WREN v. BANK OF NEW ZEALAND.

ORDER.

50 fol. @ 6°
25/-

Appeal dismissed with costs.

Order of Full Court varied by omitting the reference to the undertaking imposed upon the respondent.

No. 3 of 1935

17 April 1935

WREN

v.

BANK OF NEW ZEALAND.

JUDGMENT.

RICH J.

DIXON J.

EVATT J.

McTIERNAN J.

BANK OF NEW ZEALAND (Respt)

v

WREN (appellant)

The judgment of the Supreme Court against which this appeal is brought upheld a verdict given under the direction of the Judge at the trial of the action.

In the action the respondent Bank sued the appellant for the sum of £15,225.19.0 under a guarantee. A verdict was directed for the full amount. That amount is composed of £12,505.8.3 principal and £2,720. 10.9 interest owing to the respondent Bank by its customer, the principal debtor. The

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instrument of suretyship,upon which the respondent Bank declared, expressed a guarantee on the part of the appellant to pay on demand all sums of money whatsoever in which the customer,the principal debtor,then was or might at any time become indebted or liable to the respondent Bank whether by way of overdraft or upon bills discounted or any other dealing or transaction,with interest and all costs and expenses incurred by the respondent Bank in enforcing any security or obtaining payment. The instrument further expressed an agreement on the part of the appellant that interest should be chargeable at the rates agreed with the principal debtor or at overdraft rate and should continue chargeable until all monies guaranteed were fully paid. But,by a

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separate overriding clause,it was provided that the surety,the appellant, should not be liable by reason of the guarantee to pay more than a total sum which it proceeded to define. The total sum was defined as £15,000 plus a sum equal to one year's interest on that amount plus the costs and expenses incurred by the respondent Bank in enforcing and obtaining payment under the guarantee and plus interest on the amount demanded from the day of such demand until actual payment of such amount at the rate of 8% per annum.

The respondent Bank interpreted this clau_se, as imposing no liability upon the surety but as stating a limit upon the

amount recoverable under the liability imposed upon him elsewhere in the instrument, a limit calculated by adding to the £15,000, the one year's interest on that sum, the costs and expenses specified and the interest on the amount demanded at 8% per annum from the date of the demand. Subject to the limit so ascertained, the liability, which upon the terms of the instrument the surety incurred, would be for the full amount owing by the customer to the Bank for principal and interest. The declaration was framed upon the basis of this construction of the instrument. The sum of £12,505.8.3 claimed as principal consisted of an amount of £15,502.8.3 by which the customer was overdrawn at the date of the demand, after the deduction therefrom of £2,997 paid by the

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appellant on account of the sum demanded. The interest claimed, viz £2,720 . I0.9 , consisted of £538.13.6 interest which had accrued prior to,but was not debited to the account until after, the demand and of the interest which accrued between the demand and the institution of the action on the balance of the demand remaining unpaid.

The appellant disputed the interpretation of the guarantee thus adopted by the respondent Bank. He read the clause limiting the amount of his liability as meaning that upon demand his indebtedness as surety should be fixed at a sum not exceeding £15,000 together with one year's interest thereon and costs and

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charges and that upon that sum so fixed he should be liable to pay interest at 8% per annum independently of any liability for interest of the principal debtor and not otherwise. So read the guarantee would crystallize the appellant's liability for the principal debt once for all on demand being made and his liability for interest would arise out of his own independent covenant to pay 8% per annum. As the declaration contained no averment of such a covenant,but,on the contrary, alleged the appellant's liability in the sum sued for as a liability for a balance of £15,225.19.0 which became due from the principal debtor,the customer,to the respondent Bank,the appellant's construction of the instrument would place the respondent Bank in difficulties

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which would,unless the declaration were amended,result in the reduction of the verdict either by the amount included for interest or the amount of £2,997 which the appellant had paid. But,upon examination, it clearly appears that the instrument bears the interpretation placed upon it by the respondent Bank. The liability of the appellant for interest does not arise out of the clause containing the limitation of liability : it is not an independent liability : it is a liability as surety for the interest payable by the principal debtor,the customer, and 8% per annum is only the statement of part of the limitation upon the appellant's liability. Accordingly the declaration was properly

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framed upon the instrument for the sum which under its terms would be recoverable. But the appellant maintains that his contract of suretyship is not fully and truly expressed by the instrument. The text of that document,as all parties agree, makes him a surety (subject to the limitation of amount) for all the indebtedness of the principal debtor,the customer,to the respondent Bank on all accounts whatsoever,and places no restriction upon the amount which the respondent Bank may choose to advance to the customer. But the instrument, which is in form addressed to the Bank by the appellant, in stating the consideration for the guarantee,expresses it as follows :- " In consideration of " your accepting and acting on this guarantee and of all or any

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" advances or advance made either at the time of your receiving this " guarantee or at any time afterwards to the customer's number 2 " account ." On the evidence the inference is open that the real intention of both parties was to confine the guarantee to this number 2 account which was freshly opened. As to the power of the Bank to make what advances it chose to its customer, the appellant gave evidence that, before he gave the guarantee when he was introduced to the manager of the respondent Bank as a prospective surety, he asked him what was the then present indebtedness of the customer, and that the manager told him £34,000. Thereupon, as the appellant deposed, he said to the manager - " If I guaranteed this " account for £15,000 what do you propose to do with regard to the

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" other account - this was the No. 2 Account - do you propose to " allow the company to go beyond that ? He said ' Certainly not, " ' we will not let him go beyond it again,and as we have only " ' got you for £15,000 we will not go beyond £49,000. ' "

After signing the guarantee,he told the manager that the customer was a most optimistic man and said - " You assure me this " amount will not go beyond the £49,000 ". The manager said - " You can rest assured that it will not go beyond that amount." This evidence was admitted only subject to objection. It was not,however, contradicted. It appears that in the event as much as £150,000 was advanced to the customer. It does not appear, however,that,if the guarantee was confined to the No. 2 account,the appellant's liability would be any less than the amount recovered.

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Indeed it seems almost certain that the distinction between liability in respect of the No. 2 account and of all accounts does not affect the amount of the appellant's responsibility. His counsel contends,however, that both because,as he claims,the intention was to guarantee only the No.2 account and because of the evidence of the Bank's " assurance " that no more than £49,000 would be advanced, it appears that the contract of suretyship was not wholly contained in the writing but was composed of the writing as qualified and explained by oral terms. In other words it was partly oral and partly written. He says that after all the instrument when signed and handed over by the appellant was

only an offer (see Offord v Davies (1862) 12 C.B. N.S. 748 ; 142 E.R. 1336 per Erle J. at pp.756-7 ; 1340) . Therefore his client as offeror could qualify the writing in any way and make an offer consisting of a writing and of words explaining or qualifying it or adding terms to it. The consequence,according to the argument,is that the respondent Bank has not declared upon the true contract.

No one disputes that an offer may consist of written matter varied or explained by oral communication. But,in the present case,the document signed by the appellant was executed and handed over as a formal instrument containing an expression of his liability as surety described and worked out by many complicated

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terms, a liability which would take effect when the instrument was acted upon by the Bank's giving one day's forbearance and making a single advance. The respondent Bank thus produced and put in evidence a document in the instrument of guarantee appearing upon its face to be the formal expression of the transaction between the parties. Until evidence is adduced that such a document is not so intended, no evidence is admissible that different or additional terms were agreed to by the parties as part of the contract. In the present case, there is nothing to show that the document was not intended by the appellant to embody his contract and to constitute the formal expression of his

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obligation. No one can doubt that the respondent Bank meant that this should be its purpose. The contention,therefore,fails that the two terms relied upon formed part of the entire contract of suretyship which was partly oral and partly written. No plea of the Statute of Frauds was filed,but it may be remarked that,if the contention were correct, the consequence would be that such a plea would render the liability unenforceable.

It was next contended that,at any rate,the oral evidence would suffice to support a finding that,by an independent collateral contract made in consideration of the appellant's execution of the guarantee, the respondent Bank promised not to

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advance to the principal debtor more than £49,000 in all. An equitable plea was filed setting up such a collateral contract and relying upon its non-observance as an avoidance of the appellant's liability. A plea by way of cross-action was filed claiming damages for breach of the alleged collateral contract. The appellant contends that these pleas ought not to have been withdrawn from the jury's consideration. There are two answers to this contention either of which is fatal to its success.

If an independent collateral contract is orally made in consideration of the making of a main written contract, to possess validity it must be consistent with the obligations of the written contract. The consideration consists of the undertaking of the

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specified obligations. If the collateral contract set up defeats those obligations,it makes the consideration unreal. If it qualifies them,it impairs or detracts from the consideration. Accordingly there must be no repugnance between the collateral and the main contract,the making of which affords the consideration. Where parties do undertake by separate expressions of their intention apparently inconsistent obligations,the apparent inconsistency can be reconciled by a process of interpretation when the separate expressions of intention constitute together one contract. But,when they occur in two different contracts, the apparent inconsistency may be real,and,if so,it cannot be

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reconciled. One contract must give way to the other. If they are made on different occasions,the later operates as a variation of the former. But where they are made on the same occasion and one is made in consideration of the other,it must,at any rate if oral,give way to the main written contract unless it be consistent with it.

Now,in the present case,the respondent Bank possessed under the written contract a liberty to advance what it chose to the customer and its right of resort to the surety was unconditional. It is true that the document does not affirmatively confer a power of making unlimited advances. But it does express an intention that, subject to the limitation upon

the total amount recoverable from the appellant,he shall be unconditionally liable without regard to the amount advanced to the customer. To introduce into the transaction a contractual provision that the Bank should advance no more than £49,000 to its customer and that upon its doing so the surety should be discharged is inconsistent with the written guarantee. If the 200 alleged contractual provision be understood not as going to the existence or continuance of the surety's liability,but as sounding in damages only,it still exhibits an inconsistency with the main obligation. For the liability to damages postulated is a liability to compensate the appellant for his loss incurred as guarantor of the customer. This means that some or all of the 206

amount for which he is liable to the Bank must be included in the Bank's liability to him for unliquidated damages. In other words, the sense of the collateral contract would be that the Bank must not make the advances beyond £49,000, as the instrument leaves it at liberty to do, and thus increase the appellant's risk as surety. If, in the event, the advance of a greater amount than £49,000 does not contribute to the failure of the customer to pay the principal debt or to the calling up of the guarantee, the non-observance of the contract will have been productive of no detriment to him. If, on the other hand, these consequences could be traced to it, the purpose of the clause would be to save him harmless and this would

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be a nullification or reduction in substance of his responsibility to the Bank.

The second ground upon which the appellant's contention under consideration must fail is that the conversation deposed to does not afford evidence of an intention on the part of the Bank Manager to make on behalf of the respondent Bank a contractual promise in consideration of the appellant's giving the guarantee. Collateral contracts of such a character must be made out strictly. The evidence by which they are proved must raise a higher degree of probability that the party charged upon such an alleged contract intended to make a binding promise, and to do so in exchange for or as an inducement for the making of the main contract, than that he

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intended to and was understood to state merely his future intentiom,or that he meant to make a promise forming part of the contract intended to be expressed in the writing.

In the present case,the conversation deposed to is quite consistent with the manager's doing no more than stating his future intention. Indeed,the nature of the transaction and the terms of the conversation suggest very strongly that neither the appellant nor the manager supposed that the reference to £49,000 related to the legal rights of the parties. See Cohen v Cohen (1930) 42 C.L.R. 91 at p.96 : Balfour v Balfour 1919 2 K.B. 571 : Rose & Frank Co v Crompton 1925 A.C. 445 , 1923 2 K.B. 261.

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The burden of proof was upon the appellant and upon the evidence it would be unreasonable for a jury to find the issue in his favour.

The appeal should be dismissed.

The Full Court of the Supreme Court of New South Wales, in dismissing the appeal to it from the verdict, required from the respondent Bank an undertaking the precise terms of which as now settled seem to accomplish little. Some confusion has arisen in the Courts below, as indeed it arose for a time in this Court, as to the manner in which the respondent Bank's claim was made up, and as it was not then completely removed the undertaking

was exacted to avoid any injustice. But this confusion has now disappeared and it seems undesirable to leave the undertaking standing. The respondent Bank was entitled to an unconditional dismissal of ~~the~~ appeal to the Full Court and accordingly it should be discharged from the undertaking imposed upon it.

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WREN V. BANK OF NEW ZEALAND.

JUDGMENT STARKE J.

The respondent, the Bank of New Zealand, sued the appellant Wren upon a written guarantee given to it by the appellant, whereby he promised to pay to it on demand all sums of money advanced by it to A.C.Cooke Limited, provided that the liability of the appellant should not exceed £15,000 plus certain other sums. The action was tried before Halse Rogers J. and a jury. The learned Judge directed a verdict for the Bank, and this direction was supported by the Supreme Court of New South Wales on appeal. An appeal from this decision is now brought to this Court.

Several matters were argued upon the appeal. First, that evidence was led which should have been submitted to the jury for the purpose of establishing that the guarantee did not contain all the terms of the engagement between the parties. The evidence relied upon consisted of a conversation between the Manager of the Bank and the appellant, and certain letters, from which, it was contended, the jury might have inferred an undertaking on the part of the Bank limiting the guarantee to the No. 2 account of A.C.Cooke Limited and promising that it would not advance that Company an amount in excess of £49,000. The advance actually made to the Company considerably exceeded that sum. Parol testimony, it is admitted, cannot be received to contradict vary or add to or subtract from the terms of a written engagement into which a party has entered and which is designed to be the repository and evidence of his final intention. In my opinion, the present case is within this principle. The guarantee is a business document, and in language which imports the legal obligations of the appellant and the terms and conditions of those obligations. The only conclusion in such a case is that the guarantee embodies his engagement and final intention and contains every material term of that engagement. Secondly, that the evidence already mentioned should have been submitted to the jury in support of a plea by way of cross action that the Bank promised the appellant in consideration of his giving the guarantee that it would not advance to A.C.Cooke Limited by way of overdraft or otherwise an amount in excess of £49,000. It is of course possible "that there may be a contract the consideration for which is the making of some other contract." But "such collateral contracts" as was said

Heilbut and Co v. Buckleton 1913 A.C. at p 47, "the sole effect of which is to vary or add to the terms of the principal contract, are....viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts, but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown." The contract alleged in the present case is entirely inconsistent with the obligation of the written guarantee. The evidence does not suggest any departure from or any alteration of the obligation of the guarantee; such as it is, it suggests that the Manager of the Bank merely stated the limit of overdraft which the Bank would allow A.C.Cooke Limited, and not that he made any promise to or contract with the appellant. Thirdly, that the Bank only sued for moneys advanced to A.C.Cooke Limited, and that certain interest claimed was not a liability of the Company but an independent liability of the appellant under the guarantee. This argument rested upon a misunderstanding of Clause 13 of the guarantee, which only fixes the limit of the appellant's liability under the guarantee and does not impose an independent promise on the part of the appellant. The interest recovered is part of the obligation undertaken by the appellant under Clause 1 of the guarantee. The declaration was not as precise in this respect as it might have been, but it was the substance of the matter and not the form of the declaration that the appellant relied upon.

An undertaking was required of the Bank in the Supreme Court that it would not treat the amount of the judgment as being other than for the respective amounts of principal and interest mentioned in particulars endorsed on the writ. The appellant is not entitled to any such undertaking, and no good reason exists for its requirement. The Bank should be discharged of its undertaking and the appeal dismissed.

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