

2001

# Wells Fargo Bank v. Midwest Realty and Finance Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WELLS FARGO BANK, N.A.,  
a Corporation,

Plaintiff and Respondent, :

-vs-

MIDWEST REALTY AND FINANCE  
INC., a Corporation,

Defendant and Appellant. :

Supreme Court No. 14028

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BRIEF OF RESPONDENT AND  
MOTION FOR ATTORNEY'S FEES

\*\*\*\*\*

An Appeal from the Judgment of the Third Judicial  
District Court in and for Salt Lake County, Utah

Honorable J. E. Banks, Judge

\*\*\*\*\*

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FILED  
JUL 22 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WELLS FARGO BANK, N.A.,  
a Corporation,

Plaintiff and Respondent,

-vs-

MIDWEST REALTY AND FINANCE,  
INC., a Corporation,

Defendant and Appellant.

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Case No. 14028

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

This is an action wherein the plaintiff-respondent seeks to recover for loans made to Lee Chair Corporation on the basis of a guarantee of such indebtedness by defendant-appellants.

DISPOSITION IN THE LOWER COURT

The lower Court granted judgment in favor of plaintiff-respondents and against defendant-appellants for the total indebtedness of Lee Chair Corporation.

THE NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-appellants seek reversal of the judgment in total, or in the alternative, reversal of the judgment pertaining to one line of credit extended to Lee Chair Corporation.

STATEMENT OF FACTS

Prior to November 4, 1970, defendant-appellant (hereinafter referred to as "Midwest") was negotiating for a merger and consolidation wherein Lee Chair Corporation would be merged into Midwest International, Inc., and the surviving corporation would then be merged into Midwest (Tr. 10). It was determined that in order to keep Lee Chair Corporation viable during the negotiation period, it was necessary to procure financial assistance for Lee Chair Corporation (Tr. 11).

Inasmuch as the financial status of Lee Chair Corporation was such that it was unable to obtain credit, Midwest contacted plaintiff-respondent (hereinafter referred to as "Bank") for the purpose of inducing an extension of credit to Lee Chair Corporation (Tr. 11).

Inasmuch as the Bank was unwilling to extend the credit to Lee Chair Corporation on the basis of its credit standing alone, (Tr. 11) Midwest executed and delivered to the Bank a "continuing guarantee" (Exhibit 3). The "continuing guarantee" was executed and delivered to the Bank on or about November 4, 1970. The execution and delivery of this guarantee was made by Midwest pursuant to the written authorization of its Board of Directors (Exhibit 4). The guarantee will hereinafter be referred to as the "November Guarantee."

On the day following the execution and delivery of the guarantee, the Bank advanced to Lee Chair Corporation the sum of Sixty Thousand (\$60,000.00) Dollars (Tr. 34). This loan was evidenced by a note bearing the date November 5, 1970 (Tr. 34). The note was renewed on February 11, 1971; May 18, 1971; August 4, 1971; September 22, 1971 and on February 4, 1972 after the payment of One Thousand (\$1,000.00) Dollars principal (Tr. 34, Exhibit 16). Each renewal was accompanied by the payment of interest accruing to the date of the renewal (Exhibit 16). The last promissory note, dated February 4, 1972, is before the Court as Exhibit 2. With respect to this particular line of credit, each note was a renewal of pre-existing indebtedness; there was no new money advanced to Lee Chair Corporation.

As merger negotiations continued, it was decided that in addition to the unsecured credit of Sixty Thousand (\$60,000.00) Dollars, Lee Chair needed further financial assistance (Tr. 11). Application was made to the Bank to extend an additional line of credit secured by Lee Chair's accounts receivable (Exhibit 9). In order to induce the Bank to extend this additional credit, Midwest, on December 17, 1970, executed and delivered to the Bank another "continuing guarantee" (Exhibit 11). The execution and delivery of this guarantee was authorized by a resolution

of the Board of Directors of Midwest on December 17, 1970, (Exhibit 12). This guarantee will hereinafter be referred to as the "December Guarantee."

In reliance upon the December Guarantee, the Bank extended to Lee Chair Corporation an open ended credit line secured by the Lee Chair's accounts receivable (Exhibit 9). Credit extensions were granted as needed and payments on the accounts receivable were applied against the indebtedness. The extensions of credit and payments are itemized on Exhibit 10.

Negotiations for the merger apparently broke down and Midwest was faced with the problem of minimizing their loss under the guarantees. Midwest was faced with two alternatives: (a) terminate the guarantee thereby cutting off any future advances to Lee Chair; (b) place a ceiling on the guarantee at the level of the outstanding indebtedness thereby preventing the balance of the account from exceeding the amount of indebtedness which Midwest was already liable for. The first alternative had the danger of cutting off all funds and thereby forcing Lee Chair to discontinue business. This would sacrifice any chance of Lee Chair paying its own debt from current income. The second alternative had the advantages of freezing the loss at its present level, and still allowing



funds to go into the business in the hope of reducing the debt with current income.

Midwest wisely chose the second alternative. In a letter dated July 6, 1971, to the Bank wherein they noted:

"It is our desire that the guarantee be immediately reduced to the amount of the outstanding obligations covered by the Lee Chair note. We believe this to be about \$85,000.00."

The letter in no way indicated a desire to terminate the guarantee or cut off future advances on the accounts receivable financing. In fact, the content of the letter was precisely the opposite. All mention of cancellation was in the context of the future, and the letter specifically stated this was not to be a final cancellation:

"It was the decision of the Board that we will withdraw the 'continuing guarantee' of Midwest Realty and Finance, Inc., for and on behalf of Lee Chair Corporation. This guarantee is dated December 17, 1970, and is in the amount of \$130,000.00. . . . We would appreciate your earliest reply, indicating any further requirements for finalizing this cancellation." (Emphasis added)

The decision to "cap" the guarantee rather than cancel the guarantee and cut off further funds turned out to be an advantageous decision for Midwest. At the time of the receipt of the July 6, 1971 letter (which was on July 8, 1971) the outstanding indebtedness on the accounts receivable credit line was Thirty-Two Thousand Six Hundred Seventy-Two Dollars and

97/100 cents (\$32,672.97) (Exhibit 10). By capping the account, and allowing current income to reduce the indebtedness, the indebtedness was reduced by Twenty-Three Thousand Seven Hundred Ninety-Eight Dollars and 71/100 cents (\$23,798.71) (Exhibit 10) down to Eight Thousand Eight Hundred Seventy-Four Dollars and 26/100 cents (\$8,874.26).

The letter of July 6, 1971, by its specific terms, applied only to the December Guarantee. There was no mention of the November Guarantee. The reason for designating only one guarantee is obvious: the indebtedness under the November Guarantee was already equal to the maximum limit of that guarantee and therefore no reason to "cap" the same. However, the December Guarantee permitted a limit of One Hundred Thirty Thousand (\$130,000.00) Dollars and therefore was the only available means of reducing Midwest's exposure.

On July 8, 1971, Mr. John G. Wells of Midwest telephoned the Bank and spoke with its Vice-President, Mr. Winrow. At that time the parties confirmed the agreement to cap the accounts receivable credit line at its existing balance (Exhibit 8). The substance of the telephone conversation was summarized in a letter from the Bank to Midwest which stated:

"As to your letter of July 6, 1971, we have discussed this with Mr. Winrow and he stated that according to his conversation with Mr.

Wells, the intent of the letter was to "cap" the borrowing which was done." (Exhibit 8).

Prior to this lawsuit, Midwest never contested the summarization of the telephone conversation as stated in the letter (Tr. 21).

After receipt by the Bank of the letter of July 6, 1971, (on July 8, 1971) the indebtedness of the accounts receivable credit line never exceeded the balance existing on that date (Exhibit 10). In fact, the balance of the accounts receivable credit line declined continuously from July 8, 1971, until the date of suit when it was reduced to its present balance of Eight Thousand Eight Hundred Seventy-Four Dollars and 26/100 cents (\$8,874.26). The decision to "cap" the account rather than to cancel the guarantee permitted Lee Chair to remain in business and reduce the accounts receivable credit line substantially.

Inasmuch as the November Guarantee was never revoked, capped or otherwise amended all renewals of that indebtedness were pursuant to the specific terms of the guarantee which permitted the Bank to "renew, extend, accelerate or otherwise change the time of payment of, or otherwise change the terms of the indebtedness or any part thereof, including increase or decrease in the rate of interest thereon. . ." (Exhibit 3)

The December Guarantee was amended only with respect to the upper limits so that the unamended terms of that guarantee specifically permitted the Bank to extend, renew and advance credit so long as the amended upper limit was not exceeded (Exhibit 11).

As time passed Lee Chair was unable to respond to its obligations under the credit arrangements and the collateral, consisting of Lee's accounts receivable, was exhausted. The Bank made demand upon Midwest to respond pursuant to the terms of its guarantees. Midwest refused claiming that its letter of July 6, 1971, constituted a cancellation of both guarantees and it was not responsible for any extension of credit or renewal of credit occurring after receipt of said letter. Pursuant to this refusal to respond to the obligation stated in the guarantees, Midwest commenced this suit.

At the trial, the Court found that the letter of July 6, 1971, was not a cancellation of either guarantee and had the sole effect amending the upper limit of the December guarantee and that the Bank abided by the terms of the amended guarantee (R. 110-111).

ARGUMENT  
POINT I.

THE LETTER OF JULY 6, 1971 DID NOT CANCEL OR  
REVOKE THE GUARANTEE OF MIDWEST

The sole issue before the trial court was the intent behind the execution and delivery of the letter of July 6,

1971. Counsel for Midwest admitted during the course of the trial that the only disputed issue was the meaning of the July 6, 1971 letter (Tr. 16), quoted on pp. 20-21, infra). All other issues are dependent on the disposition of this primary issue. In fact, all issues raised by Midwest in its Brief are rendered moot by a determination that the letter did not constitute a cancellation or revocation of the guarantees.

The trial court, after a consideration of all of the facts presented at trial, determined:

"The intent of Midwest as expressed in the letter of July 6, 1971, was to reduce the upper limit set forth in the continuing guarantee of December 17, 1970 (Exhibit 11) and establish a new upper limit of said guarantee in an amount equal to the outstanding indebtedness of Lee Chair Corporation to Wells Fargo Bank as of July 8, 1971. It was not the intent of the letter to revoke the guarantee of December 17, 1970, or to cancel said guarantee but only to establish a new upper limit to the guarantee. Aside from lowering the upper limit of the guarantee, Midwest did not intend to have any other effect or modification of the guarantee of December 17, 1970." (R.110).

The objective of the Brief filed by Midwest is to argue the facts of the case in an attempt to have a re-trial of the case in this Court. Midwest asks this Court to review the facts, resolve disputed facts, and draw inferences from the facts different than those drawn by the trial court. Midwest's argument completely ignores the established law announced many times by this Court that decisions by the

trier of fact will not be disturbed on appeal if there is any evidence to support them. This Court has held that it will not overrule the trier of fact "unless the evidence so unerringly pointed to a contrary conclusion that there existed no reasonable basis for the finding." Cottrell v. Grand Union Tea Company, 5 Utah 2d 187, 299 P.2d 622 (1956). Accord, Aagard v. Dayton and Miller Red-E Mix Concrete Company, 12 Utah 2d 34, 361 P.2d 522 (1961). The findings of a trial court will be reversed only if the finding "did such violence to common sense as to convince the Court that no fact trier, acting fairly and reasonably, would refuse to make such a finding. . . ." Ray v. Consolidated Freight Ways, 4 Utah 2d 137, 289 P.2d 196, 201 (1955). Accord, Wood v. Taylor, 8 Utah 2d 210, 332 P.2d 215 (1958). So long as there is evidence to support a factual determination, this Court will not reverse such determination even though this Court may disagree as to the factual decision. Brigham v. Moon Lake Electric Association, 24 Utah 2d 292, 470 P.2d 393 (1970). The policy of upholding all reasonable factual findings of the trial court is based in part upon its advantaged position in factual matters, Peterson v. Holloway, 8 Utah 2d 328, 334 P.2d 559 (1959); Child v. Child, 8 Utah 2d 261, 332 P.2d 981 (1958).

With respect to the issues involved in the instant

case, this Court has held that where the parties to a transaction dispute the intent surrounding some act involved in the transaction, the question of the intent is a factual issue and the determination of that factual issue will not be disturbed on appeal if there is any evidence to support it. Taylor v. Turner, 27 Utah 2d 39, 492 P.2d 1343 (1972); Garrett Freight Lines v. Cornwall, 120 Utah 175, 232 P.2d 786 (1951); Youngren v. John W. Lloyd Construction Company, 22 Utah 2d 207, 450 P.2d 985 (1969).

Midwest fails to understand that the question presented is not what the trial court could have reasonably found from the evidence. The question is, "are the findings that were actually made by the trial court supported by any evidence?" General Insurance Company v. Lewis, 121 Utah 440, 243 P.2d 433 (1952).

The apparent justification for arguing the facts of the case in the Appellate Court is the claim, unsupported by the citation of any case or authority, that this is an equity case and that the Appellate Court may therefore independently determine the disputed factual issues. Although Midwest cites several cases noting the standard to be applied in equity cases, there is not a single authority supporting the notion that this is an equity case.

This is not an equity case, there are no grounds for

equitable relief. This Court has held:

"If there is a legal remedy available to which resort may be had without any substantial or irreparable damage, one may not seek equity. Erisman v. Overman, 11 Utah 2d 258, 358 P.2d 85, 88 (1961)."

The guarantees which are the subject matter of this case are common contracts used extensively in the commercial world. Powerline Company v. Russell's Inc., 103 Utah 441, 135 P.2d 906, 911 (1943). The Complaint in this action alleges a breach of said contract and seeks the legal remedy of money damages. All defenses asserted by Midwest are legal defenses. The equitable defenses of waiver and estoppel were waived by stipulation at the trial, Tr. 16. The remedies and defenses being legal in their nature, and said remedies and defenses being sufficient, there is no basis for the application of equitable principles.

Even if there were an equity case, the evidence, summarized below, justifies the finding that the letter of July 6, 1971 was not a cancellation or revocation of the guarantees. The findings of the trial court would be upheld even under an equitable standard. The principles of equity state that findings of fact "will not be disturbed unless the evidence clearly preponderates against them and a manifest injustice or inequity is wrought." McCullough v. Wasserback, 30 Utah 2d 398, 518 P.2d 691 (1974).



Inasmuch as the Court is concerned only with the question of whether there is evidence upon which the trial court could find that the July letter did not cancel the guarantee, the Bank will confine its argument to noting the evidence in support of the finding. The Bank will not attempt a complete response to Midwest's factual arguments wherein it cites evidence contrary to the Court's finding because consideration of such evidence is irrelevant if the finding is supported by any evidence. See authorities cited above.

The evidence in support of the Court's finding that the July letter did not constitute a cancellation or revocation of the guarantees is overwhelming.

The July letter clearly unequivocally stated:

"It is our desire that the guarantee be immediately reduced to the amount of the outstanding obligations covered by the L.E.E. Chair note. We believe this to be about \$85,000.00."

There is simply no other way to interpret the above language than to conclude that Midwest wished a ceiling on the account so as to limit their exposure under the guarantee.

The most convincing evidence that a cancellation was not intended, is the wording in the letter which refers to revocation or cancellation. Both references clearly established that Midwest contemplated cancellation or revocation in the

future, and did not intend a revocation or cancellation at the present time:

"It was the decision of the Board that we will withdraw the 'continuing guarantee' of Midwest Realty & Finance, Inc., for and on behalf of L.E.E. Chair Corporation. . .

We would appreciate your earliest reply, indicating any further requirements for finalizing this cancellation."

It is apparent from the above quoted language that the letter was not to be understood as an immediate cancellation or revocation. If Midwest intended the letter to constitute a cancellation, it would not have requested "further requirements for finalizing this cancellation."

As noted in the letter, the execution and delivery of the letter was authorized by Midwest's Board of Directors. A member of that Board of Directors, present when the letter communication was decided upon, reaffirmed that the intent of the letter was to "cap" the guarantee rather than to cancel the guarantee:

"Q. . . And I presume that you had some discussion concerning this letter, before it was sent, did you not?

A. The Board of Directors did, yes.

Q. And when you say the Board of Directors did, then that letter accurately sets forth their intent and their discussion with regard to that letter. Is that correct?

A. Certainly.

MR. CONDER: I object, your Honor. The letter speaks for itself.

THE COURT: I don't know without looking at it. I will strike it if it does.

Q. Now, the intent of the Board as expressed in that letter, was it not, was to reduce the upper limit from \$130,000.00 down to \$85,000.00, was it not?

A. That's what it says.

Q. Certainly. And you personally agreed on behalf of Midwest Realty to allow advances to keep Lee Chair Corporation going so long as the upper limit of that guarantee was capped or a ceiling was put on it, did you not?

A. I did not personally agree to it.

Q. Well, that was generally the intent and discussion when the letter was sent, was it not?

A. I can't recall exactly the conversation at the Board meeting, but that was the intent I assume by this letter." (Testimony of John G. Wells, Director of Midwest Realty, Tr. 12-13).

On July 8, 1971, the date that the letter of July 6, 1971 was received by the Bank, Mr. John G. Wells of Midwest had a telephone conversation with a Mr. Walter J. Winrow of the Bank (Tr. 13-14). At this time it was the policy of the Bank to make memoranda of all telephone conversations to avoid problems occasioned by employee turn-over (Tr. 38). In accordance with this policy of record keeping, Mr. Winrow made

notes of the telephone conversation on the original of the July letter (Tr. 38-39). This memorandum of the conversation, by reason of the passage of time, constitutes the most reliable summary of the substance of the conversation. The handwritten memorandum summarizes the conversation as follows:

"Talked to J. Wells on 7-8-71 in detail about my concern if guarantee reduced. I said I would like to keep guarantee at \$130,000.00 and indefinitely 'cap' the amount of receivables financing at current bal of 31,212. He agreed. We also agreed on an approx. 30 day deadline to define the intentions of Midwest and Lee Chair. It's also understood the 'cap' fig. in the receivables line would be reviewed if Lee Chair could convince Midwest and we had new authorization. Magg has been informed and agrees to these conditions WJW." (Exhibit 13)

The resolutions passed by the Board of Directors of Midwest which authorized the execution delivery of both guarantees provided:

"Be it further resolved, that the authority hereby conferred is in addition to the authority conferred by any other resolution heretofore or hereafter delivered to Bank and will continue in full force and effect until Bank shall have received official notice in writing from this corporation of the revocation hereof by a resolution duly adopted by the Board of Directors of this corporation and such revocation shall be effective only as to loans made by Bank subsequent to the receipt by it of such official notice." (Exhibits 12 and 4) (Emphasis added.)

A review of the minutes of the meetings of the Board of Directors of Midwest reveals that prior to July 6,

1971, it passed no resolution whatsoever which indicated or even suggested that the guarantee should be revoked or cancelled.

A review of the resolutions and minutes of the meetings of the Board of Directors of Midwest show that a meeting was held each year. However, the minutes or resolutions for the year 1971 are absent for some unexplained reason. In any event, the resolution and minutes which were produced by Midwest establish that there was no resolution prior to July, 1971, revoking or cancelling the guarantee (Tr. 23-24, Exhibit 1). The only resolution on the subject matter prior to July, 1971, was a resolution authorizing the officers to enter into the guarantee arrangement (Exhibit 1).

After the telephone conversation between Wells and Winrow on July 8, 1971, the Bank sent a letter to Midwest setting forth the substance of that conversation. The letter stated:

"As to your letter of July 6, 1971, we have discussed this with Mr. Winrow and he stated that according to his conversation with Mr. Wells, the intent of the letter was to 'cap' the borrowing which was done." (Exhibit 8)

Upon receipt of the letter by Midwest, there was no response denying that characterization of the conversation, denying the statement as to the intent of the letter, nor was

there any act on the part of Midwest which indicated that the letter was not an accurate statement of the conversation and of the intent of the July, 1971 letter (Tr. 21).

The officers of Midwest were well aware that Lee Chair was in a precarious financial position and needed substantial credit to maintain current operations (Tr. 10-11). It was therefore apparent that a sudden termination of all credit would have the immediate effect of forcing Lee Chair to terminate business and thereby lose any hope that Lee Chair could pay or reduce the debt from its current income. The trier of fact was entitled to infer that Midwest would not act imprudently; that Midwest had nothing to lose by "capping" the account since they were already liable for the indebtedness incurred to date; and, that Midwest had everything to lose by suddenly cutting off all credit and forcing Lee Chair out of business without giving it the opportunity to pay or reduce the debt. A sudden cancellation of the guarantee and the resulting sudden cancellation of credit to Lee Chair would have been an imprudent and unreasonable act and thus the trier of fact was justified in concluding that a cancellation of the guarantee was not intended.

Both the December and November Guarantee provided that they were cumulative with each other rather than superseding

Nevertheless, the July letter mentioned only the December Guarantee. There was no mention of the November Guarantee. This omission reveals the true intent of the letter. The failure to mention the November Guarantee is consistent with an intent to "cap" the indebtedness at its then current level. An intent to cap the guarantee did not require mention of the November Guarantee inasmuch as the indebtedness was already at the upper limit of that guarantee. On the other hand, an intent to cap the accounts, rather than to cancel them, would require only mention of the December Guarantee since the indebtedness under that guarantee had not yet reached the maximum. If the intent had been to cancel or terminate all guarantees, Midwest would surely have mentioned the November Guarantee inasmuch as it involved more indebtedness than did the December Guarantee. The trier of fact was entitled to infer that Midwest would act consistently: that it would not have mentioned the November Guarantee if "capping" the account were intended whereas mention of the November Guarantee was necessary if cancellation of the guarantee was intended.

The above evidence is ample support for the finding of the Court that the intent of the July, 1971 letter was to "cap" the indebtedness guarantee and not to revoke the guarantee. It was the exclusive province of the lower court, as the trier

of fact, to resolve the dispute by finding that there was no cancellation of the guarantee even though there was evidence on the other side of the issue. There is seldom a case where there is not evidence on both sides of the factual disputes. However, once the factual issues are decided, the decision is final if there is evidence to support the finding. The above review of the evidence demonstrates that there is evidence to support the lower court's finding. Midwest's review of contrary evidence is of no relevance to the issues presented by this appeal and could only result in a re-trial of the factual issues at the appellate level.

POINT II.

ALL OF APPELLANT'S ARGUMENTS ARE BASED UPON THE ASSUMPTION  
THAT THE JULY LETTER CONSTITUTES A CANCELLATION OR SAID  
ARGUMENTS ARE BASED UPON FACTUAL DISPUTES

The only real issue involved on this appeal is the determination of the intent surrounding the execution and delivery of the letter of July 6, 1971. Midwest admitted at trial that this was the sole issue before the court and Midwest waived all equitable defenses:

"MR. CONDER: Now, also in the interest of time, your Honor, although the pleadings have raised the question of consideration for the guarantee, we will waive that. We are not going to raise that.

The pleadings raised the question of estoppel.



We are not going to raise that.

We have only got one issue here, and we admit that the guarantees were secured. We admit that the money was advanced by the Bank, but we argue that the guarantee was cancelled and that the Bank made advances after that time and, therefore, that releases the guarantor. It gets down to that simple issue.

THE COURT: All right.

MR. McDONALD: I assume also then, Mr. Conder, you are waiving the defense of waiver as well as estoppel and also the defense of failure of demand?

MR. CONDER: Yes. We have only the one issue." (Tr. 16)

Inasmuch as the sole issue has been decided by the trier of fact on the basis of the evidence at trial, all arguments assuming a contrary fact are irrelevant. All arguments which attempt a re-trial on the basis of disputed facts are likewise irrelevant since such argument is outside the scope of review. See cases above cited.

Under Point II of its Brief, Midwest argues that the December Guarantee superseded the November Guarantee. The sole purpose of this argument is to "combine" the guarantees so as to make the July letter applicable to both guarantees rather than just the December Guarantee which is the only one mentioned in the letter.

The entire issue raised under Point II is irrelevant

if the Court sustains the finding of the trial court that the July letter "capped" the guarantee and did not constitute a cancellation. If the July letter merely capped the guarantee and did not constitute a cancellation, it makes no difference whether or not it applied to the November Guarantee because the indebtedness under the November Guarantee was already at its maximum limit at the time the July letter was received.

In a further attempt to "combine" the guarantees so as to make the July letter applicable to both, Midwest argues under Point II of its Brief, that the conduct of the parties should be considered. Midwest then notes a series of innocuous acts which consist mainly of correspondence referring to the guarantees in the singular rather than in the plural.

As previously noted, if the Court sustains the factual findings of the trial court, it makes no difference whether or not the guarantees are "combined" because if the July letter "capped" the guarantees rather than cancel the guarantees, it would have no effect on the November Guarantee which was already at its maximum limit. Furthermore, any inference with respect to the conduct of the parties is a factual matter that has already been disposed of in the trial court. The trial court specifically found that the December Guarantee did not supersede the November Guarantee (R.111). The cases, above quoted,

exclude consideration of the factual disputes. Finally, the cases which permit the conduct of the parties to be considered in determining the meaning of a contract apply only to situations where the meaning of the contract is ambiguous. In the instant case, the contractual provisions clearly and unequivocally state that the December Guarantee is to be cumulative and in addition to the obligation of the November Guarantee. See paragraph 2 of the guarantees, Exhibits 3 and 11. The unambiguous contractual terms preclude consideration of the conduct of the parties under the parol evidence rule. Farr v. Wasatch Chemical Co., 105 Utah 272, 143 P.2d 281 (1943); Lamb v. Bangart, 525 P.2d 602 (Utah 1974).

Under Point III of its Brief, Midwest attempts a re-trial of the case by reviewing all of the evidence favorable to its position and then asks this Court to make a factual finding on the basis of this evidence contrary to the factual findings of the trial court. Such an argument ignores the scope of review in this matter. Since the factual findings of the trial court were supported by the evidence reviewed under Point I of this Brief, this Court will not conduct a re-trial of the facts on appeal. Ray v. Consolidated Freightways, 4 Utah 2d 137, 289 P.2d 196 (1955); Wood v. Taylor, 8 Utah 2d 210, 332 P.2d 215 (1958); Taylor v. Turner, 27 Utah 2d 39 492 P.2d 1343 (1972); Garrett Freight Lines v. Cornwall, 120

Utah 175, 232 P.2d 786 (1951); Youngren v. John W. Lloyd Construction Company, 22 Utah 2d 207, 450 P.2d 985 (1969); Cottrell v. Grand Union Tea Company, 5 Utah 2d 187, 299 P.2d 622 (1956); Aagard v. Dayton & Miller Red-E-Mix Concrete Company, 12 Utah 2d 34, 361 P.2d 522 (1961). General Insurance Company v. Lewis, 121 Utah 440, 243 P.2d 433 (1952).

Under Point IV of its Brief, Midwest argues that since the guarantees were revoked in July, 1971, any extension or renewal of credit after that date is not the responsibility of the guarantor. Such an argument assumes that the July letter constituted a cancellation of the guarantee which is contrary to the express findings of the trial court (R. 110-111). Inasmuch as the trial court held that the July letter did not constitute a cancellation, the question of liability for extensions or renewals of credit after a cancellation is already determined and is not subject to review.

Under Point IV of its Brief, Midwest argues that the terms of the continuing guarantees authorized the Bank to apply collateral in reduction of the debt. Midwest then goes on to argue, without any reference to the evidence in the case, that the Bank failed to apply the proceeds of the accounts receivable to the indebtedness. However, a cursory review of the Bank's records (Exhibit 10) demonstrates that between the

date the letter was received and the date of the commencement of this suit the sum of Twenty-Three Thousand Seven Hundred Ninety-Eight Dollars and 71/100 cents (\$23,798.71) was applied to the indebtedness from the collateral. Moreover, by the terms of the guarantee, the Bank was not compelled to liquidate the collateral but merely had the option to do so. There is no evidence whatsoever that the Bank did not use diligence in collecting the accounts receivable and in applying the same to the indebtedness.

Under Point V of its Brief, Midwest again asserts an argument based upon the assumption that the July letter constituted a cancellation of the guarantee. The argument, and the cases cited, all involve a cancellation which is absent in the instant case.

Under Point VI of its Brief, defendant again asserts an argument based upon the assumption that the July letter constituted a cancellation.

POINT III.

IF THE FACTUAL FINDINGS OF THE TRIAL COURT WERE REVERSED,  
MIDWEST IS STILL LIABLE UNDER ITS GUARANTEES.

Assuming, for the sake of argument, that this Court were to review the factual findings of the trial court and reverse the same, Midwest would still be liable under its guarantees.

First, even if the July letter were regarded as a cancellation, under no stretch of the imagination could it cancel the November Guarantee. The letter referred specifically to the December Guarantee and made no reference whatsoever to the November Guarantee. These were separate and distinct guarantees, and the December Guarantee did not supersede the November Guarantee.

The December Guarantee specifically provided in paragraph 2 that it was "in addition to any obligations of guarantors. . .under any other guarantees of indebtedness of borrowers. . .heretofore given. . .to Bank." This language is clear and unambiguous and is not subject to any contrary construction. Paragraph 2 of the November Guarantee provided that it was "in addition to any obligations of guarantors. . . under any other guarantees of indebtedness of borrowers. . .hereafter to be given to Bank." Thus, both guarantees clearly state their relationship with the other and no strained construction can insert any ambiguity into the clear and unequivocal meaning of the language. Thus, if the July letter were a cancellation, it can only cancel the guarantee which it purported to cancel. The letter specifically mentioned the December Guarantee and made no mention whatsoever of the November Guarantee.

Midwest cited several cases supporting the proposition

that the conduct of the parties may be considered in determining the meaning of ambiguous contract provisions. Inasmuch as there is no ambiguity in the provisions relating to the relationship between the two guarantees, the conduct of the parties is irrelevant. Farr v. Wasatch Chemical Co., 105 Utah 272, 143 P.2d 281 (1943); Lamb v. Bangart, 525 P.2d 602 (Utah 1974).

Even if the contractual provisions were ambiguous, the conduct cited by Midwest is far from sufficient to give the Court any insight as to the meaning of the terms. The unilateral undisclosed intent of G. R. Harmon, President of Midwest, could have no bearing on the meaning of the contract which is diametrically opposed to his unilateral understanding. The fact that correspondence between the parties referred to "guarantee" in the singular is insufficient to change the terms of the contract. In each instance, the parties were not purporting to state their intent as to the cumulative effect of the guarantees. Moreover, the reference to "guarantee" in the singular is not grammatically incorrect. The fact that there are two documents does not require reference to guarantees in the plural. A debtor who executes two notes to a Bank does not thereafter require the Bank in their correspondence to refer to his "debts" in the plural. It is grammatically correct to refer to his obligation as a "debt" in the singular despite

the fact that the single debt is evidenced by two separate promissory notes.

If Midwest's argument were accepted, it would have a catastrophic effect in commerce. The terms of an agreement could be altered or amended by a secretary, clerk, or officer of the corporation by an inadvertent reference which was not consistent with the legal effect of a contract. Such a ruling would require every correspondence which made any reference to the legal rights of the author to be reviewed by attorneys.

The fact that account cards kept by the Bank designated only the December Guarantee during the period from February 1971 to July 1971, and thereafter showed no guarantee at all, is of no significance to the issues before the Court. The account cards were maintained to record payments and advances and did not purport to be an official statement of the Bank's legal rights with respect to the debtor (Tr. 45). If Midwest's argument were accepted, filing clerks and bookkeepers would require constant legal advice to assure that the internal records of the Bank contained no notation inconsistent with the legal rights of the Bank.

Midwest cites 100 A.L.R. 1236 and other texts in support of the proposition that renewals or extensions of



pre-existing indebtedness after cancellation of a guarantee are not binding on the guarantor. A review of this annotation reveals that there is a split of authority on that particular question. Some courts hold the guarantor liable for renewals and extensions of credit after cancellation so long as there is no new money advanced nor any increase in the indebtedness. Of significance to this case, the State of California subscribes to this latter view: renewals of existing indebtedness after cancellation which do not involve the advance of new money are still the responsibility of the guarantor if the indebtedness renewed was existing prior to cancellation of the guarantee. cf. Rodabaugh v. Kauffman, 200 P. 747 (Cal. 1921); First National Bank of Redondo v. Spalding, 170 P. 407 (Cal. 1918); American Trust Company v. Jones, 20 P.2d 346 (Cal. 1933). The law of California governs this case inasmuch as the Bank is a California banking institution engaged in the practice of banking in the State of California; the debt which was guaranteed by Midwest was negotiated and incurred in the State of California; Lee Chair Corporation is a California corporation that operates in the State of California; the obligation to guarantee indebtedness was incurred each time there was an advance to Lee Chair (R. 141) and thus the obligation of guarantee was made in the State of California (Tr. 54).

With respect to the accounts receivable financing, if the July 8, 1971 letter is construed as a cancellation, Midwest was not prejudice by the later extensions of credit inasmuch as said extensions enabled Lee Chair to remain in business and reduce the indebtedness on the accounts receivable financing by an amount equal to Twenty-Three Thousand Seven Hundred Ninety-Eight Dollars and 71/100 cents (\$23,798.71) (Exhibit 10).

If the July 6, 1971 letter is construed as a cancellation, and it were held that Midwest is not liable for later advances of credit, then it follows that Midwest would not be entitled to benefit from any payments made on the debt from accounts receivable created after the date of the cancellation. In this regard, Midwest totally failed in its burden of proof as to the extent of its liability. It offered no evidence with respect to the identity of the accounts receivable which were credited as payments to the indebtedness after July 6, 1971. The question of payments is a matter of defense, and the burden of proof rests upon Midwest. Rule 8(c), Utah Rules of Civil Procedure. Having claimed a cancellation of liability, Midwest had the burden of proving which payments were attributable to its liability and it was entitled to the benefit only from payments attributable to accounts receivable credited prior to its cancellation.


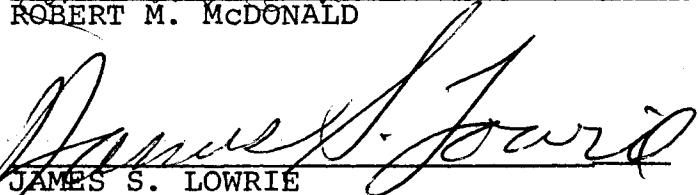
Having failed in that burden, the Court was entitled to assume that all payments made on the accounts receivable financing discharged advances made subsequent to July 6, 1971. Accordingly, even if the guarantee were cancelled, the remaining indebtedness was attributable to advances prior to cancellation.

CONCLUSION

The sole issue before the trial court was the legal effect of the letter of July 6, 1971. The respective parties produced evidence with respect to that intent, including the letter itself, and all of said evidence was available to the trial court in determining the issue. The trial court, sitting as the trier of fact, determined that the intent of the letter was to cap the accounts receivable at the level of indebtedness existing on the date the letter was received, July 8, 1971. There was sufficient evidence to justify this finding. Inasmuch as the amount of indebtedness existing on July 8, 1971 was never exceeded, the trier of fact properly determined that Midwest was liable for later renewals or extensions of credit. This factual determination is not subject to re-trial on appeal and the judgment based upon said factual determination should be affirmed.

Respectfully submitted,

JONES, WALDO, HOLBROOK & McDONOUGH

  
ROBERT M. McDONALD  
JAMES S. LOWRIE

MOTION FOR ORDER GRANTING ATTORNEYS FEES ON APPEAL

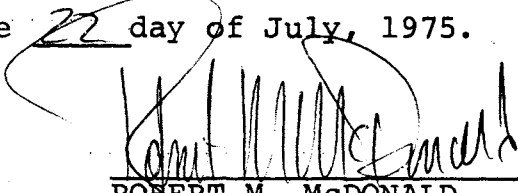
Plaintiff-Respondent respectfully moves the Court for its Order awarding attorneys fees on appeal in this matter for legal services incurred in connection with the appeal, the amount of said fees to be determined upon remand on the basis of evidence to be presented to the lower court. All attorneys fees granted to date in the lower court are attributable solely to legal services prior to the appeal in this matter. This Motion is made pursuant to the provisions of paragraph 9 of the November Guarantee and the December Guarantee which paragraphs provide:

"Guarantors agree to pay a reasonable attorneys' fee and all other costs and expenses which may be incurred by Bank in the enforcement of this guarantee and in the collection of indebtedness of borrowers to Bank."

The above quoted provisions entitle plaintiff-respondent to

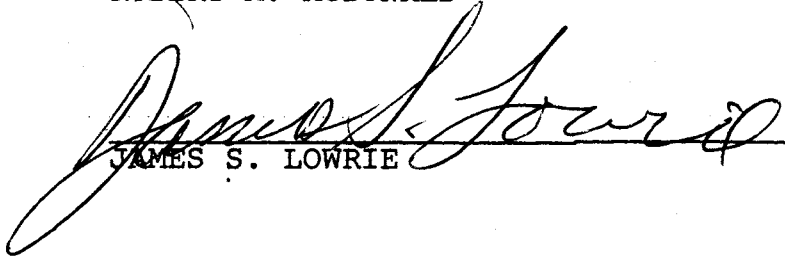
compensation for said attorneys fees and the failure to award the same would result in a reduction of the recovery of funds loaned in reliance upon said guarantees.

Dated this the 22 day of July, 1975.



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ROBERT M. McDONALD



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JAMES S. LOWRIE