BANK OF WESTERN SAMOA v SUISALA (SAAGA FAU) & OTHERS

Court of Appeal Apia
Dillon, Morling, Wylie JJ
5 November, 8 November 1991

HELD: (1) Clause in guarantee indicated that a condition that the guarantee be executed by all persons named, had been dispensed with.

Distinguished: Hansard v Lethbridge (1892) 8 T.L.R. 346

The National Provincial Bank of England v Brackenbury [1906] 22 T.L.R. 797

(2) The naming of a director of the Bank as a guarantor was a misrepresentation as it was known by the Bank that a director cannot be guarantor. Although innocent it still amounted to a misrepresentation and materially affected the respondents decision to sign the contract.

MacKenzie v Royal Bank of Canada [1934] A.C. 468

(3) That reasoning did not apply to the 1988 contract as no guarantor was a director of the Bank and therefore liability for the debt attached to the signatories.

Mrs Drake for the appellant
Mr Enari for respondent Fau
Mr Puni for respondent Kruse
Mr Fepulea'i for respondent Westerlund

Cur adv vult

The appellant carries on the business of banking in Western Samoa. In 1986 it extended an overdraft to Agricultural Supplies Limited ("the Company"). The respondents Fau and Kruse were directors of the company, as was one Terence Bourke, who was also managing director. In 1987, Bourke and all three respondents signed what purported to be a guarantee ("the 1987 guarantee"), which was joint and several, in favour of the bank guaranteeing

the overdraft extended to the company.In October 1988, Bourke and Fau signed a further personal guarantee ("the 1988 guarantee") in favour of the bank, this guarantee also being to secure the company's overdraft. A further guarantee was signed by Bourke only in October 1988, but as nothing appears to turn on the contents of this document we shall not make further reference to it.

The company did not meet its obligations to the bank whereupon the bank sued it for the amount due under the overdraft, viz. $130,227.62. Bourke and the respondents were joined as Defendants in the proceedings. Neither the company nor Bourke defended the proceedings, but all three respondents disputed their liability under the 1987 guarantee. The respondent Fau also disputed his liability under the 1988 guarantee.

The action came before Ryan CJ, who found that the respondents were not liable to the bank and entered judgement for them. This appeal is brought from the learned Chief Justice's decision.

The evidence at the trial established that both guarantees were prepared by the bank. After the 1987 guarantee was prepared two of the bank's employees visited Bourke and the respondents for the purpose of obtaining their signatures to the document. On the first page of the document, which is a printed form in regular use by the bank, there is a space reserved for the purpose of inserting the names, addresses and occupations of the guarantors. At the time the document was produced to the respondents for their signature this space contained the names of the respondents, of Bourke, and of one Tulgamala Anetipa Lam Sam. The last-mentioned gentleman was, at the time the 1987 guarantee was executed, a director both of the bank and of the company.

After the bank's officers obtained Bourke's signature to the 1987 guarantee document, they took it to Lam Sam for his signature. However, it was against the bank's policy to have one of its directors give a personal guarantee in respect of a customer's overdraft with the bank. For this reason Lam Sam did not sign the guarantee. At some stage his name was crossed off the document, but Ryan CJ found that at the time the respondents signed it Lam Sam's name had not been deleted from the first page of it.

The respondents Kruse and Westerlund gave evidence, which appears to have been accepted by his Honour, that they would not have signed the document had they known that Lam Sam was not to sign it. Fau's evidence was somewhat equivocal on this point but we think it can be inferred from his evidence that he also was of that mind. Execution of the document made the guarantors jointly and severally liable for the debt guaranteed, and if Lam Sam had signed the document the other guarantors would have had a right of contribution from him.

Both the 1987 and 1988 guarantees contained a clause in the following terms:

> "24. This guarantee shall be operative and be binding on each guarantor hereinbefore named who enters into this guarantee as from the time of such guarantor executing the same and notwithstanding that any person hereinbefore named as a guarantor or any other person who may have agreed or promised to be a guarantor in respect of all or any of the moneys hereby guaranteed shall refuse or fail to sign this or any other guarantee and the guarantor hereby acknowledges and agrees that the onus of procuring the execution of this and any other guarantee in respect of the moneys aforesaid by any and every such person (whether named as a party hereto or not) shall be on the guarantor and not on the Bank and that the Bank may act upon this guarantee accordingly."

The clause is printed in heavy type on p.3 of each document and is easily distinguishable from the other clauses on that page. His Honour found that every one of the respondents "exercising even minimal diligence or prudence would have been totally aware of the content of that clause, the net effect of which allowed the Plaintiff company to sue any signatory to the guarantee whether or not all of the signatories had signed the document."

Indeed, the respondent Kruse, who is a solicitor, said in evidence that he was aware of cl.24 and that he was "quite familiar" with the form of guarantee used by the bank.

Although variously formulated, in essence the defence which was successfully raised by the respondents to the bank's claim was that they would not have signed the 1987 guarantee (and in the case of Fau, the 1988 guarantee) had they known that Lam Sam would not be a signatory to it.

At the trial, an argument was put on behalf of the respondents that they had been induced to sign the guarantee by a fraudulent misrepresentation made by the bank that Lam Sam would become a signatory to the documents. Whilst Ryan CJ was of the opinion that the bank officers were grossly negligent in allowing Lam Sam's name to remain on the 1987 guarantee when it was known that it was the bank's policy that he should not sign it because he was a director of the bank, he found that no fraudulent misrepresentation was made to the respondents. This finding was not challenged on the hearing of the appeal.

Ryan CJ found, in effect, that there was a condition precedent to the liability of the respondents under the 1987 guarantee, namely the execution of the guarantee document by all of those named on the face of it. His Honour was of the opinion that since this condition precedent was never fulfilled because Lam Sam did not sign the document, the respondents had no liability to the bank

under the guarantee. He further found that Fau was not liable under the 1988 guarantee since his liability thereunder was subject to a similar condition precedent which had not been fulfilled.

Although his Honour did not specifically find that the bank represented to the respondents that Lam Sam was acceptable to it as one of the guarantors, it is apparent that he turned his mind to that issue. He said:

> ".... they (i.e. the respondents) were entitled to be told by the Plaintiff in clear terms that one of the proposed co-guarantors was an officer of the Plaintiff and that it was the Plaintiff's policy that he should not execute such a document. There was no evidence whatsoever that that policy was ever transmitted to the second Defendants (i.e. the respondents) or any of them."

In our opinion the outcome of this appeal depends upon the answers which should be given to the following questions:

(1) Was there a condition precedent to the liability of the respondents under the 1987 guarantee (and to the liability of Fau under the 1988 guarantee) namely the execution of the guarantee documents by all of those named on the face of them?

(2) Did the bank represent to the respondents that Lam Sam was acceptable to it as one of the guarantors in respect of the 1987 and 1988 guarantees?

(3) If it did make the representation referred to in (2), was the representation false, albeit innocently so?

(4) If the representation was made and was false, did it avoid the respondents' liability under the 1987 guarantee (and Fau's liability under the 1988 guarantee)?

A consideration of the whole of the evidence given at the trial leads us to conclude that the first question should be answered in the negative. It is true that the respondents would not have signed the 1987 guarantee had they known it was not to be signed by Lam Sam, and that Fau would not have signed the 1988 guarantee had he known it was not to be signed by the other respondents and Lam Sam.

But there was no evidence that the bank was ever told by any of the respondents that they were prepared to sign, and had signed, the guarantees subject to the condition that others would sign it. Indeed the evidence was to the contrary. Thus the respondent Kruse gave the following evidence:

Q. Were there any discussions between you and the bank when these guarantees were contemplated?

A. No

Q. ... my question is, did you convey to the bank that you would sign this document only on the condition that all the other co-guarantors also sign?

A. I did not personally say that.

The respondent Westerlund's evidence included the following:

Q. When this guarantee to the bank was contemplated did you advise the bank that you were prepared to sign the guarantee document on the condition that all those directors in particular Anetipa Lam Sam would also sign?

A. I took it for granted ... it is necessary that everybody signs to complete the documents. So that was my understanding ...

Q. That was the understanding you had when you signed it but you did not discuss that with the bank.

A. No.

Fau gave evidence that he assumed that "the names listed on the document would all be signed", but gave no evidence that he informed the bank that he had made that assumption.

Having regard to the plain terms of cl.24 of the guarantees and to the fact that all the respondents were experienced businessmen, cogent evidence was required to establish the existence of the condition precedent relied upon by the respondents. In the absence of any oral or written evidence supporting the existence of the condition counsel for the respondents relied upon a line of authority to the effect that when a surety executes a document in the belief, derived from its form, that it will be executed by all the sureties named therein as persons who are to sign, he will be relieved from his obligation if all the others do not sign: see Hansard v Lethbridge (1892) 8 T.L.R. 346; The National Provincial Bank of England v Brackenbury [1906] 22 T.L.R. 797. The rule of law laid down in such cases is stated thus in Brackenbury at p.797:

> "On similar principles a surety is not bound if the instrument when signed by him, is drawn in a form showing himself and another or others as intended joint and several guarantors, and any intended surety does not sign; and it is immaterial by whom the instrument was prepared, or whether

the surety omitted was solvent or not. In such cases the creditor must show that the surety consented to dispense with the execution of the documents by the other or others."

But in the present case, cl.24 provides the plainest indication that each respondent did, indeed, agree to dispense with the execution of the guarantee by the other persons named in it. In none of the cases relied upon by the respondents did the guarantee include clauses similar to cl.24. We therefore do not think the authorities relied upon by the respondents afford any support for the argument that their liability was subject to the condition precedent upon which they sought to rely.

We do not think the respondents' argument is strengthened by the bank's knowledge that Lam Sam was one of its directors. By executing the guarantees with that clause included each of the respondents consented to dispense with the execution of the document by the others named in it. Whether or not they consented as a consequence of a misrepresentation made by the bank is another issue.

We turn now to consider the second question, viz. did the bank represent that Lam Sam was acceptable to it as a guarantor. We think the answer to this question must be in the affirmative. Ryan CJ made no finding of misrepresentation, fraudulent or otherwise by any of the bank's officers. But in our opinion the document itself contained the representation. By placing Lam Sam's name on the document the bank represented in the clearest terms to the respondents that he was acceptable to it as one of the four guarantors. Any person seeing Lam Sam's name on the form and knowing that the bank had placed it there would reasonably have so understood it.

The next question is whether this representation was false. It is at this point that an important distinction must be made between the 1987 and 1988 guarantees. Lam Sam was a director of the Bank when the 1987 guarantee was executed. An officer of the

Bank gave evidence that "it was against the Bank's policy that a director of the Bank cannot sign the guarantee especially when a customer is concerned". When asked whether Lam Sam refused to sign the guarantee the officer stated: "He said that he did not refuse it, he said that he could not sign it because he was a Bank director. It was then that I told my colleague 'that's right'.

The inescapable conclusion from the bank officer's evidence is that Lam Sam was not acceptable to the Bank as a guarantor. That was the view which was obviously taken by Lam Sam himself and it was the view taken by the Bank. It necessarily follows that as

at the date when te 1987 guarantee was executed, the Bank falsely, albeit innocently, represented to the respondents that Lam Sam was acceptable to it as one of the guarantors.

Lam Sam ceased to be a director of the Bank prior to the execution of the 1988 guarantee. It appears from his Honour's reasons that he may have thought this was not the case but the evidence on the point is quite clear. There is nothing in the evidence to indicate that there was any reason other than Lam Sam's position as a director of the bank which made him unacceptable as a guarantor. This being so it was not false for the Bank to represent in 1988 that Lam Sam was acceptable as a guarantor. It follows that although the representation was false when the 1987 guarantee was signed, it was not false when the latter document was brought into existence.

This brings us to the critical question whether the guarantees were invalidated by the representation. We are satisfied that the 1988 guarantee was not invalidated because when that guarantee was executed the representation was not false. But we think the position is quite different with respect to the 1987 guarantee. When the respondents executed that guarantee (with cl.24 contained in it) each of them took the risk that the others named in the document might not sign it. No doubt they regarded that as a reasonable risk since they were all known to each other and had previously agreed to sign the guarantee. But Lam Sam's unacceptability as a guarantor elevated what was otherwise an acceptable risk in his case to a certainty that he would not become a guarantor. That was a fact of which they were ignorant and which was contrary to the representation made to them. The representation was material.

The materiality of the representation can be appreciated if one considers what the position would have been if, say, Lam Sam, Fau and Kruse had all been directors of the bank. If, in that assumed situation, Westerlund alone had executed the guarantee, he would surely have been entitled to assert that he would not have signed it had he known that all the others named in the document were not acceptable to the bank as guarantors.

A contract of guarantee, like any other contract is liable to be avoided if induced by material misrepresentation, even if made innocently: MacKenzie v Royal Bank of Canada [1934] A.C. 468. The respondents were therefore entitled to avoid the 1987 guarantee and are not liable to the Bank under it. However, for the reasons we have given, the respondent Fau is liable under the 1988 guarantee.

There was no evidence that Lam Sam's failure to sign the 1988 guarantee was occasioned by any special relationship he then had with the bank. Nor was there any evidence that the bank regarded him as an unacceptable surety after he ceased to be one of its

directors. It is to be noted that Kruse and Westerlund also failed to sign the 1988 guarantee. The reason why they and Lam Sam failed to sign it is not explained by the evidence. It is unfortunate that Fau is the only person to whom liability attaches in respect of the guarantee, but that is the consequence of him taking the risk that the others would sign it and of the operation of clause 24.

We are not called upon in this case to consider what remedy, if any, Fau may have against the other respondents and Lam Sam. Fau may be able to establish that he agreed with the other three that they would all guarantee the company's overdraft with the bank and that that agreement was supported by consideration. It is to be remembered that it was in the interests of all persons concerned that the company's overdraft be guaranteed since all of them had a direct or indirect interest in the company's affairs. Nothing we say in these reasons should be taken as a finding that Fau has or has not a right of contribution from the others.

We should make one final observation. The facts in relation to the 1987 guarantee are very special. It can rarely be the case that a bank will itself prepare a form guaranteeing a customer's overdraft and naming one of its own directors as one of several guarantors when it has a policy not to permit its directors to guarantee customers' overdrafts. Yet that is what the bank did in this case. In one sense it is unfortunate that the respondents Kruse and Westerlund are under no liability to the bank in respect of the guarantee which they executed. The money advanced by the bank was no doubt applied for the benefit of the company in which they were shareholders. But that result is due to the bank's failure to observe its own policy when preparing the guarantee.

In the result, the appeal is allowed to the extent that there should be judgement against the respondent Fau in the sum of $100,501. This sum is calculated as follows: as at 6 February 1991 the amount owing under the 1988 guarantee was $89,987. To this sum is added the amount of $10,514 being interest at 19% on $73,780 (the amount of the bank's demand) from 6 February to 8 November 1991. The appeal as against the respondents Kruse and Westerlund is dismissed. The appellant must pay the costs of those respondents, but as their interest in the appeal was common, they should be allowed only one set of costs between the two of them. The respondent Fau must pay the appellant's costs of the appeal. So far as the costs of the trial are concerned the order made by Ryan CJ should be varied to the extent that Fau should pay the bank's costs.

Leave is reserved to seek a review within 7 days from today of our calculation of the appropriate amount of the judgment should any party consider it inaccurate. If any such review is sought the party seeking it shall simultaneously file and serve a

written submission which shall include that party's calculation. Any other party wishing to dispute such calculation shall file and serve his submission and calculation within a further 7 days.

The judgment is not to be sealed until after the expiration of 7 days from today, or if any party seeks a review, until after the expiration of 28 days from today.