to the company. This would essentially be true if the company were otherwise carrying on business that was within its power; and there is no evidence that the main business carried on by the company at the time was without the powers of the company.

[14] Apart from the case of Rolled Steel Products Ltd v BSC mentioned above counsel for the plaintiff cited another English case Re Introductions Ltd, Introductions Ltd v National Provincial Bank (1968) 2AER 1221 and the Barbadian case Federal High School v Barclays Bank (1979) 37 WIR 53. The facts in neither of those cases were sufficiently near to those in this case to be very helpful. The principle decided was likewise not on point.

[15] I am sympathetic with the position taken by the liquidator in bringing this matter to let the court pronounce on the legality or otherwise of the guarantee purported to have been given by the company to the defendant. I do not think that he could have done otherwise in light of the evidence adduced in the affidavit of Cadman Mercer. Despite the air of irresponsibility and insincerity with which the affidavit of Cadman Mercer reeks counsel for the defendant did not seek leave to cross examine Cadman Mercer; and there is left over the whole transaction a pall which does the plaintiff no good.

[16] Counsel for the defendant submitted to the court that the single point in issue in the case is whether the guarantee given by the company to the defendant to enable a director and manager of the company to purchase a dwelling house was ultra vires. He contended that it was not and that there was no evidence produced to show that the company itself before it went into liquidation ever challenged the authenticity of the transaction. Indeed he suggested that the position now taken by the plaintiff amounted merely to a desperate afterthought.

[17] Counsel for the defendant further contended that the guarantee fell squarely within the ambit of the powers of the company as provided in at least one of its objects. He submitted that it fell within

clause 3 (12) where there is no ambiguity to warrant an interpretation out of which the transaction could be thought to be ultra vires. He further submitted that there was a resolution for the transaction and there was nothing that the defendant needed to do more to satisfy itself of the legitimacy of the guarantee.

[18] Counsel for the defendant cited the English cases of Royal British Bank v Turquand (1843-1860) AER reprint 435 and Freeman and Lockyer v Buckhurst Park Properties et al (1964) 1 AER 630 to support his contention that the defendant was not required to do more than see the power in the objects of the company to satisfy itself of the legality of the transaction; and that the defendant knowing of the power in clause 3 (12) in the memorandum could accept that the transaction was within the vires of the company. And Counsel contended that all that made the transaction valid with the execution of the documents by directors of the company. Counsel for the plaintiff countered that the Royal British Bank v Turquand case was irrelevant and the transaction was null and void as the company had no power to do what it purported to do.

[19] The plaintiff came to the court for the declarations set out earlier herein. For the court to have been able to make the requested declarations the plaintiff would have had to show at least on a balance of probabilities that Charles Mercer Limited at the time the directors executed the documents in issue had no power to do so for one of the several reasons that could have made the transaction ultra vires the company. The plaintiff had not done enough to satisfy me that the transaction was ultra vires the company.

[20] In the circumstances I have not been persuaded that I should make the declarations sought or give the other order claimed. And I do not do so. Judgment is therefore given to the defendant which will also have its costs taxed if there is no agreement thereon.

[21] This judgment is being delivered long after the parties would have been expecting it and longer than they should have had to wait. The court rues the delay which was caused by the dislocation from the volcano and my own rather precipitate move to another circuit of the court. What was decided in an appeal case in the Virgin Islands also impacted on the delay but all the notes taken by me were recovered and studied so that the relevant issues in the case have been fully treated and reflected herein.

Dated the day of 2001.

Justice Neville Smith
Judge