31/13; [2013] VSC 332

SUPREME COURT OF VICTORIA

GOLDSMITH v MACQUARIE LEASING PTY LTD

Dixon J

4, 28 June 2013

CIVIL PROCEEDING – GUARANTEE & INDEMNITY – WHETHER GUARANTEE ENFORCEABLE BY FINANCIER WHEN GIVEN TO FINANCIER'S AGENT BY BORROWER'S DIRECTORS – WHETHER FINANCIER A DISCLOSED PRINCIPAL – WHETHER GUARANTEE TAKEN BY AN AGENT ACTING FOR AN UNDISCLOSED PRINCIPAL MAY BE ENFORCED BY THE PRINCIPAL – WHETHER S126 OF THE *INSTRUMENTS ACT* 1958 (VIC) COMPLIED WITH – WHETHER FINANCIER AND AGENT EACH ENTITLED TO JUDGMENT – FINDING BY MAGISTRATE THAT GUARANTEE ENFORCEABLE AND EACH OF PRINCIPAL AND AGENT ENTITLED TO A JUDGMENT – WHETHER MAGISTRATE IN ERROR: *INSTRUMENTS ACT* 1958, S126.

HELD: Appeal allowed in relation to order made that the principal and agent be entitled to judgment. Otherwise appeal dismissed.

1. The magistrate was properly able to conclude on the evidence that Owner referred to the financier Macquarie. Corporate was the agent of a disclosed principal, but even if the magistrate was in error in that finding, a creditor may enforce a guarantee as an undisclosed principal. It has been established that a principal can step in and take over the benefit of a contract made by an agent who has not previously disclosed the existence of a principal, subject to any rights that the third party may have against the agent.

***Mooney v Williams* [1905] HCA 34; (1905) 3 CLR 1, applied.**

2. The magistrate found that Corporate, in its capacity as trustee for the Corporate Finance Unit Trust, entered into a written agency agreement with the financier Macquarie, by which Macquarie appointed Corporate as its agent to enter into financial agreements. Corporate submitted applications to Macquarie, but did so in its capacity as trustee for the Corporate Finance Unit Trust. It was open to the magistrate to find that the relationship between Corporate and Macquarie proceeded as if governed by the agency agreement.

3. The magistrate was justified in finding that Corporate had actual authority to take the guarantees with the finance facility for Macquarie. Corporate intended to enter the facility on behalf of Macquarie. Nothing in the terms of the contract or in the evidence of the surrounding circumstances that was before the court below, either expressly or by implication, excluded Macquarie's right to take the benefit of the guarantee.

4. The magistrate was entitled to infer that Mr Goldsmith gave his signed guarantee to Mr Alexander and later received a copy of it, with a set of facility documents, and to comfortably draw that inference because of the absence of any evidence from the other party, Mr Goldsmith.

DIXON J:

Background

1. On 5 March 2008, Corporate Finance Pty Ltd, as trustee for the Corporate Finance Unit Trust ("Corporate") entered into a Commercial Hire Purchase Agreement with YoMo (Australia) Pty Ltd. YoMo sought finance for broadcasting equipment for a business venture. Corporate acted as the agent for financier Macquarie Leasing Pty Ltd. Macquarie received applications for finance from Corporate and approved or refused each application in its absolute discretion. It accepted Corporate's referral of YoMo's application.

2. YoMo was obliged by the agreement to pay a total of $122,208.00 in 48 instalments of $2,546.00 per month. The plaintiffs were the directors of YoMo, who guaranteed the due and punctual performance of YoMo's contractual obligations. The agreement was between Corporate as owner and YoMo as hirer and named the directors as guarantors. On its face, the agreement was executed by YoMo, under the signature of one director, and by each director 'as guarantor'. The funds were advanced by Macquarie after an authority to pay was provided by YoMo directly to Macquarie.

3. YoMo defaulted and failed to rectify that default, entitling Macquarie to terminate the facility. It did so on 2 July 2009 and served a notice of demand on each guarantor for the outstanding balance due.

4. By a Magistrates' Court complaint, the defendants, Macquarie and Corporate, sought to enforce the guarantee and indemnity against each of the directors and recover the debt. The directors, other than Mr Goldsmith, admit that they each entered into the guarantee and indemnity with Corporate but contend that on its proper construction, the guarantee and indemnity does not permit Macquarie to enforce it against them. Mr Goldsmith, put in issue his execution of the document. All directors denied that Corporate was acting as agent for Macquarie.

5. At trial, the thrust of the defence was that Macquarie was not entitled to rely on the guarantee and indemnity clauses in the agreement, as it was not a party to the agreement. The directors argued that Macquarie was not a disclosed principal to the agreement and that the company's identity was a necessary requirement for enforceability of a contract containing a guarantee, by reason of s126 of the *Instruments Act* 1958 (Vic). Further, Corporate did not have authority to act as Macquarie's agent. Mr Goldsmith contended that as there was no evidence that he had executed the agreement, he was not personally liable.

6. By a carefully expressed and well reasoned judgment, the magistrate found for Macquarie and Corporate, holding the guarantee and indemnity to be enforceable and binding on the directors, including Mr Goldsmith. The Magistrates' Court ordered that the directors pay Macquarie and Corporate $79,225.24 together with interest and costs in discharge of YoMo's obligations under the agreement.

7. The directors now contend that the magistrate erred and appeal to this court under s109 of the *Magistrates' Court Act* 1989 seeking orders that the Magistrates' Court proceeding should be dismissed with costs to be assessed by the Costs Court on an indemnity basis.

Issues

8. The issues primarily raised in argument that I need now determine are these:

> (a) Did the magistrate err in law in finding or holding that the requirements of s126 of the *Instruments Act* 1958 (Vic) had been complied with? (Grounds 1 and 2 of the Notice of Appeal)
>
> (b) Was Macquarie Leasing a disclosed principal of Corporate and entitled to enforce the guarantee? (Grounds 3-4 and 6-9 relate to different aspects of these questions.)

I was informed that the directors rely on all remaining grounds set out in the Notice of Appeal. There were 12 grounds of appeal in total. The other issues are primarily challenges to fact finding.

> (c) Did the magistrate err, in making findings of fact, in relying on the affidavit of Stephen Alexander dated 20 September 2011, which affidavit was not admitted into evidence at the trial? (Ground 5)
>
> (d) Did the magistrate err, as there no evidence on which the magistrate could reasonably have found that the amount claimed by the defendants was calculated correctly in accordance with the terms of the agreement? (Ground 10 and 12)
>
> (e) Did the magistrate err in finding that Mr Goldsmith executed the guarantee? (Ground 11)

Grounds 1 & 2 – the requirement of writing

9. These grounds turned on the proper application of s126 of the *Instruments Act* which requires that '... the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing ...'. The directors submitted that:

> (a) The section requires that essential parts of the guarantee, that is, what is often called 'the four Ps', the parties, the price, the promises and the property must be contained in the agreement before the requirements of the statute are satisfied. This means that the parties to the agreement must be named in writing or at least sufficiently identified therein.
>
> (b) Macquarie is nowhere specified as a party to the agreement nor identified in any way as a party to the agreement and the requirement of writing is not met.
>
> (c) This is decisive of the appeal as it was Macquarie, not Corporate, that has suffered a loss.

10. The magistrate found that the guarantee and indemnity complied with the requirements of s126 of the *Instruments Act*, as the agreement is in writing and signed by each director.

11. The plaintiffs' grounds relating to this finding are without substance for the following reasons.

12. I will assume the due execution of the document for the moment and later return to Mr Goldsmith's separate ground. The agreement is in writing and the magistrate correctly identified the relevant documents. There was a commercial hire purchase agreement dated 5 March 2008 that referred to and incorporated a further document that contained the standard terms and conditions for commercial hire purchase. Relevantly, clause 2.1 provided that 'the guarantors guarantee the due performance of the Agreement by the hirer under the Agreement and indemnifies the Owner against any failure by the hirer to so perform'. Clause 2.2 incorporated the terms of the guarantee and indemnity set out in the standard terms and conditions.

13. The complaint of the directors was limited to the identity of the parties and the other essential terms of the guarantee and indemnity were found in this agreement. The parties to the guarantee and indemnity were Corporate, named as Owner, and each of the directors, named as guarantors. The hirer, whose performance was guaranteed, was identified as YoMo. The agreement was not binding on the Owner until payment was made by the Owner for the equipment. The operative clause of the guarantee, found in cl 23.1 of the standard terms was that 'In consideration of the Owner at the request of the Guarantor agreeing to enter into this Agreement the Guarantor guarantees to the Owner the due and punctual performance by the hirer of its obligations under this Agreement'.

14. The term 'Owner' means the person described in Item 2 of the schedule to the Agreement, which was Corporate, and its assigns. References to a 'person' included references to that person and successors. The benefit of the agreement and the guarantee could be assigned or transferred to any person by the Owner without impairing or discharging the guarantee and indemnity. The hirer also acknowledges that where the hirer had been introduced to the Owner by an agent, dealer, broker, or other person, commissions, fees or other remuneration might be paid.

15. The principal obligation of the hirer was the timely payment to the Owner of the rent due, by instalments, at the address set out in the schedule or in such other manner or to such other place as the Owner nominated. The standard terms were typical of a modern commercial hire purchase agreement as used in this State.

16. The directors relied on *Rosser v Austral Wine & Spirit Co Pty Ltd*,[1] where the Full Court of this Court said '[w]hether the writing be the agreement itself or merely a note or memorandum of it, all the elements of the agreement must be contained in the writing before the requirements of the statute are satisfied. This means that the parties to the agreement must be named in the writing or at least sufficiently identified therein'. The directors submitted that Macquarie is nowhere specified as a party to the agreement nor identified in any way therein as a party to the agreement. Because, as Young CJ in Eq said in *Northstate Carpet Mills Pty Ltd v BR Industries Pty Ltd*,[2] '[t]he *Statute of Frauds* requirements are that the note or memorandum must contain essential parts of the guarantee, that is, what is often called 'the four Ps', the parties, the price, the promises and the property,' no action can be brought on the guarantee by Macquarie.

17. The directors developed this submission that any agreement, or memorandum thereof, governed by the Act, should contain the names of both the parties to the agreement,[3] that is guarantor and beneficiary, but the principle was not disputed. Neither could the fact that the parties were sufficiently identified by the written agreement be disputed. Both guarantor and beneficiary parties were here identified in the schedule to the agreement and the named Owner, Corporate, was a complainant in the Magistrates' Court proceeding. For Corporate, that finding disposed of the *Instruments Act* defence.

18. The directors relied on Garrett and Bodenham, surviving Partners of *Phillips v Handley*[4] for the proposition that the guarantee itself or later memoranda or a combination of both must make clear the identity of the person intended to benefit from the guarantee. In *Rosser*,[5] the Full Court approved, as apposite, a passage from Williams' *The Statute of Frauds*[6]:

> The general principle under discussion was much considered and developed in a series of judgments delivered by Jessel MR, in the cases of *Sale v Lambert* (1874) LR 18 Eq. 1; *Potter v Duffield* (1874) LR 18 Eq. 4; *Commins v Scott* (1875) LR 20 Eq. 11 and *Catling v King* (1877) 5 Ch D 660. In all of these cases the question was whether a general word or description sufficiently identified a party to constitute a memorandum complying with the statutory requirements; and in *Sale v Lambert, Commins v Scott* and *Catling v King* it was held that such a general word or description was sufficient. In each of these last mentioned cases, however, the memorandum contained, as well as the general word or description, evidence of some circumstance which so qualified and defined that general word or description as to render the identification of the part(y) in question as reasonably certain as if he had been named. The only verbal evidence needed by the court in these cases was evidence of identification, to show that the parties possessed the characteristics of those persons identified as parties in the memoranda: its function was purely explanatory and it clearly satisfied the test laid down by Lord Blackburn in *Rossiter v Miller* (1878) 3 App. Cas. 1124, at p1153; [1874-80] All ER 465; 5 Ch D 648 ... when considering whether 'the proprietors' was a sufficient description. 'It is enough,' he said, 'if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir James Wigram described in his Treatise, *Extrinsic Evidence,* 5th ed., Intr. Obs., p10, calls evidence "to prove intention as an independent fact".

19. The directors contended that Macquarie is neither named nor sufficiently identified in the manner described above in the agreement upon which it relies. This contention, even if accurate, is not fatal to Macquarie, and it is not to the point. Corporate is identified as Owner. Once both the terms of the agreement and that Corporate was a party in the proceeding are appreciated, the absence of merit in these grounds is exposed. There is clearly identified in the agreement the parties who owe obligations and a party to whom the obligations are owed. The latter is the Owner, a description that identifies Corporate and includes its assigns, successors and, where the identified Owner is an agent, its principal.

20. For this reason, there is no want of compliance with the requirements of the statute. The directors' point is really limited to the second issue, that of agency, and whether Macquarie is necessarily a stranger to the guarantee obligation with no interest in or standing to enforce it.

21. A party to a guarantee may be acting in the capacity of agent for a principal and in such a case the principal may enforce the guarantee even though not named within it. So much is clear from *Garrett v Handley*. In that case, proceedings were brought by the surviving partners of a firm against a guarantor who directed a letter containing the guarantee to a deceased partner of the firm in respect of an advance made by the partnership. The plaintiffs succeeded because the course of the correspondence demonstrated that the guarantee was intended for the benefit of the firm, and not of John Garrett alone. The claim that the proceeding could not be brought in the firm name but ought to have been brought in the name of Garrett failed.

22. In this instance, a careful reading of the whole of the agreement demonstrates that the guarantee was not exclusively intended to be solely for the benefit of Corporate. It was intended for the benefit of Owner. I have already referred to the provisions that warrant that conclusion.

23. The magistrate was properly able to conclude on the evidence that Owner referred to Macquarie. Corporate was the agent of a disclosed principal, but even if he was in error in that finding, a creditor may enforce a guarantee as an undisclosed principal. *Mooney v Williams*[7] establishes that a principal can step in and take over the benefit of a contract made by an agent who has not previously disclosed the existence of a principal, subject to any rights that the third party may have against the agent.

24. In *Capital Finance Australia Ltd v Karabassis*,[8] each of the defendants gave a guarantee to Comlease AFG Ltd as lessor in respect of a lease of computer equipment by Green Communications Pty Ltd. The defendants objected that Capital Finance was not a party to the guarantees and indemnities and could not sue on them. Capital Finance had appointed Comlease as its agent. Gzell J, following *Garrett v Handley* and approving of the statement of principle in O'Donovan and Phillips, *The Modern Contract of Guarantee*[9] based on *Garrett*, held that Capital Finance was entitled to sue on the guarantees and indemnities as undisclosed principal. Assuming Macquarie was an undisclosed rather than a disclosed principal, there is no relevant distinction between the circumstances of *Karabassis* and those of the present case.

25. O'Donovan and Phillips argue that the rule may extend to persons who are not parties

to, and are unascertained at the date of, the agreement. It is not necessary to determine this question but I noted that the definition of Owner in the agreement includes assigns and successors. O'Donovan and Phillips, in an attractive argument, contend that where the guarantor executes a guarantee for a creditor's own benefit and also for the benefit of future assigns of the principal transaction, an assignee, who later ratifies, can arguably enforce the guarantee.

26. One category of guarantee where this undisclosed principal rule is excluded by agreement is where the description of the parties in the agreement precludes its operation. The directors contended that here the description of the party entitled to the benefit of the agreement effected an exclusion of Macquarie. *Rossiter & Anor v Miller*[10] concerned an appeal arising in an action for specific performance, brought by the vendors of certain property against the purchaser. Two questions on the appeal were, whether in view of the enactment of the Statute of Frauds, the vendors were sufficiently described in writing by the term, 'proprietors'; and secondly, whether the vendor's agent had authority to bind them. Lord Cairns LC said:[11]

> In point of fact, my Lords, the question is, is there that certainty which is described in the legal maxim *id certum est quod certum redid potest.* If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1 Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise; and I should be surprised if any authority could be found, and certainly none has been produced, to say that a contract under those circumstances would not be valid.

Lord O'Hagan said:[12]

> Everything essential to the completion of it appears on the written documents – the parties, the premises, the conditions, and the price. An offer is made; those who had full power to accept it did accept it, in terms, by their fully authorized agent.

27. Lord Blackburn said:[13]

> And though the construction by which it is held that there can be no memorandum of the agreement unless the writing shew who the parties are, is now inveterate, it is not necessary that they should be named. It is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir James Wigram in his Treatise calls evidence (1) "to prove intention as an independent fact". In the present case, without receiving any such evidence, there is ample to shew that the plaintiffs were those designated by the description of "proprietors."

28. In *Rosser*,[14] the court held that the parties to a guarantee will be sufficiently described in writing if the description used can be explained by extrinsic evidence without having to resort to evidence to prove the intention of the author. Rosser had signed a guarantee addressed to 'Each and every member of the Wholesale Spirit Merchants Association of Victoria and the Wine and Brandy Producers' Association of Victoria' of which the respondent was a member. The court held that the respondents were sufficiently described in the instrument of guarantee and that parol evidence was admissible to prove their identity.

29. Here the essential characteristic of the agreement is that it is a finance agreement, where the financier is identified as Owner. It was plain on the evidence before the magistrate, which I will come to, that Macquarie was the true Owner. Further, the magistrate was entitled to have regard to that evidence because it was not evidence of intention.

30. The proposition inherent in the directors' contentions that Macquarie need to be named or specifically identifiable in this guarantee and indemnity in order to comply with s126 of the Act is misconceived. Once the applicable principle is understood it can be seen that the magistrate had ample evidence to properly reject this defence. No error is shown.

Was Macquarie Leasing a disclosed principal of Corporate? (Grounds 3-4 and 6-9)

31. The directors contended that Corporate was not authorised to enter the guarantee as agent for Macquarie and accordingly Macquarie was not a disclosed principal.

32. The directors denied the allegation of agency. The directors contended that clause 9.1 of the agency agreement precluded Corporate from entering the guarantee on behalf of Macquarie. The argument was put in these terms.

> (a) Clause 9.1 expressly confines the authority of Corporate in these terms: 'The Agent has no authority to act on behalf of or to bind Macquarie except as expressly set out in this Agreement'.
>
> (b) The agreement draws a clear distinction between 'Finance Agreements' which are defined in clause 1.1(6) to mean lease or hire purchase agreements and 'Security' which is defined in clause 1.1(1) to mean 'any guarantee ... given ... in connection with a Finance Agreement ...'. The agreement distinguishes between Finance Agreements and Security throughout, for example, in clauses 6.3, 7.1, 7.2, 8.4, 9.2 and 11.2. Corporate is expressly authorised to act on behalf of and bind Macquarie in entering into Finance Agreements (see clause 2.1) but is not authorised to enter into guarantees or other 'Security' on behalf of Macquarie. Accordingly, the clear effect of clause 9.1 is that the Corporate had no authority to act on behalf of or bind Macquarie in entering the guarantee in this case.

33. This argument is without merit. The guarantee and indemnity was given as a term of the agreement and was a security given in connection with a finance agreement. Clause 2.1 by which Macquarie appoints Corporate as its agent to enter into finance agreements is not restricted in its terms to finance agreements with corporate borrowers that do not incorporate director's guarantees. Clause 9.1 is therefore not engaged.

34. The magistrate found that, on 19 May 1998, Corporate, in its capacity as trustee for the Corporate Finance Unit Trust, entered into a written agency agreement with Macquarie, by which Macquarie appointed Corporate as its agent to enter into financial agreements. Corporate submitted applications to Macquarie, but did so in its capacity as trustee for the Corporate Finance Unit Trust. Nevertheless, the magistrate found that the relationship between Corporate and Macquarie proceeded as if governed by the agency agreement. Such findings were open to the magistrate on the evidence.

35. The evidence was that Corporate, which was incorporated in 1992, was appointed trustee of the Corporate Finance Unit Trust on 1 July 1994. It entered into the agency agreement on 18 May 1998 in its own right. Clause 1.3(3) of the agency agreement bound to its terms, both personally and in its capacity as a trustee, a party to the agreement that was a trustee. When Mr McCulloch, of Macquarie, gave evidence, without his attention being drawn to clause 1.3(3) of the agreement, he stated that Macquarie had a written agreement with Corporate in its own right and an unwritten or implied agency agreement with Corporate in its capacity as trustee, and these agreements were in the same terms. Since 1998 Corporate, as trustee, has submitted in excess of 10,000 approved applications to Macquarie, for leases, commercial hire purchase agreements and chattel mortgages and in each of those cases, there were guarantees and in each agreement and guarantee, Corporate was noted as the 'Owner'. Mr McCulloch stated that these agreements were made by Corporate with the express authority of Macquarie, which had title to the agreements and the guarantees by force of the unwritten or implied agency agreement with Corporate in its capacity as trustee.

36. In this case, the agreement was made with Corporate in its own right and the only reference to its capacity as trustee was the inclusion of the ABN of Corporate as trustee. It was on this included ABN that counsel for the directors sought to construct an illusion of a defence in the court below. None of this evidence compromised the magistrate's findings concerning the relevant aspects of the relationship between Corporate and Macquarie, save that he reasoned that the relationship between Corporate and Macquarie proceeded as if governed by the agency agreement when it was open to him to find that the YoMo application, and quite possibly the 10,000+ other applications submitted to Macquarie by Corporate, was submitted under and governed by the written agency agreement.

37. Stephen Alexander, of Corporate, gave evidence that in November 2007 he informed Messrs Schwartz and Goldsmith that Macquarie were the underwriters of the agreement. I do not accept the semantic contention of the directors that an underwriter is plainly not the principal to a transaction but rather the provider of funds, usually on an ancillary basis, to support the financial objectives of the principal. The magistrate correctly regarded the agreement as a finance transaction and it was open to the magistrate to regard the use of the term as distinguishing

the roles of broker (Corporate) and financier (Macquarie) in the discussions between broker and borrower/guarantor.

38. Other evidence supported that finding. There was no evidence from the directors that they understood Macquarie's role to be as an underwriter, properly so called, of the transaction. Rather, the evidence was that the directors knew Mr Alexander to be a finance broker who placed applications with financiers, and who intended to place this application with Macquarie. Mr Alexander stated that at the November 2007 meeting, he said:

> In our discussions, it was determined that I would approach Macquarie Leasing because Daniel Schwartz had had a number of successfully maintained applications or transactions with Macquarie over the past, and based on his standing and reputation I felt that that was an appropriate place for me to approach for finance.

39. The magistrate was entitled to reject the directors' 'underwriter' submissions, which he expressly considered.

40. Two of the directors, including Mr Goldsmith, executed a direct debit authority in favour of Macquarie that resulted in YoMo repaying the facility directly to Macquarie. The directors' contention that they did not do so as guarantors misses the point.

41. Mr Alexander gave evidence that he attended a meeting on 15 February 2008 at the offices of YoMo at which Messrs Schwartz and Goldsmith were present. The purpose of that meeting was to collect documents previously sent to YoMo and each of the guarantors. Mr Alexander's evidence was that during that meeting he explained to them that unless they complete the Macquarie direct debit form, the transaction couldn't settle. Mr Alexander also gave evidence that after the documents had been signed he informed Messrs Goldsmith and Schwartz that Corporate was the agent of Macquarie. The directors submitted there was no evidence that Mr Alexander identified the scope or purpose of the agency to which he referred or whether Messrs Alexander, Goldsmith or Schwartz informed any of the other plaintiffs of that conversation. There was evidence that Mr Alexander informed the directors that the facility was owned by Macquarie and that the *Privacy Act* form was in fact a Macquarie form, and that the financier receiving the funds by way of direct debit would be Macquarie Leasing. Mr Alexander said, of his usual practices:

> I tell them that I have no authority in relation to approvals or otherwise, but I do tell them that because of our principal and agency agreement we have that ability to be able to log onto Macquarie's other system called MacInfoTrac to assist with changing directly of getting pay out figures or the like for clients.
>
> ... normally the process is that I sit down and go through the documents with the client. I go through and I say that we're noted as the owner but we act on (sic) under the principal and agency agreement with Macquarie Leasing. They'll be providing the funds in this transaction and they'll be settling the transaction.

42. The magistrate accepted Mr Alexander's evidence that he adopted his practice of disclosure of the relationship between Corporate and Macquarie in this case. The magistrate reasoned that other evidence supported the finding that Macquarie was a disclosed principal, referring to a direct debit authority permitting Macquarie to deduct instalments from a YoMo account pursuant to the agreement, and an authority signed by each director authorising Macquarie, as 'financier' to obtain information from a credit agency to assess whether to accept each of them as guarantors for the provision to YoMo of commercial credit.

43. Ground 6, which asserts that in concluding that Macquarie was 'competent to issue suit' for the benefit of the guarantee the magistrate fell into error, falls on the basis of my reasoning on other grounds. Macquarie was a principal taking the benefit of a guarantee obtained by its agent with actual authority. The contentions as to whether the agency was disclosed or not miss the point. An undisclosed principal is also competent to sue on a contract made by an agent on his behalf, acting within the scope of his actual authority.[15] The principle includes suing for the benefit of a guarantee. As I have already noted, the magistrate was justified in finding that Corporate had actual authority to take the guarantees with the finance facility for Macquarie. Corporate intended to enter the facility on behalf of Macquarie. Nothing in the terms of the contract or in the evidence of the surrounding circumstances that was before the court below, either expressly or by implication, excluded Macquarie's right to take the benefit of the guarantee.

44. I would add, in respect of that last point, that on the evidence, particularly the terms of the agreement, it was open to the magistrate to specifically find that YoMo and the directors were willing to treat as a party to the contract anyone on whose behalf Corporate was providing the facility that they sought from it.[16]

45. The directors bear the burden of satisfying me that the magistrate misapprehended the facts or made a wholly erroneous assessment of the relevant issues when seeking to overturn findings of fact. They have failed to do so and these grounds will be dismissed.

Remaining grounds: Use of Mr Alexander's affidavit

46. The directors contend that the magistrate erred by relying upon extraneous material, namely the affidavit of Steven Alexander dated 29 September 2012. It is clear from his reasons that the magistrate referred to this affidavit. The directors contend that it was not admitted into evidence meaning, presumably, that it was neither tendered as an exhibit or adopted by Mr Alexander when giving oral evidence. The directors contend that the decision might have been different but for this reliance on the affidavit and they do so by pointing to conflicting *viva voce* evidence from Mr Alexander.

47. First, I do not agree that the passage of evidence relied on is in conflict with the passage from Mr Alexander's affidavit that is quoted by the magistrate in his reasons. The former deals with whether Corporate bears any risk of default and the latter relates Corporate's practices in submitting finance applications through its trading trust. Excluding the evidence of the latter could not have produced a different result because there was other evidence that justified the finding.

48. Second, during the trial, the directors invited the magistrate to have regard to an exhibit to Mr Alexander's affidavit. The exhibit was the agreement and at the time, counsel was seeking leave to amend the directors' defence to raise the defence under the *Instruments Act*. The amendment was not being opposed and counsel was using the exhibit to explain how the defence was developed. Mr Alexander was then called as the first witness. At this stage, the directors took no objection to Mr Alexander's affidavit being used. Mr Alexander gave oral evidence and was not asked to adopt his affidavit.

49. When cross examining Mr McCulloch, counsel for the directors did not object to the magistrate reading a passage from Mr Alexander's affidavit to Mr McCulloch and asking Mr McCulloch if the contents of that paragraph accorded with his understanding. Mr McCulloch agreed that the passage quoted to him, which included the passage reproduced in the reasons, correctly stated the position as the witness understood it concerning the practical operation of the agency relationship. Its adoption by the witness provided an evidentiary basis that permitted the magistrate to rely on it. But there is a further reason to reject this ground.

50. Counsel for the directors then proceeded to cross-examine Mr McCulloch about alleged similarities between his affidavit and Mr Alexander's affidavit, suggesting there was a common script. This cross examination acknowledged that the court had the affidavit and was based on the proposition that Mr Alexander's affidavit was a prior inconsistent statement that the witness had adopted. Counsel at no stage objected to the magistrate reading or having regard to Mr Alexander's affidavit. Once the affidavit was made relevant to show a prior inconsistent statement, it became evidence before the court of the facts recorded in the affidavit, to which the magistrate could have regard.[17] If the directors intended to limit the use of the affidavit to proof of the fact of a prior inconsistent statement, the directors ought to have applied under s136 of the *Evidence Act* 2008 (Vic) to limit the use that might be made of the affidavit. That application should have been made to the magistrate and it is not appropriate to now permit it under the guise of an appeal ground.

51. Ground 5 will be dismissed.

Did Mr Goldsmith give a guarantee? (Ground 11)

52. The magistrate had before him a document that on its face was signed by Mr Goldsmith. The directors submitted that Macquarie and Corporate failed, without explanation, to call the attesting witness to Mr Goldsmith's signature. I am not persuaded that it was not open for the magistrate to find that the guarantee was given by Mr Goldsmith in the unexplained absence of

the attesting witness. Mr Goldsmith's defence alleged not that the signature was not his or that he did not give a guarantee, but rather that the guarantee was not 'properly and duly executed', whatever that means. In the context of allegations as to the parties to the guarantee, his defence alleged that Macquarie was not a party to the guarantee because it was not the Owner rather than that Mr Goldsmith was not a party, because he did not give a guarantee. The pleading did not distinctly raise any issue of fact out the circumstances of execution of the guarantee by Mr Goldsmith that warranted calling the attesting witness and the unexplained absence of Mr Goldsmith as a witness denied the pleaded contention any content.

53. Mr Goldsmith did not give evidence denying that the document bore his signature. There was no evidence that might otherwise explain that what appeared to be a routinely executed guarantee was not what it seemed to be.

54. There was evidence before the magistrate that on 21 January 2008 Corporate sent to YoMo and each of the directors copies of the agreement, Standard Terms and Conditions, Important Notice to Guarantors, Application for Credit – Consents/Acknowledgments, Direct Debit and Asset and Liability Statement. On 15 February 2008, Mr Alexander attended at YoMo's offices and met with Messrs Schwartz and Goldsmith. Mr Alexander collected the signed documentation, including the signed agreement and the guarantee and indemnity but excluding the direct debit authority. There was also evidence that copies of the signed documents were later sent out to the hirer and the guarantors from Corporate's office. The magistrate was entitled to infer that Mr Goldsmith gave his signed guarantee to Mr Alexander and later received a copy of it, with a set of facility documents, and to comfortably draw that inference because of the absence of any evidence from the other party, Mr Goldsmith.

55. On 15 October 2009, Mr McCulloch received an email from Mr Goldsmith, in the following terms, 'Please find attached Letter, A/L and tax returns seeking a final resolution of my guarantee to Macquarie Leasing'. In the attached letter, Mr Goldsmith states, 'I am writing to you seeking a final resolution of my guarantee to Macquarie Leasing ... Out of the four guarantors, Daniel Schwartz has been consistently making the lease payments but cannot afford to do so now and the other two guarantors have not paid a cent'.

56. Mr Goldsmith contends there is no evidence linking the letter and the email.

57. The magistrate expressed himself as 'positively satisfied,'[18] that copies of the executed documents were provided to Mr Goldsmith and the letter of 15 October 2009 was referred to in Mr Goldsmith's amended defence dated 18 July 2011, providing the linkage. Having regard to the content of the letter and the fact that the defence was not supported by evidence, the magistrate's finding that Mr Goldsmith gave the guarantee and indemnity was properly open and there was no error of law identified on this ground.

Quantum - Grounds 10 and 12

58. Two distinct grounds are here raised. The directors contended that the sum quantified was not a 'Termination Amount' specified by clause 15.1 of the Terms and Conditions as no default interest was included as required by clause 1(19)(c). The directors cross-examined Mr McCulloch regarding the calculation of loss and the magistrate expressly rejected the directors' submission based on that cross-examination. The finding that the payout figure detailed by Mr McCulloch in an exhibit was inclusive of those terms comprising the 'termination amount' defined in clause 19 of the standard terms and conditions of the agreement was open to the magistrate on the evidence. No error of law was identified.

59. The indemnity required from the directors was for a single loss. Although the magistrate correctly observes that the loss pleaded in the further amended complaint was identified as a loss suffered by Macquarie or, alternatively by Corporate as agent for Macquarie, either the principal or the agent but not both can enforce the contract. The agent's right to do so is destroyed by the intervention of the principal in the exercise of his own right.[19] The judgment for Corporate is inconsistent with the finding that Macquarie has, as principal, enforced the guarantee, and the judgment in its favour cannot stand.

60. On this ground alone, the appeal will be allowed in part.

Orders

61. The appeal will be allowed and the judgment below will be set aside. In lieu thereof, there will be judgment for the first complainant/first defendant, Macquarie Leasing Pty Ltd in the sum of $79,225.24, together with interest. I invite counsel to calculate the appropriate sum for interest to this day. I will hear counsel in respect of further orders and on costs of both the appeal and the trial.

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[1] [1980] VicRp 33; [1980] VR 313, 314.
[2] [2006] NSWSC 1057 [43].
[3] *Williams v Lake* [1859] EngR 1004; (1859) 121 ER 132, 134; (1859) 2 E & E 349; *Riley v Melrose Advertisers* (1915) 17 WALR 127, 129.
[4] [1825] EngR 99; 107 ER 1208; (1825) 4 B & C 664, which with the line of cases that follow it, is discussed by the learned authors of O'Donovan and Philips, *Modern Contract of Guarantee*, para 10.2850.
[5] [1980] VicRp 33; [1980] VR 313, at 316.
[6] Section Four (Cambridge 1932), 63
[7] [1905] HCA 34; (1905) 3 CLR 1, 8; 11 ALR 437.
[8] [2003] NSWSC 737; 11 BPR 21,123 (12 August 2003).
[9] 3rd ed, LBC Information Services, Sydney, 1996, at 514.
[10] (1878) 3 AC 1124; [1874-80] All ER 465; 5 Ch D 648.
[11] Ibid, 1140.
[12] Ibid, 1148.
[13] Ibid, 1153.
[14] [1980] VicRp 33; [1980] VR 313, 319. See also *Trueman v Loder* [1840] EngR 273; (1840) 11 Ad & El 589, 594; [1840] EngR 273; 113 ER 539, 541; *Morris v Wilson* 5 Jur NS 168, and *O'Donovan and Philips, Modern Contract of Guarantee*, 4th ed, Thomson Law Book Co, Chapter III, 65.
[15] *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207; [1994] 1 All ER 213; [1994] 2 WLR 370.
[16] Compare *Teheran-Europe Co Ltd v S T Belton (Tractors)* Ltd (No. 1) [1968] 2 QB 545, 555.
[17] See s60 *Evidence Act* 2008 (Vic), *Lee v The Queen* [1998] HCA 60; (1998) 195 CLR 594, 601, 603-4; (1998) 157 ALR 394; 72 ALJR 1484; (1998) 16 Leg Rep C1.
[18] Referring to *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100.
[19] *Atkinson v Cotesworth* [1825] EngR 389; (1825) 3 B & C 647; 107 ER 873; *Mooney v Williams* [1905] HCA 34; (1905) 3 CLR 1, 8; 11 ALR 437; *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141, 150.

APPEARANCES: For the plaintiffs Goldsmith: Mr AW Sandbach, counsel. Goldsmiths Lawyers. For the defendants Macquarie Leasing Pty Ltd: Ms E Glover, counsel. Douros Jackson Lawyers.
