Privy Council Appeal No. 87 of 1917.

William Egbert and Others - - - - *Appellants*

v.

The Northern Crown Bank - - - - *Respondents.*

FROM

THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE **OF THE** PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1918.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
LORD ATKINSON.

[*Delivered by* LORD DUNEDIN.]

The respondents are a Bank having a branch at Calgary, in the province of Alberta. The appellants are the surviving signatories and the executors of one deceased signatory, whose name was Breckenridge, to a letter of guarantee executed in favour of the Bank. The guarantee was given to secure the advances made and to be made to a company called Woodcrafts (Limited) of which the guarantors were directors.

The arrangement had its inception in May 1911 when a letter of guarantee was granted to the amount of 20,000 dollars. This was superseded in December 1911 by another for 50,000 dollars, and that again superseded on the 8th April, 1912, by the guarantee now in question for 75,000 dollars.

The present action is raised in respect of the guarantee, and there is no question but that there is due from the company to the Bank sums which in all do not exceed 75,000 dollars. The defence is rested upon two separate points with which their Lordships will presently deal. They were both repelled by the learned Trial Judge, whose judgment was with a variation affirmed by the Court of Appeal.

It will be convenient first of all to set forth the material portions of the guarantee. They are as follows:—

"In consideration of the Northern Crown Bank agreeing or continuing to deal with Woodcrafts (Limited), Calgary, Alberta, herein referred to as the 'customer' in the way of its business as a bank, the

undersigned hereby jointly and severally guarantee payment to the bank of the liabilities which the customer has incurred, or is under or may incur or be under to the bank, whether arising from dealings between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the customer: including in such liabilities all interest, computed with quarterly or other rests, according to the bank's usual custom, charges for commission and other expenses, and all costs, charges, and expenses which the bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of 75,000 dollars, with interest at the rate of 7 per cent. per annum from the date of demand for payment of the same, which it is agreed the same shall bear).

"And the undersigned agree that the bank may refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as the bank may see fit, and may apply all moneys received from the customer or others, or from any securities upon such part of the customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the undersigned under this guarantee.

* * * * *

"And this shall be a continuing guarantee, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee."

* * * * *

The ground of defence with which it is convenient to deal first is that the guarantee was brought to an end by notice.

The facts as to this are that on one of the guarantors (Breckenridge) dying, his executors on the 7th August, 1913, wrote a letter revoking the guarantee. Notwithstanding this, the account with the company was kept alive, renewals being taken for acceptances then current, and fresh advances being made up to the time when the account was finally closed in the spring of 1915.

At their Lordships' bar the effect of this was pled alternatively. It was argued, first, that this notice brought the guarantee to an end as regards all the guarantors; and second, that it brought it to an end, at least as regards Breckenridge; and in either case it was further urged that the subsequent renewals were equivalent to giving time, and that consequently either all parties or alternatively Breckenridge's executors were free of all liability.

It is not necessary to examine as to what is the law in the case of death when nothing is said in the guarantee about its continuation or not. Here there is a clause which specially deals with the question of control, and the question necessarily depends on the true construction of that clause above quoted beginning "And this shall be a continuing guarantee."

Their Lordships are of opinion that this clause stipulates that the guarantee is to remain in force until there is a notice given by each and all of the guarantors, the executors of any

deceased co-signatory coming in his place. Such a stipulation is in accordance with the literal meaning of the words, and is in harmony with what might be expected, looking to the position of the persons who were granting the obligation. Further, if it had been sought to allow anyone to bring the guarantee to an end, either for himself or for all, nothing would have been easier than to express such an intention by such words as "all or any of the undersigned," or other appropriate expression. This disposes of the first ground of defence in both its alternatives.

The second ground of defence is this. By the Bank Act, R.S.C., 1906, cap. 29, sec. 91, it is made illegal for a bank to charge interest at a rate greater than 7 per cent. The effect of that enactment was discussed and settled in the case of *McHugh* v. *Union Bank of Canada* (1913, App. Cas. 299).

In the present case, on the 22nd January, 1913, the local manager of the bank, acting in accordance with instructions received from the head office, raised the rate of interest charged to the company from 7 per cent. to 8 per cent., and this change was agreed to by the company. The system of dealing was this. As acceptances fell due and were not met, new acceptances were got from the company, the bank then discounting these acceptances and crediting the account with the proceeds, while debiting it with the amount of the old acceptances. After the date of the change interest on overdrafts and discount rates were all calculated at 8 per cent. instead of 7 per cent. No intimation of this new arrangement was sent to the guarantors. They plead that in respect of this they are free.

The law as to this class of plea is well settled. *Holme* v. *Brunskill*, 3 Q.B.D. 495, may be taken, as is remarked by the learned Trial Judge, as one of the leading authorities on the subject. The judgment of Cotton, L.J., in which Thesiger, L.J., concurred, contains the following passages:—

"The cases as to discharge of a surety by an agreement made by the creditor to give time to the principal debtor are only an exemplification of the rule stated by Lord Loughborough in *Rees* v. *Berrington*, 2 Ves. Jr. 540. 'It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.' The true view, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without enquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the security, the surety may not be discharged: yet that, if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not in an action against the surety go into an enquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that

if he has not so consented he will be discharged. This is in accordance with what was stated to be the law by Amphlett, L.J., in *Croydon Gas Company* v. *Dickinson*, 2 C.P.D. 51."

This statement of the law was followed by Chitty, J., in *Bolton* v. *Salmon*, 1891, 2 Ch., at p. 54, and was inferentially approved by Lord Watson in *Taylor* v. *Bank of New South Wales*, 11 App. Cas., at p. 603.

The matter is tersely summed up by Quain, J., in the case of *Polak* v. *Everett*, 1 Q.B.D., at p. 677: "I think the convenience and policy of the matter . . . . is that the contract of the surety should not be altered without his consent."

The appellants argue that these authorities apply. They lay stress on the opening words: "In consideration of (the bank) agreeing or continuing to deal with (the company) *in the way of its business as a bank.*" They say that in respect of that they were entitled to suppose that dealings with the bank would be in accordance with the law, *i.e.*, on a 7 per cent. basis; that an agreement between the bank and the company that dealings should be on an 8 per cent. basis was an alteration of the contracts, and that this alteration not having been communicated to them they were set free.

The question is not free from difficulty, but their Lordships think that the views of the Court of Appeal are right. What is guaranteed is not any one advance of 75,000 dollars, but all contractual indebtedness up to 75,000 dollars. That indebtedness may be, and in fact was, the result of a series of contracts. Each of the contracts was a contract to repay the money advanced with interest thereon. It is legitimate to read into each contract, from the guarantors' point of view, a condition that the interest should not exceed 7 per cent. But the difficulty in the appellants' argument lies in this, that the so-called agreement to charge 8 per cent. is statutorily invalid and of no effect. Though of no effect to legalise the interest, it does not invalidate the contract to repay the principal. That was inferentially decided by McHugh's case. Accordingly the indebtedness in respect of the principal has not been interfered with. In so far as advances on current account are concerned, the only result of the attempted agreement is to make the interest run at 5 per cent., which cannot constitute a violation of an implied contract that interest should not be greater than 7 per cent. So far as the discounts are concerned, the excess is a mere voluntary payment which the debtor cannot recover, but which, in so far as they exceed 7 per cent., do not bind the guarantors in a statement as against them of the debtor's account. This is fully given effect to by the variation made by the Court of Appeal on the judgment as originally pronounced by the Trial Judge. In their Lordships' opinion, therefore, the facts are not such as to make the case fall within the legal principles above laid down.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

WILLIAM EGBERT AND OTHERS

v.

THE NORTHERN CROWN BANK.

DELIVERED BY LORD DUNEDIN.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1918.