

37/00; [2000] VSC 394

SUPREME COURT OF VICTORIA

ADAM v BANLAY PTY LTD

O'Bryan J

26, 29 September 2000

CIVIL PROCEEDINGS – CONTRACT OF GUARANTEE – APPLICATION FOR CREDIT ACCOUNT – SIGNED BY COMPANY DIRECTOR – TERMS OF AGREEMENT - TO ABIDE BY TERMS OF PAYMENT – TO ANSWER FOR DEBT IF FULL PAYMENT NOT MADE – WHETHER TERMS OF APPLICATION VAGUE OR UNCLEAR – WHETHER DOCUMENT CONSTITUTED A CONTRACT OF GUARANTEE – TERMS OF AGREEMENT NOT STRICTLY ENFORCED – WHETHER THIS IMPLIED THAT THE CONTRACT OF GUARANTEE WAS NOT TO BE ENFORCED.

A. was the sole director and shareholder of Covering Oz Pty Ltd ("company"). A. signed an Application for 30 Day Credit Account and sent it to B P/L. The contractual terms and conditions included an agreement to abide by B P/L's trading terms of strict payment 30 days from the date of invoice and further that in the event full payment was not made by the due date, A. would pay all outstanding amounts incurred and all legal and/or collection charges incurred by B P/L in recovering any overdue amount. When the company defaulted in payment of its account, B P/L commenced a claim against A. in the Magistrates' Court. On the hearing, A. gave evidence that he had no discussions with anybody from B P/L in relation to a credit facility and when he signed the application document no-one suggested that there was a guarantee involved. He also said that he would not have given a guarantee "on a completely unsecured exercise like this". The magistrate rejected the defence and made an order on the claim together with interest and costs. Upon appeal—

HELD: Appeal dismissed with costs.

(1) **The document – which had multiple purposes – required A. personally to agree to abide the terms of credit and if the terms were not met, to pay in full the debt. The plain meaning of each obligation was prefaced by the word "agree" which is a word that is not vague or open to more than one meaning. Also, the use of the word "further" in the document played an important role in understanding the critical words. The critical words had no uncertainty of meaning and were not ambiguous.**

(2) **The guarantee did not become unenforceable because B P/L did not strictly enforce its 30-day trading terms against the company. The indulgence granted to the company was short term and did not carry an implication that the creditor would not enforce its security in the form of a guarantee in the future.**

O'BRYAN J:

1. This is an appeal from a decision in the Magistrates' Court at Dandenong on 27 April 2000 pursuant to s109 of the *Magistrates' Court Act* 1989.

2. A complaint was brought by the respondent (the plaintiff in the court below) against the appellant (the defendant in the court below) on a contract of guarantee for an amount of \$28,700.52. The appellant denied that he guaranteed payment of the said amount on behalf of Covering Oz Pty Ltd. After a hearing the Magistrate found that the appellant signed a contract of guarantee on 16 December 1998 and ordered that he pay to the respondent the said amount plus interest of \$1,257.32 and costs of \$3,902: total \$33,859.84.

3. On 26 May 2000 Master Wheeler ordered that the following questions of law are raised by the appeal.

1. Did the learned Magistrate err in holding that the appellant by having signed an application for "30 Day Credit Account" entered into a guarantee as to the debts of Covering Oz Pty Ltd?

2. Were the terms of the said credit application so vague, unclear or equivocal as could not suffice to constitute a guarantee?

3. What is the extent of the Magistrate's obligation to give sufficient reasons for his decision?

4. The third ground is ineptly worded. As it stands it is too wide and should not be answered. The Magistrate gave reasons for his decision and was not requested to provide additional reasons. I shall consider the third ground, in due course, but signal that it cannot succeed in its present form.

5. It was common ground in the court below that the appellant was the sole director and shareholder in Covering Oz Pty Ltd a company in liquidation when the claim was brought in the Magistrates' Court.

6. Evidence was given that Covering Oz Pty Ltd applied to the respondent for "30 Day Credit Account" in or about December 1998. The respondent carried on a truck and trailer repair business in Dandenong, Victoria and Covering Oz Pty Ltd was a company with a business address in South Australia. The respondent forwarded to Covering Oz Pty Ltd by post a blank "Application For 30 Day Credit Account", consisting of two pages. In due course the application was completed, signed by the appellant and returned to the respondent. The respondent was apparently satisfied by the information it received for it granted credit to Covering Oz Pty Ltd and, for a time, extended a 30 day credit arrangement. Finally, Covering Oz Pty Ltd defaulted in payment of its account and the respondent commenced a claim against the appellant.

7. The Application document needs to be analysed at this stage for the main issue concerns the proper construction of words printed on page 2 of the document.

8. Page 1 of the document does not contain contractual terms and conditions. A company applying for "30 Day Credit Account" is required to provide particulars of its name, address, telephone number, date of incorporation, name of business and nature of business. At the foot of the page particulars are required of the name and address and phone number of each director.

9. In the spaces provided the appellant's name, address and phone number were disclosed.

10. Page 2 of the document is in two sections. The first section is concerned with details of the credit required and the names and addresses of business references.

11. The contractual terms and conditions are set out in the second half of page 2 as follows:

"I/We the Directors ... (the applicants) hereby agrees to abide by Banlay Pty Ltd's trading terms of strict payment 30 days from the date of invoice).

I/We further agree that in the event that full payment is not made by the due date, I/We will pay

(a) All outstanding amounts incurred

(b) All Legal and/or collection charges incurred by us in recovering any overdue amount.

Name of Authorised Person

Signature

Dated

12. The second line below the words: "I/We the Directors", ends with a bracket, obviously a typographical error.

13. Alongside the words: "I/We the Directors", the name Bruce Adam is written.

14. Below the words: "Name of Authorised Person" two names are written: Tracey White on the first line and on the second line below, Bruce Adam. Below the word: "Signature" are two signatures. It is common ground that the signatures were placed on the document by Tracey White and Bruce Adam. Below the word: "Date", 16/12/98 is written.

15. Tracey White was an accounts clerk employed by Covering Oz Pty Ltd in December 1998. In my opinion, on a fair reading of the document, Tracey White was not a contracting party on behalf of Covering Oz Pty Ltd. She was not a director of the company and did not agree to abide by Banlay's trading terms, or to pay all outstanding amounts incurred in the event of default by Covering Oz.

16. Tracey White was not sued in the Magistrates' Court. Her name was mistakenly written on page 2 of the document.

17. In the court below, the appellant gave evidence that he had no discussions with anybody from the respondent in relation to a credit facility being offered and when he signed the application document no-one suggested to him that there was a guarantee involved. He also said that he would not have given a guarantee "on a completely unsecured exercise like this".

18. Be that as it may, the question to be determined is whether the appellant did in fact guarantee full payment of any outstanding amount, if the 30 day trading term of payment was exceeded by Covering Oz Pty Ltd.

19. The respondent submitted that the Application for credit document had multiple purposes. First, the formal part of the document, on page 1 was an application by the director or directors of a private corporation for a 30 day credit account. Second, on page 2, the director or directors agreed to abide by Banlay's trading terms of strict payment 30 days from the date of invoice. Third, on page 2, the director or directors further agreed that in the event that full payment is not made by the due date, he or she or they would pay all outstanding amounts incurred and all legal and/or collection charges incurred by Banlay in recovering any overdue amount.

20. The first and second purposes of the application for credit document are clear, in my opinion and no challenge was made to the meaning of the document above the line commencing "I/We further agree etc". The critical words must be read according to their natural and ordinary meaning in the light of the contract as a whole giving due weight to the context in which the words appear including the nature and object of the contract. In the case of ambiguity the words must be construed *contra proferentem* the respondent.

21. Mr Mattin of counsel for the appellant submitted that the terms of the application were vague, unclear or equivocal as could not suffice to constitute a guarantee. Considered as a whole, the application for credit document does not distinguish between an application for credit terms and a contract of guarantee, Mr Mattin submitted, and creates uncertainty in meaning.

22. Mr Mattin conceded that an enforceable contract of guarantee does not require the presence of the word "guarantee". Nor is it necessary for the respondent to prove that the appellant had the intention to guarantee the debt of Covering Oz Pty Ltd when he signed the Application for Credit document, in my opinion. The intention of the appellant when he signed the document is irrelevant since all that is necessary to satisfy the purposes of the *Instruments Act*, s126, is a memorandum or note of the agreement signed by the person to be charged with the default. The appellant did not assert that he did not understand the document he signed.

23. In my opinion, the critical words have no uncertainty of meaning and are not ambiguous. The word "further" plays an important role in understanding the critical words. As I indicated earlier, the document has multiple purposes. It is an application for credit and it contains contractual terms. A director or directors of the corporation seeking credit terms from Banlay are the applicants who agree to abide by Banlay's trading terms and further agree to answer for debt of Banlay in the event that full payment is not made in accordance with the trading terms. The words "agree" and "further agree" are contractual in meaning.

24. The document required the applicants personally to agree

- (a) to abide the terms of credit; and
- (b) if the terms were not met, to pay in full the debt.

The plain meaning of each obligation is prefaced by the word "agree", a word that is not vague or open to more than one meaning.

25. Because no ambiguity exists in the critical words, the *contra proferentem* rule has no application.

26. It appears that the respondent did not strictly enforce its 30 day trading terms against Covering Oz. An argument was mounted in the court below that the guarantee became unenforceable against the appellant in those circumstances. The Magistrate rejected the argument, correctly in

my opinion, but omitted to provide detailed reasons for rejecting the argument. I am quite satisfied that the argument had no merit. The indulgence granted to the debtor company was short term and did not carry an implication that the creditor would not enforce its security in the form of a guarantee in the future.

27. In my view the learned Magistrate's reasons were adequate.

28. Grounds of appeal numbered 1 and 2 are answered in the negative and the appeal will be dismissed with costs.

APPEARANCES: For the appellant Adam: Mr JD Mattin, counsel. Macpherson & Kelly, solicitors. For the respondent Banlay Pty Ltd. Mr GL Rice, counsel. Hardys, solicitors.
