

FIJI DEVELOPMENT BANK

A

v.

NAVITALAI RAQONA

[SUPREME COURT—(Kermode, J.)—1 May 1984]

B

Civil Jurisdiction

Contract—Guarantee—Application for summary judgment—may not be entered if arguable defence—guarantor bound by signature—no defence of limitation.)

C

W. D. Morgan for the Plaintiff
V. K. Kapadia for the Defendant

Plaintiff claimed against the defendant the sum of \$5,017.03 and interest thereon owing to the Bank by Peniasi Lewadamu which sum the defendant guaranteed to pay to the Bank on demand pursuant to the terms of a written agreement executed by the defendant on 26 September, 1977.

D

On 30 January, 1984 following entry of appearance and defence filed, plaintiff relying on Order 14 rule 1, applied for summary judgment on the grounds that the defendant had no defence to the action. The application was supported by an affidavit of the plaintiff's Assistant Manager—Securities.

E

The defendant put forward three alleged defences. If any of them raised a question or issue which ought to have been tried the plaintiff would not be entitled to summary judgment. These defences were—

1. The contents of the guarantee and the extent of his liability were not fully explained to him.
2. The agreement between the parties was that the plaintiff would first proceed to recover the debt from Peniasi Lewadamu; if the bank were unsuccessful in recovering all the debt the defendant and co-guarantor were to make arrangements for its recovery. The allegation was thus that plaintiff's claim was in breach of that undertaking.
3. Plaintiff's claim was Statute barred.

G

Held: (Referring to the defences in their order—)

1. A party of full age and understanding is normally bound by his signature to a document whether he reads it or not. The document was not one required by law to be read over to or explained to him.
2. The main term of the guarantee was clear viz the defendant had guaranteed to pay the debt owing by Lewadamu on demand i.e. there was nothing to support defence two in the terms of the guarantee.

H

- A 3. The defence ignored that the defendant's liability did not arise until demand was made. That demand was made in writing only 2½ years before action.

There was no mention of the co-guarantor (by the plaintiff in its action) yet the guarantor's liability was joint and several. No objection could be taken to plaintiff suing only one i.e. failing to refer to the co-guarantor.

- B Judgment entered for plaintiff for \$5,017.03 and a further \$134.56 for interest.

Cases referred to:

- Saunders v. Anglia Building Society* (1971) A.C. 1004.
McLardy v. Slatteum (1890) 2 QB 504.
 C *Paclantic Financing Co. Inc. v. Moscow Narodny Bank Ltd.* (1983) 1 WLR 1063.
Bank of Australasia v. Palmer (1897) AC 540.

KERMODE, Mr Justice.

Judgment

- D The plaintiff Bank's claim against the defendant is for the sum of \$5,017.03 and interest thereon owing to the Bank by one Peniasi Lewadamu which said sum the defendant guaranteed to pay to the Bank on demand pursuant to the terms of a written Guarantee executed by the defendant on the 26th September, 1977.

The defendant entered An Appearance to the writ and delivered a Defence on the 16th December, 1983.

- E On the 30th January, 1984, the plaintiff pursuant, to Order 14 rule 1 applied for summary judgment on the grounds that the defendant has no defence to the Bank's claim. The application is supported by an affidavit sworn by Mr D. S. Naidu the Bank's Assistant Manager—Securities and filed herein.

The defendant has filed an affidavit in reply.

- F Before this application was dealt with the defendant applied to amend his Defence by raising an alternative defence that the claim is statute barred. Leave was granted to amend the Defence.

The fact that the defendant had filed a Defence before the plaintiff applied for summary judgment is not necessarily fatal to the plaintiff's application if the Court is of the view that there is no defence to the claim.

- G In *McLardy v. Slatteum* (1890) 2 Q.B. 504 the plaintiff succeeded in obtaining summary judgment under Order 14 one month after a Defence had been delivered.

The Defence was filed on the 14th December, 1983 during the Court's annual vacation period. Time for filing any Reply or taking any further action only started to run as from the end of that period namely the 3rd January, 1984. There was not as much delay in commencing the Order 14 proceedings as would appear. It was certainly within one month of the effective date of filing of the Defence.

- H The defendant has raised three alleged defences. If any of them raise a question or issue which ought to be tried the plaintiff will not succeed (*Paclantic Financing Co. Inc. & Others v. Moscow Narodny Bank Ltd.* (1983) 1 W.L.R. 1063)

If however, there is clearly no merit in the alleged defences and I am satisfied there is no defence to the claim, it is my duty to give judgment for the plaintiff.

The three defences raised are:

1. The defendant says the extent of the liability and the contents of the guarantee were not fully explained and/or understood by him.

There is no dispute that the defendant executed the Guarantee. His defence is not a plea of non est factum. The document is not one which is required by law to be read over and explained to the Guarantor.

In the House of Lords case *Saunders v. Anglia Building Society* (1971) A.C. 1004 it was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms.

The general rule is that a party of full age and understanding is normally bound by his signature to a document whether he reads or understands it or not.

There is in my view no merit at all in this first defence.

2. The second defence is that the agreement and/or arrangement between the parties was that the plaintiff would first proceed to recover the debt from the said Peniasi Lewadamu. If the Bank was unsuccessful in recovering all the debt then the defendant together with a co-guarantor Ratu Josaia Tavaiqia were to make arrangements for the recovery of the debt owing by the said Peniasi Lewadamu. He alleges that the plaintiff's claim is in breach of that agreement and/or arrangement.

The Guarantee is before the Court.

Nowhere in the Guarantee is there any provision evidencing the alleged agreement or arrangement. On the contrary clause 5 of the Guarantee provides that it shall be a principal obligation and shall not be treated as ancillary or collateral to any other obligation howsoever created or arising.

If the alleged agreement is collateral or subsequent to the guarantee, it has not been so pleaded and no basis has been laid for such a defence. No consideration has been shown.

If the alleged agreement or arrangement was a verbal one made before or at the time the guarantee was executed the defendant would not be permitted to lead evidence to establish his defence.

Lord Morris in *Bank of Australasia v. Palmer* (1897) A.C. 540 at p. 545 said:

"Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract".

The main term of the guarantee is clear and that is that the guarantor has guaranteed on demand to pay the debt owing by Peniasi Lewadamu.

There is no merit in the second defence.

The third defence which is not raised in the defendant's affidavit but was added to the original Statement of Defence is his allegation that the plaintiff's claim is statute barred. The basis for this claim, although not stated, appears to be the fact that the guarantee is dated the 28th September, 1977, and the writ was filed on the 26th October, 1983, more than 6 years later.

The defendant's liability under the said guarantee did not arise until demand was made on him for payment. That demand was made by written notice addressed

- A to the said Ratu Josaiia Tavaiqia and the defendant and dated the 12th May, 1981. Only 2 $\frac{1}{2}$ years have elapsed since the debtor's liability arose under the guarantee and the Limitations Act has no application.

There has been no mention of the liability of Ratu Josaiia Tavaiqia. He is a co-guarantor and could have been joined in the writ. However, the liability of the two guarantors is both joint and several and no objection can be taken to the Bank

- B deciding to claim the money from the defendant. The defendant can later claim contribution from the said Ratu Josaiia Tavaiqia.

There will be judgment for the plaintiff against the defendant for the sum of \$5,017.03 and the further sum of \$134.56 for interest on the said sum of \$5,017.03 from the 29th July, 1983, to the 26th October, 1983, and further interest on the said sum for \$5,017.03 from the 26th October, 1983, at the rate of 11% per annum to the date hereof.

- C The plaintiff is to have the costs of this action.

Judgment for the Plaintiff.