BANK OF WESTERN SAMOA v AGRICULTURAL SUPPLIES LIMITED AND OTHERS

Supreme Court Apia
Ryan CJ
6 February, 19 April 1991

CONTRACT - default order - guarantors liability - named signatory does not sign - clause in contract validating guarantee if signatory does not sign.

HELD: No liability on signatories of the guarantee for debt as the Bank had actual knowledge that one of the named signatories could not sign and that information should have been passed on by the Plaintiff to the other guarantors.

Hansard v Lethbridge T.L.R. 346
National Bank of England v Breckenbury (1906) T.L.R. 797

CASES CITED:

- Smith, Fleming & Co. Ex parte Harding [1879] 12 Ch.D 557
- Commercial Bank of Australia v Amadio [1983] 57 ACJR 358
- National Bank of England v Breckenbury [1906] T.L.R. 797
- Hansard v Lethbridge T.L.R. 346
- Ellesmere Brewery Company v Cooper & Others [1896] 1 Q.B. 75

Drake for Plaintiff.
Enari for Fau
Puni for Kruse
Fepulea'i for Westerlund

Cur adv vult

The factual situation in this dispute is not really in dispute other than for one small but relatively significant point. The first Defendant was not represented at the trial nor was the first named second Defendant Bourke. Accordingly the defences raised by the 2nd, 3rd and 4th named second Defendants are not really available to the first Defendant and Bourke, given that the first Defendant has taken no steps whatsoever in the

proceedings and that Bourke's defence was simply a denial of the allegations made.
In 1986 the Plaintiff gave to the first Defendant an overdraft facility for its business operations. All of the second Defendants with the exception of Westerlund were directors of the first Defendant company and Bourke was the Managing Director. In 1987 all of the second Defendants signed what purported to be a guarantee, which was joint and several in favour of the Plaintiff guaranteeing the first Defendant's overdraft. In October 1988 the first two named second Defendants, Bourke and Fau signed a further purported personal guarantee in favour of the Plaintiff. As at the date of trial which was the 6th February 1991 the amount outstanding on overdraft with the first Defendant and for which the Plaintiff now sues was $130,227.62. The reason for the delay in my judgment is that on the date of the hearing I adjourned matters so that the various counsel could file written submissions on the legal points at issue they not being in a position to put forward arguments on the date of hearing. To date I have received submissions on behalf of the Plaintiff and the second Defendants Fau and Westerlund but I have not, surprisingly, received submissions on behalf of the second Defendant Kruse. However I am not prepared to wait any longer for such submissions and I will give my judgement without the benefit of same.

The evidence establishes that in 1986 the Bank itself prepared the guarantee which was produced as an exhibit and two of the Bank employees went to the various directors of the company to obtain their signatures to same. It appears there was no difficulty in obtaining Bourke's signature and he clearly was the person who organised the facility with the Bank.

Although it is not crystal clear it does seem that Bourke was the first person to sign the document and that the Bank staff then went to one Anetipa Lam Sam, he being also a director of the first Defendant company to obtain his signature to the same. It appears that Lam Sam was a director not only of the first Defendant but also of the Plaintiff company and that it was against the Plaintiff company's policy to have one of its directors involve himself in the execution of a personal guarantee of the type involved in this case. At some stage the name of the director Lam Sam was crossed off the document. It is significant that it is not initialled by any of the signatories to the first guarantee. When a second guarantee was drawn up about a year later Lam Sam's name appeared yet again on the document but once again he did not execute that document. However on this occasion the name was not deleted and still remains intact on the first page of the guarantee form.

There is a dispute between the witnesses called by the Plaintiff and the various second Defendants who gave evidence as to whether or not the name of Lam Sam was deleted from the guarantee form

prior to the execution of the document by the second Defendants who signed same. All of the second Defendants say that the name was still in place and had not been deleted when they signed the document.

The Plaintiff's witnesses are undecided as to whether or not the name was deleted before or after the signatures by the second Defendants and in those circumstances given their inability to recall I am in no doubt but that the evidence of the Plaintiff's witnesses is not as satisfactory as the evidence of the second Defendants and on what may well turn out to be a crucial aspect of the evidence and infact the only aspect which is in dispute, I accept the evidence of the second Defendants to the effect that the name of the Director Anetipa Lam Sam was still on the document when the document was signed by the second Defendants. That is of course of particular significance in this case as I have already suggested because each and every one of the second Defendants who gave evidence said that they would not have signed the guarantee had they known that Lam Sam was not to sign it. They said that they would not have so signed because in the circumstances should judgment be taken against all or any of the second Defendants then had Lam Sam signed the guarantee form, all joint and several guarantors would have had a right of indemnity or contribution from Lam Sam as of course they would have against each other. The second Defendants themselves suggested that Lam Sam was a man of substance and there would have been no suggestion about them entering into the guarantee arrangement unless Lam Sam was to be a party to same.

It was obvious from the evidence given in Court that all of the arrangements seemed to have been arranged by Bourke. He presented or arranged for the document to be presented to the second Defendants very much as a fait accompli.

As far as the Bank's policy as to what one of its directors could or could not do it must be a consequential finding by me on the evidence produced, and there was certainly no suggestion that the policy suggested was other than what I have already mentioned, namely that it was considered inappropriate for directors of the Bank to execute inter alia Bank guarantees in respect of overdraft facilities, that the Bank had actual notice of same when the document of guarantee was prepared by it. Notwithstanding that notice the Bank not only prepared the first guarantee but the second guarantee also, Lam Sam still apparently being a director of Plaintiff and the first Defendant as at that date. Infact there were two guarantees executed on 24 October 1988, one of which was signed only by Bourke and the other of which was signed by the second Defendant Fau and Bourke also. It is a curious fact that the certificate of execution of the guarantees was not executed until over a year later on 24 October 1989 but it does not seem that any particular point rests on that peculiarity.

The deed of guarantee contains a clause numbered 24 which is as follows and on which the Plaintiff places great reliance in this case:

> "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 itself is in heavy type and when one looks at page 3 of the document, it stands out quite dramatically from the rest of the clauses on that page. I am in no doubt but that each and every one of the second Defendants exercising even minimal diligence or prudence would have been totally aware of the content of that clause the net effect of which of course allowed the Plaintiff company to sue any signatory to the guarantee whether or not all of the signatories had signed the document. However it is another strange circumstance of this case that although the clause purports to put the onus on each of the guarantors to obtain the signature of all of the guarantors it was clearly the Bank itself, through its officers, who quite literally hawked the document around Apia attempting to have it executed by all guarantors. That really seems to me to take away somewhat from the strength of clause 24 when one looks at the real situation rather than the theoretical situation contemplated by that clause.

That really is the synopsis of the factual situation. As I have said neither the first Defendant nor the first named second Defendant have taken any steps to defend the matter here in court other than as I have already set out and it does seem to me that in the circumstances particularly with Mr Bourke having executed all of the guarantees that there can be, without the production of any evidence by the first Defendant and the second Defendant Bourke, no defence available to them to the claim put forward by the Plaintiff and accordingly there will be judgment for the Plaintiff against the first Defendant and against the first named second Defendant Terence Victor Bourke in the sum of $130,227.62 together with costs and disbursements as fixed by the Registrar.

Dealing with the situation now insofar as the three second Defendants Fau, Westerlund and Kruse are concerned, the defence basically put forward as I have already indicated was that they would not have been a party to the guarantee, or guarantees in the case of Fau, unless they were quite certain that the director Lam Sam was also going to be a signatory.

Mrs Drake's submissions on behalf of the Plaintiff appeared to me to be quite compelling until I considered the submissions put forward by the second Defendants Fau and Westerlund and in particular the submissions filed on behalf of Mr Westerlund. Having said that, Mrs Drake did concede that in the case of Smith, Fleming & Co. Ex parte Harding [1879] 12 Ch.D. 557 at page 564, the Court held that there may be an obligation on a creditor to obtain the signatures of other guarantors if it can be shown that it was a condition of the guarantee that additional guarantors must be obtained. The case of Smith Fleming also seems to suggest that what is required before the burden is satisfied is a clear understanding of the contract of guarantee to be executed by the particular guarantors. Here there seems to be no doubt but that that was the case given that Lam Sam's name appeared even a year later when the second lot of guarantees were drawn up but what comes to light in this particular case, is a rather loose and casual approach to the execution of the guarantee by officers of the Plaintiff Bank. As I have said there was actual knowledge on the part of the Plaintiff as to Mr Lam Sam's position but notwithstanding that the document had not been signed by him in September 1987, a year later two further documents were drawn up with his name on each document. That seems to me to be a deplorable lack of attention to detail on the part of the officers of the Plaintiff and I must say that the specific witnesses called by the Plaintiff could not in my view really be held responsible given their duty to report back to a superior at the Bank at the specific times. They were in reality mere functionaries for senior officers at the Bank. There was a submission during the course of the hearing that there was fraudulent misrepresentation by the Plaintiff in the execution of the guarantee. The evidence certainly does not establish that. The best that can be said of the Plaintiff is that its officers acted with gross negligence. There was certainly no evidence produced before me which suggested fraud or misrepresentation in an active and positive manner.

Mrs Drake in her submissions goes on to submit that the contract of guarantee is not a contract uberrimae fidei and refers to the decision in the Commercial Bank of Australia v Amadio [1983] 57 ACJR 358 at page 362. I doubt whether any of the second Defendants would take issue with that submission however that decision has little relevance here. All of the second Defendants who executed the document were quite clearly men of substance and of business acumen and experience but they 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 or any of them.

Mr Enari on behalf of Mr Fau submits that there was a condition precedent, namely, the execution of the guarantee by all of those named on the face of the document, which was never fulfilled because someone did not execute same and accordingly he relies on the decision of the National Bank of England v Breckenbury [1906] T.L.R. 797 and Hansard v Lethbridge T.L.R. 346. Both of those cases dealt specifically with contracts on guarantee where there had been an omission of the signature of one of the sureties. That argument of course has a great deal of force in the circumstances of this case, given the protestation of the witnesses Fau, Kruse and Westerlund that all were quite firmly of the view that had Sam Lam not executed the document then there would have been no wav that any of them would also have signed it.

Mr Fepulea'i for the second Defendant Westerlund relies strongly on the cases of Lethbridge and Breckenbury referred to by Mr Enari. He also refers to the decision of Ellesmere Brewery Company v Cooper & Others [1896] 1 Q.B. at page 75. That latter case dealt with a material alteration to the document itself which could perhaps be cómpared to the material alterations of the first guarantee executed here namely the deletion of the name Lam Sam. However here the decisions in Lethbridge and Breckenbury are of the utmost significance in this particular case. In the Lethbridge decision it was held that where a surety executed a document in the belief derived from its form that it would be executed by all the sureties named therein as persons who were to sign, he will be relieved of his obligation if all the others do not sign. That is of course precisely the same situation which the second Defendants allege in this case. In the case of Breckenbury it was held that a guarantee to a Bank for an overdraft was on its face intended to be a joint and several guarantee by four guarantors. Three out of the four signed the guarantee but the fourth did not sign he being willing to do so and then died. It was held there that the three who signed were not liable to the Bank on the guarantee.

The evidence in the case before me is if anything even stronger than was the position in Lethbridge and Breckenbury given that the Plaintiff Bank had actual knowledge all along of Lam Sam's position even if its servants blundered in having the documents prepared where one of the signatories or proposed signatories to the guarantee was infact a director of the Plaintiff company and would therefore not be a satisfactory or acceptable guarantor. That information should have been passed on by the Plaintiff to the other guarantors, the second Defendants but was not. However I do not find that that was as a result of fraud or

misrepresentation but simply the result of, as I have already said, gross negligence on the part of the Plaintiff's servants. Given that finding it is unnecessary for me to go further and deal with such matters as past consideration and the like which were raised by the second Defendants. The situation in my view is quite clear. There is and cannot be any liability on the part of the second Defendants in any shape or form in respect of any of the guarantees given the fundamental defect in the first guarantee carried over as it was into the second and third guarantees. In those circumstances there will be judgment for the second Defendants and in the case of the second Defendants Fau and Westerlund they are entitled to costs as fixed by the Registrar. As far as the second Defendant Kruse is concerned given his counsel's failure to comply with the requirements of the Court as to the filing of written submissions the amount of costs will be fixed at one half of the amount fixed in respect of Fau and Westerlund. The costs of course are to be fixed as on a claim for $130,000.00.