IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 25 OF 1991
(High Court Civil Action No. 139 of 1989)

BETWEEN:

PAUL FREEMAN — APPELLANT

-and-

NATIONAL BANK OF FIJI — RESPONDENT

Mr H.M. Patel for the Appellant
Mr A. Rabo for the Respondent

Date of Hearing : 17th May 1993
Date of Delivery of Judgment : 25th November 1993

JUDGMENT

This is an appeal from a decision of Scott J delivered by him on 22nd March 1991. The action was one commenced by the respondent bank (the bank) against the appellant and one Sir John Falvey KBE, QC, by statement of claim filed, it seems, in April 1989. It was an action on a guarantee given by the appellant and Sir John on about 13th March 1985 to guarantee the overdraft facilities being afforded to a company External Trade Organisation (Fiji) Ltd (the company) by the bank. At the time of the application for an advance and the giving of the guarantee Sir John Falvey was the chairman of directors of the company and the appellant was managing director and chief executive of the company. Sir John Falvey died sometime before the proceedings were concluded, and the proceedings do not seem to have been

further pursued against his estate. The guarantee was a joint and several one, so there is no argument about the appellant becoming the sole party against whom the proceedings continued.

In the proceedings judgment was entered in favour of the bank for the amount sued for, namely $128,799.83, presumably with interest from the date of the writ to judgment. A number of matters were raised and dealt with by His Lordship in the careful judgment delivered by him. From the amended notice of appeal and the submissions made to us on behalf of the appellant it appears to us, that two main aspects only are relied on to support the appeal. Because of the conclusion we have reached we place on record that we endorse the findings of His Lordship on all matters not dealt with in this appeal and they will remain as res judicata, at least so far as the appellant is concerned.

The following facts appear to us to be relevant to the matters with which we propose to deal.

An application for an advance of $10,000 was made on behalf of the company by the appellant and Sir John Falvey as directors and signatories on 15th March 1985 (record p 109, Ex P.7). The application form contained a space under the heading "Security". In it was entered:

> *Joint and several guarantee unlimited as to amount from Sir John Falvey KBE, QC and Paul Freeman unsupported*

On the same date a deed of guarantee was executed by the same two gentlemen. We draw attention to the following matters in relation to it:

(i) the names of the two guarantors are entered with what is clearly their home addresses; there is no reference to their connection with the company or position held by them in the deed except that the company is named as the debtor whose debt is being guaranteed;

(ii) the operative part of the deed commences:

> *NOW THIS DEED WITNESSES that in consideration of the premises the Guarantor*
>
> *HEREBY GUARANTEES to pay to the Bank on demand which may be made at any time and from time to time the money hereinafter mentioned or so much thereof as may be specified in each such demand that is to say :-*
>
> *(a) all moneys (including moneys advanced by way of loan for fixed term or provided by way of overdraft) now or hereafter to become owing or payable to the Bank by the Debtor either alone or on joint partnership account or on any other account whatsoever whether as principal or surety; also*
>
> ...

there follows a number of descriptions of other monies which the guarantor may become liable to pay;

(iii) there are a number of clauses; relevant ones provide:

> 1. *Subject to Clauses 2 and 5 this Guarantee shall be a continuing guarantee and shall not be considered as wholly or partially discharged by the payment at any time hereafter by the Debtor or by the Guarantor of any of the moneys hereby secured or by any settlement of account or by the death or notice of the death of the Guarantor ...*
>
> 2. *In case the Guarantor shall give to the Bank at the branch of the Bank where the account of the Debtor shall be kept written notice of the desire of the Guarantor to discontinue any further liability under this Guarantee then and immediately after the said notice shall have been so given the liability under this Guarantee of the person giving such notice shall cease and determine in relation to any liability which shall be incurred after the receipt of such notice ...*
>
> 5. *This Guarantee shall be security for the whole of the moneys hereby secured but nevertheless the total amount payable by the Guarantor shall not exceed the sum of _____ ($_____ _____) and interest thereon until payment ...*
>
> 19. *Any notice to be given or demand to be made upon the Guarantor or the Debtor hereunder by or on behalf of the Bank shall be deemed to be duly given or made if it is*

in writing and is signed by an authorised officer of the Bank and is left at or sent through the post in a prepaid envelope or wrapper addressed to the Guarantor or the Debtor at the usual place of abode or business or registered office of the Guarantor or the Debtor as the case may be ...

20. .... And when two or more Guarantors or Debtors are parties hereto this Guarantee and the obligations and agreement on their part herein contained shall bind them and every two or more of them jointly and each of them severally.

By letter dated 13th March 1985 from the bank to the appellant as general manager of the company it was notified that an overdraft limit of $10,000 had been approved against the joint and several guarantee of Sir John Falvey and the appellant (see generally record p 109 - 118, exhibits P7,P8,P9).

By letter dated 3rd April 1985 (Ex. P 10) the company sought further advances. The letter contained this paragraph (record p 121):

We are of course aware that you are holding an executed guarantee which itself under Clause 5 is unlimited and we would ask that this guarantee be limited to the sum of $30,000 and we would initial the original concluding this matter.

It was signed by Sir John Falvey and the appellant. The bank replied on 11th April requiring certain matters to be done and stating (record p 122 Ex.P 11):

> *Upon completion of all security formalities, we shall be prepared to limit the liability under the guarantee to $30,000.*
>
> *The facility granted will be due for review by 30 June 1985.*
>
> *Kindly sign and return the enclosed copy of this letter in confirmation.*

The letter signed by the appellant and initialled by Sir John Falvey appears to have been returned on 24th April 1985.

By letter dated 2nd May 1985 the bank again required the matters to be effected that it had sought in its previous letter (debenture over to Company's assets and personal balance sheets both directors), which prompted a reply from another director and the Secretary of the Company which included this (record p 124 Ex.P 13):

> *We were of course in communication with Sir John Falvey KBE, QC. in his capacity as one of the guarantors, and Sir John in reply has told us :-*
>
> > *"that in all his years in Fiji as a practising Barrister and Solicitor he has never once been asked to give a personal balance sheet to any institution with whom he has signed as a Guarantor. But, please assure the Bank he can and will meet any funds required to meet his guarantee if called upon."*
> > *...*

Copies of this letter appear to have been sent to Sir John Falvey and to appellant. The bank subsequently waived the requirement for balance sheets (record p 13). The debenture was executed on 18th February 1988, the seal of the company being affixed in the presence of Sir John and the respondent.

By letter dated 1st August 1985 the bank notified the Company of the approved additional facility, making a total of $30,000, stating (record p. 133 Ex. P 15):

> ....
>
> *Security will remain a guarantee unlimited as to amount from Sir John Falvey and Paul Freeman.*
> .....
>
> *Kindly sign and return the duplicate copy of this letter ...*

It was returned on 7th August 1985 signed by the appellant with this notation:

> *"Already agreed to see letter 3.2.85 Falvey/Freeman."*

This must be a reference to the letter of 3rd April 1985 (Ex. P 10).

During 1986 the bank complained to the company on several occasions about the state of the company's debt to the bank, culminating in a letter of demand of 29th December 1986 (Ex. p 17). The amount claimed was $36,321 plus accrued interest.

This prompted a reply dated 14th January 1987 from the appellant as president of the company making an offer of payments. The letter dated 14th January 1987 was signed on that day by Sir John Falvey (Ex. P 19). It is able to be safely inferred that both guarantors were aware that the money advanced by the Bank under the previous arrangements now stood as over $36,000.

Various events occurred during 1987 culminating in an approval by the Bank for further facilities up to $100,000 upon, inter alia, "Unlimited guarantee by directors/shareholders." This was modified to the Bank consenting to the "existing guarantors, Sir John Falvey & Paul Freeman will suffice" (Ex. P 25). This was followed by a telephone conversation on 22nd or 23rd December 1987 between an officer of the Bank on the one hand and Sir John and the appellant on the other on which the establishment of the securities (including the guarantee) for the loan of $100,000 was accepted by both (Ex. P 26), acknowledged by the bank in the memorandum of 28th December 1987 (Ex. P 27), followed by a letter to the solicitors for the company dated 25th January 1988 (Ex. p 28) which stated :

> *Unlimited Guarantee from directors/shareholders from Sir John Falvey and Mr Paul Freeman presently held (photocopy enclosed). However, consents to the additional borrowings from the existing guarantors will suffice.*
> ...

This was followed by a reply from the Solicitors (8th February 1988, Ex. P 27) which stated:

... and would appreciate if you would kindly confirm that the Bank will accept the undermentioned securities in substitution of the securities mentioned in your letter of instructions dated 25th January 1988.

...

3. Consents to existing guarantees will suffice and no fresh guarantees will be required to be executed by Sir John Falvey and Mr Paul Freeman.

...

As soon as we received your confirmation we shall proceed with this matter.

The response, a letter to the Solicitors (10th February 1988 Ex. P 30)

...

3. Consents to the additional borrowings from the existing guarantors (unlimited) i.e. Sir John Falvey and Mr Paul Freeman will suffice.

...

On 17th February 1988 written consents were required. They were given by both gentlemen by letter dated 19th February 1988 Ex. P 33 which stated (record p 168):

We, Sir John Neil Falvey KBE., QC., of Suva, Barrister and Paul Freeman of Suva, Investor, having given our consent to the increases in the company's borrowings by fixing the corporate seal to the security documents as prepared by Jasbir Singh & Associates, Solicitors, of Suva, hereby further advise that WE, as joint and several guarantors of the abovementioned account with the National Bank of Fiji agree to the said increase.

By writ filed in April 1989 the bank sought recovery of the above amount plus interest that brought it up to $128,799.93.

We have felt that this long history of events is desirable in the light of the defences that were filed, and those which were argued on the appeal. They came down to two, set out in full in the helpful submissions of counsel for the appellant dated 19th March 1993.

The first ground was there had been no formal demand (or any demand) made on the appellant for payment of the monies owing, and that such a demand was necessary before any recovery under the guarantee could be had by the Company.

The second ground was that the guarantee was limited to the sum of $30,000, and, if the bank was able to recover anything, that was the limit of recovery.

We shall deal with with the second ground first. It was based upon claims that the documents to which references had already been made limited the amount for which the appellant, and Sir John Falvey, had given personal guarantees to $30,000, and some oral evidence given in the proceedings, particularly that of one Mr Stevens, who appears to have been the manager in charge of relationships between the bank and the company from about January 1987. In our opinion the learned trial judge was perfectly correct in refusing to accept this ground of defence.

In summary, the documents to which we have referred establish the bank's acceptance on 13th March 1985 of an

application by the company for financial assistance up to $10,000 upon the security of joint guarantees by the appellant and Sir John Falvey. That guarantee was executed on 13th March 1985. It mentioned no amount and was unlimited. By 3rd April 1985 an application to the bank for an increase was made. That was acceptable subject to a debenture over the company's entire assets being executed and the supply of signed personal balance sheets of both directors; subject to that the bank was prepared to limit the liability under the guarantee to $30,000. After some to-ing and fro-ing, the bank on 13th May 1985 agreed to dispense with the personal balance sheets. The debenture was never executed, that is, in pursuance of this arrangement.

Two things may be said. It is probable that this agreement lapsed. It does not matter. It was undoubtedly replaced by later agreements. Secondly, no suggestion was ever made that any variation of the guarantee by subsequent oral or written agreement between the parties was not a valid variation. We agree.

The company had further problems. It sought increased accommodation. On 1st August 1985 the bank agreed, making a total of $30,000 subject to conditions. One was that "(s)ecurity will remain a guarantee unlimited as to amount" from the two guarantors. Another was that the "guarantor's (sic) consent be produced for the increased facility." Whether the bank accepted what the appellant wrote (or somebody wrote) on the bottom of

this letter "Already agreed to see letter 3.2.85 Falvey/Freeman," and signed by the appellant we do not know. Mr Stevens was nowhere in the picture by this stage. But the matter does not finish there.

The Bank had further problems. By mid-1986 it was writing letters to the company expressing its concern about the excesses. On 29th December it wrote a letter of demand - amount owing $36,321.92 plus accrued and accruing interest. An offer of repayment on terms was apparently accepted. Enter Mr Stevens on 8th May 1987 with authority up to and including $150,000 "on fully secured basis." (Ex. P 22)

By December 1987 the Company was seeking accommodation of $100,000; on 21st December 1987 its application was refused. One ground was "previous promises for providing collateral advantages not fulfilled" - no doubt a reference to the agreement to give a debenture over to company's assets. By 22nd December the bank had relented, agreed to $100,000, and stated (Ex P 25):

> *"Security will be*
> *First registered debenture over the company's assets*
> *Unlimited guarantee of directors/shareholders*
> *Third party first registered mortgage ....*

The letter of offer bears a notation by Mr Stevens "Consents to additional borrowings from existing guarantors, Sir John Falvey & Mr Paul Freeman, will suffice."

A letter from the company, 23rd December, is in effect an acceptance; it refers to a telephone conversation between the appellant and Mr Stevens and Sir John Falvey in which "the establishment of the securities" was discussed. This is,we would assume, the conversation to which Mr Stevens' handwritten note refers.

Now, just stopping there, we simply find it inconceivable that any limit of $30,000 liability by the guarantors was discussed, or if not discussed, believed by anyone. Here was the bank, complaining about the non-performance of previous security promises, concerned about the performance of the company, carefully seeking new securities, expressly demanding a guarantee unlimited as to amount, and it is suggested that it was content with personal guarantees of less than one third of the amount agreed to be advanced. The Judge did not believe it. We confess we are not surprised. For the manager to note on the bottom of a letter which, inter alia, sought unlimited guarantees from "directors/shareholders", that the consents to the additional borrowings by the two director guarantors alone would be sufficient, and not to record the alleged limit of those guarantors, is to invite any Court to take flights of fancy. Neither the Judge nor this Court felt or feel disposed to do so.

But the matter does not end there. By letter to the solicitors for the company of 25th January 1988, Mr Stevens required the preparation of various security documents.

As to the guarantees he stated that the "unlimited guarantees" from the two directors were held, and that consents to the additional borrowings from them would suffice. Following a discussion, the solicitors, by letter dated 8th February 1988, requested that consents to existing guarantees would suffice and that no fresh guarantees need be executed. Mr Stevens (10th February 1988) agreed that consents to the additional borrowings would suffice. The consents given by the two guarantors, dated 19th February, 1988 have been set out in full earlier herein - "WE, as joint and several guarantors of the abovementioned account with (the bank) agree to the said increase."

The unlimited guarantee of the directors was again adverted to a letter from the bank dated 25th March 1988.

So much for the evidence of Mr Stevens. The Judge did not believe him.

The first ground of appeal relates to the failure of the bank to give any notice of demand to the guarantors before commencing these proceedings. While we can understand the Judge's reaction to this defence, we have the misfortune to disagree with his finding in relation to it.

There are two branches to the submission that these proceedings are defective on the basis of want of notice. His Lordship found :

(1) that no notice of demand to the guarantors was necessary in this case; and

(2) that there was a "clear and unequivocal" demand for payment made in the statement of claim or in the particulars given under it.

It is to be noted, however, that the defence denies that any demand was made as required under the provisions of the guarantee.

While his Lordship correctly stated the principles of law apposite to a case of liability arising under a guarantee where no demand for payment is necessary, the guarantee in this case specified that a demand was required - the debtor guarantees "to pay the Bank on demand ...." Where the guarantee document specifies that such a demand shall be made, the law is clear that no liability arises until such a demand is made. It is the difference between suing for a debt presently owing, when no demand is necessary, and bringing a debt into existence by the making of a demand when one is. No particulars given by or pursuant to a writ by which action is commenced can suffice because there is no cause of action at the time the proceedings are initiated.

We could, in these reasons for judgment, set out at length the authorities in which this aspect of the law is recognised and explained. In view of the very comprehensive coverage of those authorities in the submissions which were handed to us, and to which we have already referred, we have taken the course of

annexing the relevant part of those submissions with acknowledgment of the authorship and thanks to the solicitors for the appellant.

The result will be:

Appeal upheld. Verdict and judgment set aside and a verdict entered for the appellant.

Respondent to pay the appellants costs of the appeal and in the High Court.

.....
Mr Justice Michael M Helsham
President Fiji Court of Appeal

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Sir Mari Kapi
Justice of Appeal

.....
Sir Edward Williams
Justice of Appeal