35/03; [2003] VSC 370

SUPREME COURT OF VICTORIA

PARADISE CONSTRUCTORS PTY LTD and STRANGIO v LOFTS QUARRIES PTY LTD

Dodds-Streeton J

1, 7 October 2003

CIVIL PROCEEDINGS – GUARANTEE AND INDEMNITY SIGNED BY COMPANY DIRECTOR – GUARANTEE THAT COMPANY WOULD OBSERVE ALL OF ITS OBLIGATIONS INCLUDING "DUE AND PUNCTUAL PAYMENT OF ALL MONIES PAYABLE BY" THE COMPANY – DIRECTOR GIVEN CREDIT UP TO $10,000 – COMPANY INDEBTED FOR $21,074.08 – PAYMENT SOUGHT IN THAT SUM FROM DIRECTOR – CLAIM BY DIRECTOR THAT SUM OWING LIMITED TO $10,000 – ORDER BY MAGISTRATE FOR FULL AMOUNT – WHETHER MAGISTRATE IN ERROR.

S. a director of PCP/L provided a guarantee to LQP/L that PCP/L would duly perform and observe all of its obligations "including the due and punctual payment of all monies payable" by PCP/L. S. applied for credit from LQP/L and was advised that the account was opened "on a maximum limit of $10,000." PCP/L became indebted to LQP/L in the sum of $21,074.08 in respect of goods supplied and action was taken in the Magistrates' Court to recover that sum. At the hearing S. submitted that the guarantor's liability was limited to $10,000. The magistrate made an order for the full amount plus interest and costs. Upon appeal—

HELD: Appeal dismissed.
1. The predominant modern approach to the construction of contracts of guarantee is to construe guarantees negotiated by business people according to a reasonable commercial meaning. The strict approach of older authorities (which stressed a limitation of the guarantor's obligation to that expressly undertaken on a strict construction of the instrument) has, in appropriate cases, been displaced.

2. In the present case, the obligations of PCP/L guaranteed by S. under the guarantee included an unlimited amount in relation to breach by PCP/L of the Terms and Conditions of Trade, in addition to PCP/L's liability under an agreement to provide credit. S's contention that the guarantor's liability was limited to a fixed sum under a specific credit agreement was not supported by the terms of the guarantee. In so far as it was arguable that the liability of PCP/L under the credit agreement was *prima facie* limited to $10,000, that conclusion was displaced by the application of cl3 of the Terms and Conditions, or addressed by the variation provision in clause 3 of the guarantee.

DODDS-STREETON J:

The Proceeding

1. In this proceeding the second-named appellant, Bruno Strangio ("Strangio") appeals pursuant to s109 of the *Magistrates' Court Act* 1989 (Vic) ("the Act") from a final order made by Mr Crisp, Magistrate, on 26 June 2003.

2. The Magistrate on 26 June 2003 upheld the Magistrates' Court Complaint of the respondent, Lofts Quarries Pty Ltd ("Lofts") against Strangio for $20,760.12 pursuant to an indemnity and guarantee, together with interest of $2,213.69 and costs on a solicitor/client basis.

3. The Order of Master Wheeler made on 28 July 2003 relevantly states:

> "2. The question of law shown by the second named appellant to be raised by the appeal is: was the guarantee and indemnity dated 30 October 2001 (being Exhibit BS-8 to the said affidavit of Bruno Strangio) limited to $10,000?"

Pleadings and Documents

4. By an affidavit sworn on 28 July 2003 in support of the appeal, Strangio deposes that in the Magistrates' Court Complaint (No. Q02293177) filed 23 October 2002, Lofts, as plaintiff, alleged a trading agreement pursuant to which it provided the first-named appellant, Paradise Constructors Pty Ltd ("Paradise") with goods as ordered by Paradise from time to time. Strangio

was the sole director and shareholder of Paradise. Lofts alleged that Paradise was indebted to Lofts for $21,074.08 in respect of goods supplied. It was further alleged by Lofts that Strangio, in consideration of the granting of credit to Paradise, indemnified Lofts against losses, damages or expenses suffered or incurred by Paradise and guaranteed Paradise's due performance pursuant to the trading agreement.

5. By amended notice of defence dated 24 January 2003 Paradise and Strangio (as defendants to the Magistrates' Court Complaint) admitted that Paradise ordered and received some goods, but denied that Paradise ordered all of the goods as alleged. They denied that Strangio undertook to indemnify Lofts in his personal capacity, but contended that he did so only in his capacity as a director of Paradise.

6. An application for credit dated 30 October 2001 ("application for credit") to Lofts stated the customer to be Paradise. The credit limit was stated to be $10,000. The application noted that:

> "(A) The Customer agrees that all purchases will be made subject to the Supplier's standard Terms and Conditions either endorsed herein or available for inspection at the premises of Lofts Quarries Pty Ltd (ACN 005 671 465) (the Supplier) unless otherwise agreed to in writing by the Supplier.
>
> (B) The Customer agrees that all credit provided to the Customer will be subject to the Supplier's Terms of Credit either endorsed herein or available for inspection at the premises of the Supplier unless otherwise agreed in writing by the Supplier".

7. The application for credit was signed by B. Strangio, "sole director and secretary" and dated 30 October 2001.

8. The indemnity and guarantee to Lofts (the "Supplier"), dated 30 October 2001 ("the guarantee") provided:

> "1. In consideration of the Supplier entering into Terms and Conditions of Trade ('Terms and Conditions') with and/or extending credit to the customer described in the Schedule ('Customer') at the request of the guarantors described in the Schedule ('Guarantors'), the Guarantors HEREBY JOINTLY AND SEVERALLY COVENANT with the Supplier that the Customer as described in any of the Suppliers Terms and Conditions of trade or any agreement to the provision of credit from the Supplier to the Customer whatsoever ('Terms and Conditions'), will duly perform and observe any and all of its obligations under this Deed including the due and punctual payment of all monies payable by the Customer.
>
> 2. If the Customer defaults in any way on the payment of any monies owing to the Supplier, and notice is given in writing to the Guarantors, the Guarantors will pay to the Supplier all monies owing to the Supplier from the Customer.
>
> 3. The joint and several liability of the Guarantors under this Indemnity and Guarantee will not be discharged or affected in any way by any indulgence or concession granted to the Customer by the Supplier, in the amendments or variation of the Terms and Conditions or any act, matter or thing which but for this provision might operate to relieve the Customer from the obligations under the Terms and Conditions.
>
> 4. The obligations of the Guarantor will not be discharged or affected in any way by the bankruptcy, insolvency, liquidation, receivership or administration of the Customer.
>
> 5. This Guarantee is a continuing guarantee and will remain in force and effect until all obligations to the Supplier guaranteed under this Indemnity and Guarantee have been discharged in full. It is in addition to and will not prejudice nor be prejudiced by any other guarantee, indemnity or other security or right against any other person which the Supplier may have for due performance of the obligations of the Customer under the Terms and Conditions.
>
> 6. Without limiting the preceding clauses the Guarantors will jointly and severally indemnify and keep indemnified the Supplier against any loss or damage suffered or incurred by the Supplier (including economic loss and reasonable legal costs and disbursements on a solicitor and client basis) arising from any breach whatsoever of the Terms and Conditions by the Customer.
>
> 7. This Guarantee will inure for the benefit of the Supplier and its successors, assigns and representatives."

9. The "Customer" described in the Schedule to the guarantee is Paradise. The "Guarantor" described in the Schedule is Bruno Strangio, "sole director and secretary".

10. A letter of Lofts to Paradise dated 2 November 2001 stated, *inter alia*, "Your application for a credit account with this company has been considered and we are pleased to advise that you account is **now open**, and on a maximum limit of $10,000 as requested".

The Appeal

11. Section 109 of the Act relevantly provides:

> (1) A party to a civil proceeding in the Court may appeal to the Supreme Court on a question of law, from a final order of the Court in that proceeding.
>
> (2) An appeal under sub-section (1)—
> (a) must be instituted not later than 30 days after the day on which the order complained of was made;
> (b) does not operate as a stay of any order made by the Court unless the Supreme Court so orders;
>
> (3) Subject to sub-section (2), an appeal under sub-section (1) must be brought in accordance with the rules of the Supreme Court.
>
> (4) ... (5) ...
>
> (6) After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Court with or without any direction in law.

12. Order 58 of the Supreme Court Rules governs appeals under s109 of the Act.

13. The order appealed from must be final and the appeal lies only on a question of law.

14. An appeal pursuant to s109 of the Act is not a re-hearing, but an appeal strictly so-called[1].

15. In the present case, the order of the Magistrate is final in nature. Further, the question of law the subject of the appeal has been identified with precision.

Amendment

16. The appellant sought an order that the title of the proceeding be amended to reflect the correct name of the first-named appellant, which is Paradise Constructors Pty Ltd. The respondent sought an order that the name of the respondent in the title to the proceeding be amended by deleting "ACN 055 471 423" and substituting "ACN 005 671 465". Those orders will be made.

The Parties' Contentions

17. Mr Greenberger, counsel for Lofts, contended that the question of law the subject of the appeal had not been raised below and had not, in terms, been determined by the Magistrate. As such, he submitted that it was inappropriate for determination on appeal.

18. Mr Gurvich, counsel for Strangio, pointed out that the issue of the limit of liability under the guarantee was raised in the Magistrates' Court pleadings.[2] It was also canvassed in cross-examination.[3] Further, the Magistrate was provided with copies of the application for credit, the guarantee and the letter of 2 November 2001.

19. In *Barton v Estate Agents Licensing Authority*[4] the Court of Appeal noted, without apparent dissent, the construction of a provision analogous to s109 of the Act by Young CJ and McGarvie J in *Transport Accident Commission v Hoffman*.[5] In that case, Young CJ and McGarvie J construed the provision as "granting a right of appeal from any decision on a question of law which was involved in the decision."

20. In my opinion, the question whether Strangio's liability under the guarantee was limited to $10,000 was determined in the negative by the Magistrate. That determination necessarily underpinned the order made by the Magistrate on 26 June 2003, which is the subject of this appeal.

21. Accordingly, a right of appeal under s109 properly lies on the question of law stated in order 2 of the Order of Master Wheeler made on 28 July 2003.

22. Mr Gurvich conceded that the guarantee was valid and imposed liability on Strangio. He submitted that on a proper construction, the guarantor's liability was limited to $10,000. He observed that the ambit of the liability under the guarantee must be construed in the context of circumstances at the time of execution. The guarantee was executed at the same time as, and in conjunction with, the application for credit dated 30 October 2001, which imposed a credit limit of $10,000. The letter of Lofts dated 2 November 2001 confirming the approval of credit to that amount was received shortly after the execution of the guarantee. Mr Gurvich relied on *Philips v Astling,*[6] in which Lord Mansfield acknowledged the fundamental principle that where, as a matter of construction, a precise sum is fixed as the subject matter of the guarantee, and any larger sum is "restrained", the guarantor is not bound to pay the larger sum.

23. Mr Gurvich also relied on *National Bank of Nigeria v Awolesi,*[7] where the consideration for the guarantee was stated to be continuation of the existing account. It was held that liability under a new account was not guaranteed. That conclusion was based on a construction which took into account other terms of the guarantee.

24. The secondnamed appellant also cited *Burnes v Trade Credits Ltd*[8] in which it was held that the guarantor of a mortgagor's obligations was discharged by a material variation to the terms of the mortgage, which was, as a matter of construction, unauthorised by a term providing that further advances would be included, save in specified circumstances.

25. Mr Gurvich submitted that in the circumstances of the present case, where the guarantee was executed in conjunction with the application for credit imposing a limit of $10,000, the liability of Paradise covered by the guarantee was absolutely limited to that sum. As such, the extension of credit to Paradise in excess of that sum without notification to, and the express consent of, the guarantor, constituted an unauthorised material variation. In essence, the secondnamed appellant contends that the guarantee should be construed as guaranteeing only a specific contract (the provision of credit) which was for a fixed maximum amount.

26. It was also submitted that it was irrelevant that Strangio (as the sole director and shareholder of the corporate customer) had notice of, and consented to, its placement and acceptance of orders to an amount in excess of the original credit limit, due to the application of the separate legal entity principle.[9] The separate legal entity principle does not preclude the attribution of notice to, or informed consent by, a company director personally. In *Winstone v Bourne*[10] Mahon J rejected the defendant directors' contention that they had not assented to the variation of a debenture in their capacity as guarantors, but only in their capacity as directors of the debtor company. The separate legal entity principle should not operate to vitiate the effect of notice to, and consent by, corporate controllers, in order to relieve them of liability for obligations to which they assented and from which they benefited.

27. Mr Greenberger, counsel for Lofts, contended that on a proper construction of the guarantee, the liability of Paradise guaranteed by the guarantor was an "all monies, all accounts" liability. It was not limited to a particular principal contract, nor to a specific sum.

28. In this context, he submitted that the words "under this deed," contained in clause 1, should be disregarded as meaningless. I accept that contention. Counsel for the secondnamed appellant expressly conceded that the Customer (Paradise) has no obligations under the deed. If the meaningless reference to the customer's obligations "under this deed" be excised, clause 1 of the guarantee refers in terms to "[the Customer's] obligations ... "including the due and punctual payment of all monies payable by the Customer".

29. Further, the reference to the consideration for the guarantee is not limited to an extension of credit to the Customer, but includes "the Supplier entering into Terms and Conditions of Trade," as an alternative or additional source of consideration to the provision of credit.

30. The "Terms and Conditions" are defined in Note A of the application for credit and the "Terms of Credit" are defined in Note B of the application for credit as "either endorsed hereon or

available for inspection at the premises of the Supplier unless otherwise agreed in writing by the Supplier".

31. The secondnamed appellant relies on the incorporation of the terms of the application for credit into the guarantee as the basis for limiting liability to $10,000. He cannot, without inconsistency, resile from the definition of other terms set out in the application for credit.

32. It is not disputed that the relevant Terms and Conditions are those comprised in Exhibit "BS-9" to the affidavit of Bruno Strangio, sworn 28 July 2003. Clause 3 of the Terms and Conditions is entitled "Credit Limit". It provides, "The Supplier may impose a credit limit on the Credit Account. The amount of such a limit is at the absolute discretion of the Supplier".

33. The respondent contended that, properly construed, there was no absolute or fixed credit limit imposed on the credit agreement covered by the guarantee. By clause 3 of the Terms and Conditions, any credit limit imposed on the Customer from time to time could be unilaterally raised or lowered by the Supplier. As such, the guaranteed obligation in relation to the credit agreement was for an unlimited amount of credit.

34. Further, clause 3 of the guarantee expressly provides that the liability of the guarantor "will not be discharged or affected in any way by any indulgence or concession granted to the Customer by the Supplier, any amendment or variation of the Terms and Conditions ... " Thus, if the increased credit provided to Paradise constituted a material variation of the principal contract, it did not, under the terms of the guarantee itself, discharge the guarantor's liability.

35. Mr Greenberger also submitted that clause 2 of the guarantee fortified the conclusion that the guarantee covered "all monies". Clause 2 relevantly provides that "if the Customer defaults in any way on the payment of any monies owing to the Supplier ... "

36. Further, clause 6 of the guarantee provides that, "without limiting the preceding clauses, the Guarantor will jointly and severally indemnify and keep indemnified the Supplier against any loss or damage suffered or incurred by the Supplier (including economic loss and reasonable legal costs and disbursements on a solicitor/client basis) arising from any breach whatsoever of the Terms and Conditions by the Customer".

37. Clause 6 does not limit the source of the guarantor's liability to a principal contract for the provision of credit. Further, it does not limit the guarantor's liability by reference to any amount specified as a credit limit. Clause 6 is expressly predicated on an additional basis of liability, being breach of the Terms and Conditions (which include Terms and Conditions of Trade) consonant with the dual bases of consideration expressed in clause 1 of the guarantee.

37A. I note that in so far as issues of fact were relevant to his decision, the Magistrate accepted the evidence of the witnesses for the respondent, concluding that the secondnamed appellant had demonstrated "breathtaking mendacity".

Conclusion

38. The predominant modern approach to the construction of contracts of guarantee is to construe guarantees negotiated by business people according to a reasonable commercial meaning.[11] The strict approach of older authorities (which stressed a limitation of the guarantor's obligation to that expressly undertaken on a strict construction of the instrument)[12] has, in appropriate cases, been displaced.

39. In the present case, I am satisfied that, on a proper construction, the obligations of Paradise guaranteed by Strangio under the guarantee included an unlimited amount in relation to breach by Paradise of the Terms and Conditions of Trade, in addition to Paradise's liability under an agreement to provide credit. In my opinion, the secondnamed appellant's contention that the guarantor's liability was limited to a fixed sum under a specific credit agreement is not supported by the terms of the guarantee.

40. In so far as it is arguable that the liability of Paradise under the credit agreement was *prima facie* limited to $10,000, that conclusion is displaced by the application of clause 3 of the Terms

and Conditions, or addressed by the variation provision in clause 3 of the guarantee. Further, the separate legal entity principle does not relieve the guarantor of the consequences of notice of, or consent to, an increased credit limit, merely because he received notice or gave consent whilst acting as a director of Paradise.

41. In my opinion, the order of the Magistrate, based on the conclusion that the guarantor's liability was not limited to $10,000, does not evince error on any question of law.

42. It follows that the appeal should be dismissed.

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[1] *Carter v Ried* [1992] VicRp 22; [1992] 1 VR 351 at 361; (1991) 13 MVR 229.
[2] In paragraph 8 of the amended notice of defence.
[3] Transcript p34.
[4] [1998] 1 VR 164; 11 VAR 362.
[5] [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193.
[6] [1809] EngR 519; 2 Taunt 206; 127 ER 1056.
[7] [1964] 1 WLR 1311.
[8] (1981) 34 ALR 439.
[9] *Salomon v Salomon & Co Ltd* [1897] AC 22; [1895-99] All ER 33; 66 LJCh 35.
[10] [1978] 1 NZLR 94 at 96.
[11] *Ankar Pty Ltd v National Westminster* [1987] HCA 15; (1987) 162 CLR 549 at 560-561; 61 ALJR 245; [1987] ASC 57; O'Donovan J and Phillips J*, The Modern Contract of Guarantee*, 3rd edn, 1996 at pp216-218.
[12] *Eastern Countries Building Society v Russell* [1947] 1 All ER 500.

APPEARANCES: For the appellants Paradise Constructors Pty Ltd: Mr MK Gurvich, counsel. Lewenberg & Lewenberg, solicitors. For the respondent Lofts Quarries Pty Ltd: Mr R Greenberger, counsel. Jerrard & Stuk Lawyers.
