

FIJI DEVELOPMENT BANK v NAVITALAI RAQONA

(1984) 30 FLR 151

Supreme Court, Fiji.

Kermode J

Facts:

The defendant, Mr. Navitalai Raqona executed a written guarantee on the 26th of September 1977 in favour of the plaintiff bank. The guarantee was for money owing to the plaintiff bank by one Peniasi Lewadamu. The terms of the written agreement contained a clause that the guarantee was payable on demand. Demand was made pursuant to a written notice to the defendant and the co-guarantor on the 12th of May 1981. The defendant refused to honour his contingent liability under the executed guarantee and the matter came before Kermode J in the Supreme Court of Fiji. Although there was another co-guarantor Ratu Josaiava Tavaiaqia, a claim against him has not been made.

Claim:

The plaintiff claims against the defendant the sum of \$5,017.03 and interest thereon owing to the plaintiff (Bank) by Peniasi Lewadamu, which was guaranteed by the defendant and payable on demand.

Outcome:

The defences of the defendant failed, and the claim of the plaintiff was upheld. The defendant was ordered to pay the sum of \$5,017.03 and the further sum of \$134.56 for interest outstanding and any further interest at the rate of 11% per annum.

Legal Principles:

Ratio Decidendi

- A person of full age and understanding is bound by the signature and it is immaterial whether he or she read or understood the document signed.
- One of the exceptions to a signed document being binding upon the signatory is 'non est factum'. However, the plea of 'non est factum' is unsuccessful when the signatory is a person of full age and understanding.
- The obligation to pay the debts of the debtor under a written guarantee is enforceable upon the guarantor when demand is made.
- Where there is more than one guarantor the creditor can elect to sue either one of them and the guarantor can afterwards claim the contributions from the fellow guarantors if the liability was joint and several.

- Where the terms of the contract are clear and have been reduced to writing, ‘parol evidence rule’ prevents the party relying on oral evidence to vary those written terms of the contract, which the parties have agreed to record as part of the contract.
- The limitation period for a civil claim of a guarantor’s liability is six years from the date the liability arises. The liability does not arise on the execution of the Guarantee, rather it is contingent, and arises when demand is made on the guarantor to pay on his guarantee.

Obiter Dicta

- A guarantor can later claim the contributions from the co-guarantor(s) when the liability is joint and several.
- The time when the defendant files a defence is fatal if the court is of the view that there is a defence to the plaintiff’s claim of a summary judgement.

Commentary:

Contractual Obligations and the Effect of Signature

The general rule is that a party of full age and understanding is normally bound by his signature to a document whether he reads or understands it or not. (*Saunders v Anglia Building Society* (1971) AC 1004 (House of Lords)). A person signing a contract is bound by the terms of the contract. In the present case the defendant executed a guarantee and is bound by the terms of the guarantee. It is a contractual obligation and according to *Kermode J* the guarantee is not a document which is required to be read over and explained to the guarantor when he signs it.

With the deepest of respect for *Kermode J*’s judgement I differ in opinion. It is true that a guarantee does not have to be read or explained to the guarantor. But, in the modern day of transactions, a person should not be bound by an onerous guarantee liability unless he or she has received independent legal advice before the execution of the guarantee, or has waived the right to independent legal advice. (*Barclays Bank Plc v O’Brien* [1994] 1 AC 180; *Shotter v Westpac Banking Corporation and Villars* [1987] BCL 352; *Stuart Walker Guarantees: Is there a New Duty on Banks?* NZLJ September 1988, 319)

Defence of Non Est Factum

The defence of ‘non est factum’ is not applicable if the party signing the document is of full age and understanding. In this situation the defendant was of full age and understanding when he executed the guarantee and is therefore bound by his contractual obligations.

Guarantees

A guarantee is a contingent liability, which the guarantor may be liable for in the future. The creditor can recover from the debtor the sum owed to him, or choose to recover from the guarantor depending upon the terms of the guarantee. A guarantee payable on demand is binding on the guarantor once demand is made. Unless there are unusual features surrounding the dealings between the creditor and the debtor, the creditor is not obliged to recover the debt from the debtor before he can proceed to recover from the guarantor. However, a creditor should not act unconscionably or fail to disclose unusual features of his relationship with the debtor. (*Lloyds Bank Ltd. v Bundy* [1975] QB 326; *Scales Trading Ltd. v Far Eastern Shipping Plc Ltd.* [1999] 3 NZLR 316).

It would be prudent on the part of a guarantor to see the inclusion of a clause in the contract ensuring that the guarantor is liable only if recovery against the debtor is insufficient. Moreover, a guarantor should not

be liable to the creditor unless the debtor is sued, as a guarantee is one of those unjust transactions where there is no personal benefit to the guarantor.

Limitation Period for Civil Claims:

The limitation period for civil claims is governed by the Limitations Act (Cap 35) of the Fiji Islands. Section 4(a) of the Limitation Act (Cap 35) applies to a guarantee as it a contractual obligation. However, it is necessary to consider when the counting of the six years starts from. For a guarantor to be liable the six years is from the day the guarantor is actually liable, being the day the demand notice is issued to the guarantor.

Other Comments:

It would be interesting to note the outcome of contracts of Guarantee now that Fiji has a Consumer Credit Act which tries to strike a balance between the inequitable powers that a creditor has in comparison to a debtor and a guarantor.

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