

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC 192 of 2004

BETWEEN : **CARPENTERS FIJI LIMITED** a limited liability company having its registered office at Suva and trading as **CARPENTERS HARDWARE** and **CARPENTERS MOTORS** throughout Fiji.

Plaintiff

AND : **ANIL CHANDRA** of Nadi, Company Director.

1st Defendant

AND : **NITENDRA JAGDISHWAR SINGH** aka **NITEN SINGH** of Nadi, Company Director.

2nd Defendant

Counsel : M/S Lateef & Lateef & Associates for the Plaintiff
Krishna & Company for the 1st Defendant
Young & Associates for the 2nd Defendant

JUDGEMENT

BACKGROUND

1. Carpenters Fiji Limited (“CFL”) sold some items and provided services to Janit Constructions Limited (“JCL”) on a credit facilities account.
2. JCL defaulted in its payment of the debt on that account. The total debt, I gather, was \$118, 387.45.
3. To recover this debt, CFL did two things. Firstly, CFL petitioned this Court and obtained an Order to wind up JCL. Secondly, CFL pursued JCL’s guarantors.
4. There were three guarantors. They were one Jagdishwar Singh (“Jagdishwar”), Anil Chandra (“Anil”), and Nitendra J. Singh

("Nitendra"). Anil and Nitendra were directors of the debtor company, JCL. Jagdishwar is the father of Anil and Nitendra.

5. CFL filed a claim against Jagdishwar at the Labasa High Court (Civil Action No. HBC 41 of 2004) for the whole sum of \$118,387.45:

"...pursuant to an unlimited guarantee executed by the Defendant on or about 12 June 2002 guaranteeing payment of items purchased ...and for services rendered to the account of Janit Construction Limited (in Liquidation)".

6. The claim against Anil and Nitendra filed in the Lautoka High Court is exactly the same as the one filed in Labasa against Jagdishwar (see table below).

	Lautoka Claims	Labasa Claim
Defendant(s)	Anil & Nitendra	Jagdishwar
Amount Claimed	\$118,387.45	\$118,387.45
Based on	Unlimited Guarantee	Unlimited Guarantee
Wording of Guarantee	standard Guarantee that CFL insists upon guarantors	same as the one before the Lautoka Court now.
Comments	Nitendra has since settled with CFL by agreeing to pay 1/3 of \$118,387.45.	Singh J gave judgment (reported in paclii (Carpenters Fiji Ltd v Singh [2007] FJHC 30; HBC41.2004 (25 September 2007) against Jagdishwar in the sum of \$20,000 (discussion below)

SETTLEMENT BETWEEN ANIL CHANDRA & CARPENTERS

7. On 15 March 2011, Carpenters filed a Notice of Discontinuance of its action against Anil on account of the fact that the matter had been settled in full between the parties.

CLAIM AGAINST JAGDISHWAR AT LABASA HIGH COURT

8. Mr. Justice Singh gave a full judgment in Carpenter's claim against Jagdishwar (Carpentars Fiji Ltd v Singh [2007] FJHC 30; HBC41.2004 (25 September 2007)).
9. Before Singh J, Jagdishwar argued:
 - (i) that the guarantee as worded did not render him liable because of lack of consideration and
 - (ii) the terms of contract between the principal debtors and Carpenters were varied without the consent of Jagdishwar so the guarantee is discharged.

Lack of Consideration?

10. Singh J held that the guarantee itself stated what the consideration was and was valid on that account.
11. Singh J said that the guarantee was a commercial contract and must be interpreted through the eyes of a reasonable person having the background knowledge of the parties (Lord Hoffman in Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1998) 1 ALL ER 98 at 114 and adopted by the Court of Appeal in Hassan Din & Another v. Westpac Banking Corporation – ABU 66 of 2003).
12. Singh J rejected the argument that the guarantee only covered past debts or past consideration. He said there were two considerations in the agreement, firstly forbearance to sue for existing debts and secondly to supply goods in the future with promise to pay.

Variation Without Consent

13. On the argument that the guarantee had been varied without consent of the guarantor and was therefore unenforceable, Singh J reviewed the common law position that any substantial departure from principal contract by a creditor without the surety's consent will discharge the surety because it alters the surety's obligations (Holme v. Brunskill 1878 3 QBD 495 at 505; Privy Council in Egbert v National Crown Bank (1918) AC 903 at 908. Volume 20 of Halsbury's Laws of England 4th edition paragraph 253)ⁱⁱ.
14. This principle is given statutory effect in Fiji in section 11 of the Indemnity Guarantee and Bailment Act.
15. Section 11 provides:

"Any variance made without the surety's consent in the terms of the contract between the principal and the creditor discharges the surety as to transactions subsequent to the variance."
(underlining is mine for emphasis)
16. While the above statement of principle is true, Singh J said that the guarantee must be examined to see what obligations they confer in the case before him. He took clause 8 into account which provided that the Carpenters could treat Jagdishwar as if Jagdishwar were a principal debtor and Jagdishwar waived all his rights as guarantorⁱⁱⁱ.
17. Singh J then reviewed some other case law (e.g. Heald v. O'Connor 1971 1 WLR 497; Dunlop (N.Z.) Ltd. v. Dumbleton 1968 NZLR 1092) where the issue of whether a variation without a surety's consent give the surety the right to avoid the guarantee.
18. Singh J then said that Fiji's section 11 supports the view that any variance without surety's consent "*discharges the surety*" and not merely gives him the right to be discharged. The section however provides that such discharge relates only to transactions subsequent to the variance. It does not extend to transactions prior to the variance.

19. Singh J found on the facts that in this case there was variance to the extent that the credit amount was extended to up to nine times more than the sum which the guarantor had signed up on. Accordingly, he discharged Jagdishwar from liability from the amount which he had signed up on but held him liable only to the sum which he had guaranteed which was \$20,000-00.

[14] The departure here was substantial. The initial term of principal agreement only approved a purchase of \$20,000.00 per month with time being granted for payment of thirty (30) days. Here the credit amount was allowed to escalate to close to nine times that sum. The defendant may have known about the increase but that is not consent. The total sales from 17th October 2002 to 21st October 2002 came to \$45,262.00, a substantial change from the initial agreed sum of \$20,000.00. The court was not told the exact date the variation was done but it must be round about this time.

[15] Accordingly I hold that once the \$20,000.00 limit was surpassed the defendant was discharged as to his liability beyond \$20,000.00. Trade facilities which exceed \$20,000.00 do not bind the guarantor.

[16] Accordingly I enter judgment for the plaintiff against the defendant in the sum of \$20,000.00 together with costs summarily fixed in the sum of \$3,000.00.

20. I note that the Pre-Trial Conference Minutes executed by the parties raises the same issues which Singh J had dealt with above.
21. Notably also, Singh J found that the initial term of the principal agreement upon which the guarantee was based only approved a purchase of \$20,000.00 per month with time being granted for payment of thirty (30) days. However, although, the credit amount was allowed to escalate to close to nine times that sum.
22. I ask two questions at this time. Firstly, whether there is any reason why I should not apply Singh J's reasoning and findings in this case before me now and secondly, should the amount for which the defendant before me

now is to be held liable is to be any different from the amount for which Singh J found for Jagdishwar.

23. For the first question, I see no reason why I should not apply the same reasoning.
24. For the second question, I have considered the fact that whilst Jagdishwar was merely one of three guarantors for Janit without any involvement in the company, as far as one can say, the other two guarantors were both directors of the company. Can knowledge of the escalation of the credit be extended to them?
25. Directors are the brain of the company and any decision by Janit to extend the credit terms in question would only have been made on the application of the directors on behalf of the company.
26. I am of the view that the defendant before me should be liable for the balance of the sum owing which I work out to be as follows:

Total debt	-	\$118,387
Amount Settled by Jagdishwar	-	\$20,000
Amount settled by Anil Chandra	-	\$ \$39,462.30 (1/3 of \$118,387.45)
Balance for which Niten Singh should be held liable	-	\$ 58,924.70

ORDER

27. I enter judgement accordingly in favour of the plaintiff against the second defendant in the sum of \$58,924.70 plus costs which I summarily assess at \$2,000-00 (two thousand dollars only).



Anare Tuilevuka
JUDGE
Lautoka

ⁱ As Singh J observed:

The guarantee states what the consideration is. It reads:

"In consideration of your having at my request agreed to supply Janit Construction Limited (herein "the Principal Debtor") with goods and services as required by him from time to time: and/or in consideration of forbearance on your part to immediately demand and sue for payment of any monies now owing by the Principal Debtor to you to the intent that this Guarantee shall cover all monies due from time to time by the Principal Debtor to you on any account whatsoever."

ⁱⁱ Singh J explains the rationale behind this principle as follows:

The rationale behind this principle is that a guarantor is responsible only for the obligations which he has guaranteed. Therefore if the principal debtor and the creditor without the guarantor's consent agree between themselves to alter the nature of the obligation the guarantor is discharged because the obligation in its altered form is not what he guaranteed: Hancock v. Williams (1942) SR (NSW) 252, 255.

ⁱⁱⁱ As Singh J said:

[10] The construction and meaning of the guarantee are of critical importance. One must examine the exact nature of the obligations which are guaranteed. There may be clauses in a guarantee which suggest exclusion of discharge on grounds of variation. As I have stated earlier, the guarantee is a continuing guarantee which in Clause 1 also includes **"all such goods and services as you may from time to time at his request supply"**. At the time of the execution of the guarantee the credit trade agreement had not been finalized nor is there any evidence to say that any verbal discussions as to the limit of such account had been discussed. However, guarantees are not given in a vacuum; they are given in response to a principal agreement. In this case it was agreement to supply goods to a limit of \$20,000.00 per month.

[11] The defendant's argument that the variation released the defendant from liability counters difficulty in the face of Clause 8 that provides that the plaintiff could treat the defendant as if he were a principal debtor and he waives all his rights as guarantor. The relevant portion of Clause 8 reads:

"In order to give effect to this guarantee I declare that you shall be at liberty to act as though I were a principal debtor and I waive all and any of my rights as guarantor which may at any time be inconsistent with any of the above provisions."