THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 226

Record No. 2014 1126

[Article 64 548/13]

Ryan P.
Irvine J.
Keane J.

Between/

Sri Apparel Limited

Plaintiff/

Respondent

- And -

Revolution Workwear Limited, Donal O'Sullivan, Paul Bond and Safety World Limited

Defendants/

Appellants

JUDGMENT of Ms. Justice Irvine delivered on the 31st day of July 2017

Introduction

1. This appeal is brought by the second defendant, Donal O'Sullivan, against the judgment and order of the High Court (Laffoy J) of the 21st June 2013. The court held that Mr. O'Sullivan was liable to the plaintiff as guarantor under an agreement of the 16th August 2009. It is not in dispute that he entered into the agreement and gave the guarantee in question but issues arise as to the continuing validity of the obligations that Mr. O'Sullivan undertook.

2. The plaintiff, SRI Apparel, holds the worldwide distribution rights in Caterpillar (CAT) clothing. In 2007 a company controlled by the second defendant, Mr. O'Sullivan, began to purchase CAT clothing from an Irish distributor company controlled by the third defendant, Mr. Bond. As a result of doing business a relationship developed between the principals of the plaintiff company, Mr. Gallinger, and of the other companies, namely, Mr. O'Sullivan and Mr. Bond. The Bond company got into financial difficulty and the three parties made arrangements which led to an agreement on the 16th August 2009 that is at the centre of this appeal.

3. Mr. O'Sullivan and Mr. Bond formed a new company, Revolution Workwear Ltd., in which Mr. O'Sullivan held 80% shareholding and Mr. Bond 20%. This new company, the first defendant in this action, then entered into a distribution agreement with the plaintiff, SRI Apparel Ltd., on the 16th August 2009. As the judgment of the High Court makes clear, the form of this contract contains errors and omissions and infelicities of style, to use a charitable expression and none of the parties engaged Irish legal assistance but nothing turns on that in the appeal.

4. The general provisions of the agreement were followed by "Special Covenants" including one entitled "(c)" which provided that Mr. O'Sullivan and Mr. Bond individually executed the 2009 agreement as co-maker with Revolution and individually guaranteed all obligations of Revolution thereunder for the initial term, i.e., until 31st December 2014. The trial judge held that Mr. O'Sullivan could have been under no illusion that he was signing the agreement as guarantor because he was an experienced businessman and he executed the agreement twice, once on behalf of the company and again on his own behalf.

5. At the time when this agreement was executed, Mr. Bond was not only a shareholder and director of the new company, Revolution Workwear Ltd., but was also a director of the plaintiff company. Mr. O'Sullivan was not aware of that at the time and neither Mr. Gallinger nor Mr. Bond apprised him of the fact. That failure is one of the issues that we have to consider in the appeal. It appears that Mr. Bond resigned as a director of SRI Apparel Ltd. on the 17th February 2010.

6. Mr. Bond departed Revolution Workwear Ltd. in October 2010 and resigned as a director on the 24th October 2010 under a cloud of corporate wrongdoing that caused the company, as the High Court judge recounts, considerable financial difficulty because it had CAT stock for which it did not have a buyer. Mr. O'Sullivan was then left to continue running the business on his own. Against this background, SRI and Revolution agreed a variation of the 2009 agreement in the form of a letter dated the 16th February 2011 from SRI to Revolution. Laffoy J sets out the various alterations that were agreed as evidenced by the letter and noted that:-

> "it was expressly provided that all other terms of the 2009 Agreement would remain in full force and effect. The document in letter form was signed by Mr. Gallinger on behalf of the plaintiff. Mr. O'Sullivan acknowledged and agreed to the terms set out on behalf of Revolution by signing below Mr. Gallinger's signature."

7. In the course of negotiations prior to the execution of the 2011 agreement, Mr. Gallinger in an email dated the 11th January 2011 stated that SRI "will need a personal guarantee from Donal O'Sullivan". Mr. O'Sullivan refused to provide such a guarantee in relation to the 2011 agreement. The parties nevertheless reached accord as reflected in the letter of the 16th February 2011.

8. Among the findings made by the trial judge in the course of a lengthy judgment dealing with issues concerning the other defendants as well as the matters now arising on the appeal by Mr. O'Sullivan was that the plaintiff company was in breach of the terms of the 2009 agreement in its conduct in November and December 2010 when it sold merchandise to a company in France and another company in the United Kingdom resulting in a significant loss to Revolution Workwear Ltd.. Mr. O'Sullivan was unaware of

these breaches at the time when he entered into the 2011 agreement. While the judge noted at paragraph 94(c) that Mr. O'Sullivan claimed that this was one of the grounds which discharged him from his liability under the guarantee, he complains that the judge did not subsequently address the merits of that contention.

9. Following the trial of the somewhat complex issues between the plaintiff and the first and second defendants, the trial judge in her judgment of the 21st June 2013 held that the plaintiff, SRI Apparel Ltd., was entitled to judgment against the first defendant, Revolution Workwear Ltd., in the sum of €114,951 and that the second defendant, Mr. O'Sullivan, had not been discharged as a guarantor under the agreement dated the 16th August 2009. Mr. O'Sullivan appealed to the Supreme Court and the matter was in due course transferred to this court by order pursuant to Article 64 of the Constitution.

10. The issues arising on the appeal are as follows:–

> (a) Did the trial judge err in law in finding that the fact that Mr. Bond was a director of the plaintiff, SRI Apparel Ltd., was not an unusual feature of the contractual relationship between that company and Revolution Ltd.?
>
> (b) Did the trial judge err in law in finding that Mr. O'Sullivan was not discharged from his obligations under the guarantee by reason of the variations to the 2009 agreement brought about by the 2011 agreement?
>
> (c) Did the trial judge err in fact and/or in law in failing to attach any weight to the reference to the need for a personal guarantee in the e-mail from Mr. Gallinger to Mr. O'Sullivan dated the 11th January 2011?

The High Court proceedings

11. The proceedings that were commenced by SRIA on the 30th November, 2011 sought wide ranging relief against the named defendants. In particular SRIA sought an injunction restraining Revolution from distributing CAT merchandise in certain named territories in addition to which it claimed damages for breach of contract in respect of both the 2009 and 2011 agreements. Claims were also made against Mr. O'Sullivan and Mr. Bond as guarantors of the liability of Revolution. A single defence and counterclaim was filed on behalf of the first, second and fourth named defendants while a separate defence was filed on behalf of Mr. Bond.

12. While the trial judge at para. 63 of her judgment stated that the defendants did not plead an entitlement to rescind the 2009 agreement by reason of the non disclosure by SRIA that Mr. Bond was a director of that company; Revolution did in fact raise that plea at para. 22 of its defence. However, I have not been able to establish whether it pursued that relief at the hearing due to the fact that this court heard the appeal without the benefit of a transcript of the evidence heard in the High Court. It might well be the case that to have pursued that line of argument would have militated against Revolution's counter claim which was based upon the subsistence of the 2009 agreement. However, it is not disputed that Revolution claimed that SRIA, in failing to disclose that Mr. Bond was a director of that company was in breach of an implied term of the agreement which required the parties to act in good faith and that it was also in breach of s. 194 of the Companies Act 1963.

13. Insofar as the defence relied upon the nondisclosure by SRIA of Mr. Bond's directorship in that company it is noteworthy that it was not formally pleaded that the nondisclosure of that fact to Mr. O'Sullivan relieved him of his obligations as a surety or that Mr. Bond's directorship of SRIA was an unusual or material fact which ought to have been brought to his attention because it impacted upon the risk which he expected to bear when he signed as surety and which in equity permitted him to be considered discharged of his obligations under the 2009 agreement. The height of the plea on Mr. O'Sullivan's behalf was that Mr. Bond's directorship of SRIA placed him in a conflict of interest situation and that as a matter of fact, had he known of that conflict of interest he would not have signed the 2009 agreement as a co surety. However, in the replies to particulars of the 13th February, 2012 the defendants did state that Mr. Bond's interests should have been disclosed to both Revolution and Mr. O'Sullivan albeit it on the basis of his "conflict of interest" rather than because it affected adversely the risk which Mr. O'Sullivan agreed to accept when he signed as a surety.

14. Although there is no plea in the defence that the failure of SRIA to disclose its breach of the 2009 contract in November and December 2010 provided a legal basis for Mr. O'Sullivan to be discharged from his obligations as surety following the 2011 agreement, it seems to me likely, having regard to what was stated by the trial judge at para. 53 of her judgment that the defendants only learned of SRIA's breach when discovery documentation was exchanged two days before the hearing.

15. Mr. O'Sullivan, as was noted by the trial judge at para. 20(j) of her judgment, claimed that he was discharged of his obligations as guarantor due to the fact that the 2011 agreement constituted a substantial variation of the 2009 agreement which he maintained materially affected the ability of Revolution to meet its obligations thus entitling him to be discharged as surety.

16. Revolution, apart from its denial of liability in respect of SRIA's claim, counter claimed damages against SRIA in respect of a number of alleged breaches of the 2009 agreement. One aspect of that counterclaim was based upon the breach of contract to which I have already referred and which occurred in November and December 2010 when SRIA, contrary to the provisions of the 2009 agreement, sold certain CAT merchandise to retailers in the U.K. and France contrary to the provisions of the 2009 agreement.

17. It is also material to note that, perhaps due to the late exchange of discovery documentation, Mr. O'Sullivan made no formal plea in the defence claiming that he was entitled to be discharged as surety as a result of the fact that when Revolution signed the 2011 agreement, which carried with it his guarantee from the 2009 agreement, SRIA failed to disclose the breach of contract to which I have just referred. However, it is to be noted that at para. 94(c) of her judgment the trial judge records that Mr. O'Sullivan argued that he should be discharged from his liability on foot of the guarantee contained in the 2009 agreement because he was unaware when he signed the 2011 agreement on Revolution's behalf, of that breach of contract.

18. While a full defence was filed on behalf of Mr. Bond, when the proceedings came on for hearing in the High Court counsel for SRIA, counsel representing Mr. Bond advised the court that an interim agreement had been reached whereby SRIA was content, at that point in time, not to further pursue its claim against Mr. Bond. That being so the Court was asked to adjourn the proceedings against Mr. Bond generally with liberty to re-enter. It is important to record that at no stage was the court advised that SRIA had decided to take no further action against Mr. Bond on foot of his guarantee. It is perhaps also material to note that notices for contribution and indemnity had been served by Revolution and Mr. O'Sullivan on Mr. Bond. However, in the context of this appeal, the court is only interested in the notice for contribution and indemnity served by Mr. O'Sullivan on Mr. Bond and it would appear that Mr. O'Sullivan's entitlement to contribution and / or indemnity in respect of the judgment granted against him in his capacity as guarantor, as was noted by the trial judge, "remains to be heard and determined".

Relevant findings of the High Court judge material to this appeal

19. The High Court judge rejected the argument that Mr. O'Sullivan was entitled to rescind the 2009 agreement because SRIA did not disclose that Mr. Bond was a director of that company at the time the 2009 agreement was executed. She concluded that the 2009 agreement was a commercial transaction negotiated at arms length and that Revolution had not demonstrated that there was any duty on SRIA to disclose that Mr. Bond was a director of that company or that any failure to do so amounted to a misrepresentation. In passing she noted that it was a matter of public record that when the 2009 agreement was executed Mr. Bond was a director of SRIA. She also pointed to the fact that the effect of s. 194 of the Companies Act 1963, in the context of the 2009 agreement, was to require Mr. Bond to declare his interest in the contract proposed between Revolution and SRIA to the board of directors of Revolution, assuming he had a financial interest in that agreement. Thus it was that she concluded that Mr. O'Sullivan's reliance on s. 194 as the basis for his claim that there was an obligation on SRIA to disclose that Mr. Bond was a director of SRIA was misconceived.

20. As regards Mr. O'Sullivan's contention that the failure of SRIA to disclose what he characterised as the "unusual fact" that Mr. Bond was a director of that company was sufficient to discharge his liability as guarantor of Revolution's liabilities as per the 2009 agreement, the High Court judge, having assessed the creditor's obligations of disclosure to a surety in light of the decisions in *Royal Bank of Scotland plc v. Etridge (No. 2)* [2002] AC773, *Moorview Developments Limited v. First Active plc* [2009] IEHC, *Seaton v. Heath* [1899] 1 Queens Bench 782 and *North Shore Ventures Limited v. Anstead Holdings Inc.* [2012] CH31, rejected that submission. She was not satisfied that the fact that Mr. Bond was a director of the creditor and its debtor, Revolution, constituted an unusual feature in the context of a distributorship contract.

21. I accept the submission made by Mr. O'Callaghan S.C. that the trial judge's reasons for rejecting the argument that Mr. O'Sullivan ought to have been discharged from his obligations under the guarantee because his contractual relationship with SRIA was "materially different in a potentially disadvantageous respect" from what he might naturally have expected when he agreed to take on the role of surety, are not set out in her judgment. However, I am nonetheless satisfied that it is to be inferred from the fact that she specifically referred to this submission at para. 94 of her judgment and yet refused to discharge Mr. O'Sullivan from his obligations under his guarantee that the High Court judge fully considered this submission before rejecting it.

22. As to the findings of the High Court judge material to the second issue under consideration on this appeal i.e. the assertion that the High Court judge erred in law in failing to conclude that Mr. O'Sullivan was discharged from his liability as surety for Revolutions indebtedness by reason of the fact that he did not have full knowledge of all of the relevant facts material to the variation in 2011, namely that SRIA had sold merchandise to distributors in U.K. and France in breach of the 2009 agreement, the High Court judge rejected that argument. His liability under the guarantee provisions of the 2009 agreement was not discharged by reason of the non disclosure by SRIA of its breach of the 2009 agreement.

23. In the course of explaining her refusal to discharge Mr. O'Sullivan from his liability as a guarantor, the High Court judge considered in great detail the development of the law in a number of jurisdictions as to the circumstances in which a surety might be discharged of their obligations. In particular, she considered in some detail the decisions in *Polak v. Everett* [1876] 1 Queens Bench 669, *Holme v. Brunskill* [1878] 3 QBD 495, Bank *of India v. Patel* [1982] 1 Lloyds Reports 507, *Bank of Montreal v. Wilder Et al* [1983] 149 DLR (3d) 193, *Danske Bank A/S trading as National Irish Bank v. McFadden* [2010] IEHC 116 and *Ankar Pty Ltd. v. National Westminster Finance (Australia) Limited* [1987] 162 CLR 549, a number of which I will refer to later.

Discussion and Decision

Issue 1: Did the trial judge err in law in finding that the fact that Mr. Bond was a director of the plaintiff SRI Apparel Ltd. was not an unusual feature of the contractual relationship between that company and Revolution Ltd.?

24. There is no real dispute between the parties as to the obligations of a creditor, in terms of disclosure to an intended surety. The decisions in *Royal Bank of Scotland v. Ettridge (No. 2)*, *Mooreview Developments v. First Active plc* and *North Shore Ventures Limited v. Anstead* make clear, as was stated by Nicholls L.J. in *Ettridge*, that "a creditor is obliged to disclose to a guarantor any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect"

25. It is clear from the very detailed judgment of the High Court judge that she set about applying the aforementioned principles to the facts as found by her in the present proceedings. In that regard she first addressed whether or not the fact that Mr. Bond was a director of both parties to a distributorship agreement was, as required under the aforementioned *jurisprudence*, an "unusual feature of the contract between the creditor and the debtor".

26. Having considered the evidence before her, evidence which is unknown to this court save for a three page agreed note concerning certain aspects of the evidence and that which is referred to in the judgment, the High Court judge came to the conclusion that it simply could not be stated that in the course of a distributorship agreement it was "unusual" that there might be a director common to both parties. That being so, the fact that Mr. Bond was a director of SRIA was not something that had to be disclosed to an intended surety under the prevailing principles.

27. Having regard to the aforementioned finding of fact, which was perhaps in part made by the trial judge based on her own vast experience of commercial litigation, and in circumstances where no evidence was led by Mr. O'Sullivan for the purpose of seeking to establish that Mr. Bond's directorship of both companies was an unusual feature of this type of commercial agreement, it is difficult to see how that finding of fact could be displaced by this court in light of the limitation of its jurisdiction as per Hay v. O'Grady [1992] 1 IR 210.

28. However, even if this court could displace that finding by the trial judge, it would have to be satisfied that the High Court judge was in error in failing to conclude that the fact that Mr. Bond was a director of SRIA might materially prove disadvantageous to Mr. O'Sullivan in that it would render his position materially different from what he had anticipated when he signed the 2009 agreement as surety knowing that Mr. Bond was to be a co-surety of the liability of Revolution but not knowing that he was a director of SRIA.

29. That brings me to the risk which Mr. O'Sullivan agreed to accept when he executed the 2009 agreement in his capacity as a co-surety. When he did so he agreed to guarantee to the extent of 100% the liabilities of Revolution under the distributorship agreement. He did so knowing that his co-surety was to execute the guarantee thus exposing him to an equivalent liability. The risk which Mr. O'Sullivan accepted was that in the event of Revolution defaulting on its contractual obligations that SRIA could opt to sue both himself and Mr. Bond as co-sureties, as occurred here, or might simply elect to pursue one or other of them.

30. A person who signs as a co surety, as was the case with Mr. O'Sullivan, has no legal right, absent a specific agreement with the creditor in such terms, to require the creditor to sue all or any particular surety / sureties. A creditor knowing that a particular surety might not be a mark for any judgment as might be obtained against them, is perfectly entitled to pursue only the surety they consider

likely able to meet any judgment obtained in their favour. The creditor is not obliged to put good money after bad and chase a surety / sureties who might never be in a position to meet their liabilities.

31. Thus, when Mr. O'Sullivan signed the 2009 agreement as a co surety he implicitly accepted the risk that SRIA might ultimately elect to sue him rather than Mr. Bond. He cannot therefore claim that his risk as a surety was in any way changed by the fact that Mr. Bond was a director of SRIA even if the court were to accept that it was likely in such circumstances that he would not be sued on foot of his guarantee given that he was a director of that company.

32. What was relevant and material to Mr. O'Sullivan's risk was the fact that Mr. Bond was to be a co surety. That being so, Mr. O'Sullivan knew that in agreeing to guarantee Revolution's liabilities that he would enjoy the valuable right of contribution if called upon by SRIA to meet his obligation as surety. It follows that the risk accepted by Mr. O'Sullivan was that he would be personally liable to SRIA in respect of 100% of Revolution's liabilities subject to his entitlement to seek contribution from Mr. Bond if called upon to meet those obligations. The fact that Mr. Bond was a Director of SRIA was immaterial to the risk to Mr. O'Sullivan associated with that agreement. He remains entitled to seek contribution from Mr. Bond as his co-surety, as has happened in this case, and the fact that Mr. Bond is a director of SRIA or that SRIA did not seek judgment against him in the course of the High Court hearing, has had no adverse effect on the risk Mr. O'Sullivan signed up to when he executed the 2009 agreement in his capacity as co surety.

33. Accordingly it matters not whether, as a result of the fact that Mr. Bond was a director of SRIA, it was less likely that he would be pursued in the event of Revolution defaulting on its liabilities. Mr. O'Sullivan agreed to guarantee 100% of Revolution's liabilities in the knowledge that he would enjoy the entitlement to seek indemnity from Mr. Bond should he have to discharge that liability. He was given no assurance and neither was he entitlement to assume that SRIA would ever sue Mr. Bond on foot of his guarantee. His only right was he entitled to seek contribution from Mr. Bond if called to meet his own obligations under the guarantee, a right he continues to enjoy and which as yet remains to be determined. Accordingly, it is irrelevant, in my view, that SRIA has adjourned its claim against Mr. Bond generally with liberty to re-enter given that Mr. O'Sullivan retains his right to pursue Mr. Bond to seek contribution at a later date.

34. For the aforementioned reasons I am satisfied the High Court judge did not err in law when she concluded that the fact that Mr. Bond was a director of SRIA did not make Mr. O'Sullivan's contractual relationship with SRIA "materially different in a potentially disadvantageous respect" from which he might naturally have expected when taking on the role of surety. It follows that the appeal on this issue must fail.

Issue 2: Did the trial judge err in law in finding that Mr. O'Sullivan was not discharged from his obligations under the guarantee by reason of the variations to the 2009 agreement brought about by the 2011 agreement?

35. Mr. O'Callaghan argues that while the trial judge was entitled to conclude that Mr. O'Sullivan could not be discharged in his capacity as guarantor because he was a material player who actively participated in arranging the alternation to the contractual relationship between creditor and debtor as provided for in the 2011 agreement, she did not adequately address the argument that he could not be held to his guarantee in respect of those changes because he was unaware of SRIA's breach of the 2009 agreement at the time that agreement was varied. As the 2011 agreement provided that the obligations of Mr. O'Sullivan as surety would continue, his informed consent to the variations proposed was required. That required that he be advised of Revolution's breach of the 2009 agreement given that the said breach had adversely affected Revolution's ability to meet its obligations to SRIA thus increasing his risk as surety.

36. Once again there is no dispute between the parties as to the legal principles to be applied by a court when asked to discharge a surety from their obligations under a contract of guarantee. The origins of such principles were traced by the trial judge through many decisions pertaining to guarantees including those of *Holme v. Brunskill* [1878] 3 QBD 495, *Danske Bank A/S trading as National Irish Bank v. McFadden* [2010] IEHC 116, *Bank of India v. Patel* [1982] 1 Lloyds Reports 507 and *Bank of Montreal v. Wilder et al* [1983] 149 DLR (3d) *193 Polak v. Everett* [1876] 1 Queens Bench 669 and *Ankar Pty Ltd. v. National Westminster Finance (Australia) Ltd.* [1987] 162 CLR 549. I do not consider it necessary to repeat that exercise here accepting as I do her analysis and conclusions. Thus I will do no more than briefly summarise the principles which emerge from these decisions insofar as they are material to the submission referred to in the last preceding paragraph.

37. It is not in dispute that any material variation in the terms of the contract as between creditor and debtor will discharge the surety of their liability (see for *e.g. Holme v. Brunskill*) unless it be the case that the surety may be taken to have assented to the change by virtue of active participation in this change (see Clarke J. in *Danske Bank v. McFadden)*. Further, a surety may be discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation or if he causes or connives at the default of the principal debtor (see judgment of Bingham J. in *Bank of India v. Patel*). In certain circumstances a guarantor will be discharged from their obligations where the creditor is in breach of a term of the principal contract (see *Bank of Montreal v. Wilder*). However, it does not follow that a guarantor will be discharged when the creditor is in breach of its contract with the debtor.

38. It is important to consider this aspect of Mr. O'Sullivan's appeal in the context of the findings of fact and legal conclusions reached by the trial judge which are not challenged on this appeal. They are as follows:-

> (i) that the breaches by SRIA of the 2009 agreement were not fundamental and / or repudiatory in nature as might have otherwise entitled the defendants to repudiate their respective liabilities under the 2009 agreement.
>
> (ii) that the financial difficulties which Revolution encountered in late 2010 and which led to the 2011 agreement were not due to SRIA's breach of the 2009 agreement.
>
> (iii) that the sales of CAT merchandise to distributors in France and the UK in breach of the 2009 agreement:
>
> > "…were a reaction to, rather than a catalyst of, Revolution's financial difficulties, which manifested themselves in October 2010 and which Mr. Gallinger was endeavouring to deal with in the period immediately after Mr. Bond's departure."
>
> (see para 51 of the judgment of the trial judge)
>
> (iv) that SRIA had not set out to cheat or deceive Mr. O'Sullivan when it breached the 2009 agreement, rather Mr. Gallinger had tried after Mr. Bond's departure to retrieve the situation as best he could.

39. Given that the High Court judge did not specifically address this issue in her judgment it is necessary for this court to consider whether Mr. O'Sullivan can establish as a matter of law that the failure on the part of SRIA to bring its breach of the 2009 agreement to his attention, so that as surety he could validly consent to the alteration of that agreement in February 2011, provides him with a legal entitlement to be discharged from his guarantee.

40. The first matter of importance is that it is clear that on the facts of this case that there could be no variation of the contract between the creditor on the debtor without Mr. O'Sullivan's agreement, as the trial judge observed in para. 19 and 86 of her judgment. He signed the 2011 agreement on behalf of Revolution and was thus fully aware of the proposed variations in the contractual relationship as they might affect not only Revolution but his own liability as surety. Thus in accordance with the law as outlined by Clarke J. in Danske bank, he had no entitlement in equity to seek to be relieved of his obligations as surety.

41. Neither can Mr. O'Sullivan bring SRI's conduct at the time of the variation within the decision in *Bank of India v. Patel* such that he might claim an entitlement to be discharged as surety. The following statement by Bingham L.J. at p. 515 of this decision provides helpful guidance on the matter: -

> "I consider the true principle to be that while a surety is discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation or causes or connives at the default of the principal debtor in respect of which the guarantee is given or varies the terms of the contact between him and the principal debtor in a way which could prejudice the interests of the surety, other conduct on the part of the creditor, not having these features, even if irregular, and even if prejudicial to the interest of the surety in a general sense, does not discharge the surety."

42. The trial judge determined that SRI sold the merchandise into the UK and France in breach of the 2009 agreement in an effort lessen the consequences of Mr. Bond's conduct for both SRIA and Revolution. There was no finding of bad faith, concealment or deliberate misrepresentation on the part of SRIA. Thus, even if it had been established, which it was not, that SRIA's breach of the 2009 agreement could be said to have been generally prejudicial to Mr. O'Sullivan's interests as surety, he would not on that account in equity have been entitled to be discharged from his obligations.

43. Neither is this a case in which it can be stated that SRIA caused or connived with others to bring about a default on the part of the principal debtor, such that Mr. O'Sullivan might claim an equitable entitlement to be relieved of his obligations. There was no evidence that SRIA had "caused or connived at" the default of Revolution. Having heard the evidence of both Mr. Gallinger and Mr. O'Sullivan, she concluded that Revolution's problems in late 2010 were much closer to home i.e. they had been stimulated by the fraudulent actions of Mr. Bond who resigned as Director and left Revolution at that time.

44. The basis for the equitable relief sought by Mr. O'Sullivan was the assertion that the breach by SRIA of its contract with Revolution had the affect of increasing his risk as surety, a risk to which he had not agreed. That being so, the onus was on Mr. O'Sullivan to establish as a matter of law that a principal debtor, at the time of any proposed variation of the principal contract, is obliged to advise the guarantor of any existing default on their part under that agreement. While many authorities were produced concerning the circumstances in which a surety might be relieved of their obligations should the principal contract be varied without their consent, no authority was produced to support the type of disclosure obligation proposed by Mr. O'Sullivan or to demonstrate that equity would as a result of any such breach intervene to relieve the surety of their obligations under the agreement once varied.

45. As Laffoy J. made clear in the course of her judgment, Mr. O'Sullivan's reliance upon the decision of the High Court of Australia in *Ankar Pty. Ltd.*, to support his claim to be discharged of his liability as surety by reason of SRIA's breach of the distributorship agreement was misplaced. What was under consideration in that case was a breach by the creditor of the terms of the contract of guarantee between the creditor and guarantor rather than a breach of the principal contract between the creditor and debtor.

46. That no such authority has been forthcoming is perhaps not surprising given that a contract of guarantee itself is not a contract *uberrimae fidei* with the result that there are limited obligations of disclosure on the part of the creditor when entering into the principal contract. In order to establish his right to claim against a guarantor, a creditor is not obliged to establish that the transaction between himself, the principal debtor and surety was a fair one or that in the course of pre contract negotiations he had made a full disclosure of all material facts. The creditor owes no fiduciary duties of that nature.

47. That being so it is difficult to see how it could be claimed that such duties arise at the time when the parties to an agreement which may be concluded in such circumstances comes to be varied.

48. For the purpose of assessing the potential validity of this ground of appeal it is perhaps helpful to reflect upon the fact that a surety enjoys all of the rights of the principal debtor. Thus, any loss that the surety might suffer as a result of a breach by a creditor of the principal contract can adequately be compensated by their right of set off. They can plead breach by the creditor of an obligation owed to the principal debtor and claim credit for that breach in any proceedings brought against them, as occurred in the present case. If, as is the case here, the breach by SRIA of the 2009 agreement entitled Revolution to no more than a right to set off of any loss arising from that breach, it is difficult to see how equity would favour discharging the surety of their liability in respect of the non disclosure of that breach. Why would equity afford the surety a greater remedy than that available to the principal debtor?

49. Whilst the effect of SRIA's breach of the 2009 agreement was to deny sales to Revolution that might have been made, it does not follow that Mr. O'Sullivan as surety was at any greater risk in the event of Revolution failing to discharge its liabilities under the 2011 agreement. In the event of that default, as is apparent from the outcome of the within proceedings, Revolution and Mr. O'Sullivan were both entitled to set off as against SRIA's claim the loss arising from the breach when it came to an assessment of their overall liability. Thus it cannot be said that the failure by SRIA to disclose its breach of the 2009 agreement at the time that agreement was varied in 2011 was one which affected the risk to be absorbed by Mr. O'Sullivan following the variation of that agreement.

50. For all of the aforegoing reasons I am satisfied that the trial judge did not err in law in failing to discharge Mr. O'Sullivan as surety of Revolution's liabilities because at the time he agreed to the variation brought about by the 2011 agreement he was not made aware of the fact that SRIA had been in breach of the 2009 agreement.

Issue 3: Did the trial judge err in fact and/or in law in failing to attach any weight to the reference to the need for a personal guarantee in the email from Mr. Gallinger to Mr. O'Sullivan dated 11 January 2011?

51. While it is submitted that the trial judge erred in law in failing to have any regard to the email written by Mr. Gallinger in January 2011 in anticipation of a variation of the 2009 agreement stating he would require a personal guarantee from Mr. O'Sullivan, thus indicating he was of the view that the existing guarantee would not carry over in respect of the proposed variation of that agreement, that is a submission that I reject.

52. In my view, it matters not what Mr. Gallinger considered the position to be in respect of Mr. O'Sullivan's obligations as surety in the run up to the 2011 agreement. What matters is what the contractual position was between the parties in the commercial dealings between SRIA, Revolution and Mr. O'Sullivan. Mr. O'Sullivan was a co surety to the 2009 agreement. He signed the 2011 agreement on behalf of Revolution and having regard to the decision of Clarke J. in *Dankse Bank v. McFadden* must be taken to have been fully familiar with what was proposed. The terms of the 2011 agreement provided that all aspects of the 2009 agreement as were not varied, were to be carried over. One such provision was that which pertained to his guarantee. That being so the contractual position was that there was no need for him to sign the 2011 agreement or enter into any other contract of guarantee in order that he might remain liable for Revolution's obligations under that agreement as may have been the belief of Mr. Gallinger. As a matter of law Mr. O'Sullivan's guarantee given in 2009 continued.

53. In circumstances where Mr. O'Sullivan in executing the 2011 agreement is to be taken to have understood that he would continue to be liable for Revolution's obligations notwithstanding the variation provided for in the 2011 agreement, he can have no complaint that the trial judge discounted the e-mail from Mr. Gallinger which in my view is of no contractual significance whatsoever.

Conclusion

54. Having considered the submissions of the parties, I am satisfied that there was no obligation on SRIA at the time Mr. O'Sullivan signed the 2009 distributorship agreement as surety, to disclose to him that Mr. Bond was a director of that company. That Mr. Bond was a co director of SRIA and Revolution was not an unusual circumstance, in the legal sense, such as required disclosure.

55. Further, not only was Mr. Bond's position as director of SRIA and Revolution not unusual in the legal sense, but the fact that he was made no difference to the risk which Mr. O'Sullivan accepted when he signed the 2009 agreement as a co surety with Mr. Bond. Mr. O'Sullivan's liability to SRIA and his right to contribution from Mr. Bond are precisely the same regardless of the fact that Mr. Bond is a director of SRIA. In these circumstances the first ground of appeal must fail.

56. I am also satisfied that, for the reasons earlier stated, Mr. O'Sullivan cannot be discharged in equity from his liability as surety in respect of Revolution's liabilities to SRIA by virtue of the non disclosure by SRIA of its breach of the 2009 agreement at the time that agreement was varied in 2011. That being so the second ground of appeal must also fail.

57. Finally, I am fully satisfied that the trial judge did not err in law when she decided to attach no weight to the subjective opinion expressed by Mr. Gallinger in his e-mail of January 2011 to the effect that a personal guarantee from Mr. O'Sullivan would be required in respect of Revolution's obligations under the 2011 agreement. The High Court judge correctly concluded as a matter of law that Mr. Gallinger's opinion was of no legal significance in circumstances where there was no further discussion regarding this requirement and Mr. O'Sullivan signed the 2011 agreement which itself provided that all of the provisions of the 2009 agreement would be carried over under the 2011 agreement. Accordingly the third ground of appeal must also fail.

58. In light of the aforegoing, I would dismiss the appeal.