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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A.150/79

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BETWEEN THE BANK OF NEW SOUTH WALES
a corporation carrying on the business of banking in New Zealand and elsewhere
Plaintiff

A N D KENNETH REGINALD BARTRUM
of Auckland, Company Director,
THOMAS ROBERT BIRD
of Tauranga, Company Director and
MARSHALL ANDREW BIRD
of Tauranga, Company Director
Defendants

Hearing: 21 March 1984

Counsel: P.D. McKenzie for Plaintiff
G.A. Howley for Defendants

Judgment: Delivered on 19 JUN 1984

T.J. McGRORY
Deputy Registrar

JUDGMENT OF GALLEN J.

Mirror Newspapers Limited was the proprietor of a local weekly newspaper circulating in the Tauranga district. The company was managed by a Mr Marshall Andrew Bird who considered that its operations could be extended by developing the newspaper into a daily circulating in the Tauranga district. The banker for the company was the then Bank of New South Wales. It provided overdraft accommodation for the company of a comparatively limited nature which was secured by, inter alia,

a guarantee given by the defendant Thomas Robert Bird who was a director of the company, as was the defendant Marshall Andrew Bird. The sum guaranteed was limited to $15,000.

Evidence was given that the Manager of the bank in 1974 became concerned at the situation which had developed and required the defendant, Marshall Andrew Bird, to produce figures to satisfy the bank justifying the continuation of the daily newspaper. The figures provided were not reassuring and the then Manager recommended to the bank authorities that the account be stopped and that a receiver be appointed under the current account debenture which the bank held. At this time however, the defendant Kenneth Reginald Bartrum came on the scene. Mr Bartrum appears to have been interested in acquiring an interest in the newspaper and on the basis of his interest a proposal was put forward whereby the bank was requested to provide finance for the company to the extent of an additional $50,000. Mr Bartrum was involved in substantial land development in the Auckland area and he was to reduce the amount owing by the sum of $30,000 on or before 3 October 1974 and thereafter to reduce the amount outstanding by the payment of monthly instalments of $1,000 each, payable from 3 November 1974 until 3 August 1975, at which time the whole situation was to be reviewed. The general proposal was acceptable to the bank which wrote to all defendants on 3 July 1974 what is described as a "term loan letter" setting out the basis on which the bank was prepared to provide the facility. This letter was in the

following terms:-

"Tauranga, N.Z.
3rd July, 1974.

The Managing Director,
Mirror Newspapers Limited,
Tauranga.

Dear Sir,

Referring to your application for financial accommodation, we are pleased to advise that the Bank has agreed to offer you a Term Loan of $50,000-00 on the following conditions.

1. The Term Loan of $50,000-00 is to be made available in an account styled "Mirror Newspapers Limited Term Loan Account" upon which no operations other than the drawing of the Term Loan, repayment of principal and the charging and payment of interest are to be made.

2. The whole of the agreed Term Loan must be drawn within six months of the date of this letter or the undrawn portion of the loan will lapse. If the loan is not fully drawn within six months but an extension is arranged, the Bank may charge a holding fee equal to interest on the amount of the undrawn portion of the Term Loan for the period of extension calculated at a rate to be determined by the Bank not exceeding the rate mentioned in paragraph (4) hereof.

3. The principal amount of the Term Loan is to be repaid by a reduction of $30,000-00 on or before the third day of October, 1974, and by monthly instalments of $1,000-00 each payable from the third day of November, 1974 to the third day of August, 1975 inclusive, at which time clearance of remaining debt is to be reviewed. Prepayment of principal

will be accepted by the Bank at any time subject to payment of such interest in respect of the unexpired term of the Term Loan as may be arranged with the Bank at the time of prepayment.

4. Interest shall be payable on the amount of the principal sum from time to time drawn and owing calculated on a daily balance and shall be paid to the credit of the Term Loan account referred to in paragraph (1) on 31st March and 30th September in each year. The rate of interest charged on this Term Loan shall be $8-50 per centum per annum provided that where the term of repayment of the Term Loan extends over more than five years the Bank may after the expiration of five years from the date hereof at its discretion vary the rate of interest charged on the Term Loan provided that the rate as varied shall not exceed the then prevalent rate charged or chargeable by the Bank at the time of such variation in respect of other loans of like term and like nature to other customers. No set-off for interest purposes will be allowed between the debt in the Term Loan account and any credit in any other account of yours with the Bank.

5. (a) The Bank shall not be under any obligation to advance any part of the Term Loan unless and until you or your surety shall have executed securities in favour of the Bank in accordance with the printed forms currently used by the Bank appropriate to the nature of the real and personal property to be secured or otherwise in such form as the Bank shall require as enumerated on the back hereof:

(b) Where the proposed security shall consist of an Instrument by way of Security under the Chattels Transfer Act 1924 nothing in your application for a loan or in this offer or in any acceptance of the conditions of this offer

whether such application, offer and acceptance shall be read together or separately or whether any two shall be read together shall confer upon the Bank or be construed as conferring upon the Bank any right in equity to any chattels or to any charge or security thereon or thereover and notwithstanding that the Bank may have made advances to you at any time prior to the execution of such securities aforesaid.

(c) You recognise that any security now or hereafter held by the Bank from you from time to time shall secure (subject as regards rate of interest and terms of repayment to this agreement) the balance from time to time owing in the Term Loan account and also all your other direct and contingent liabilities from time to time to the Bank.

6. Notwithstanding the provisions of paragraph (3) of this agreement the whole of the indebtedness for both principal and accruing interest in the Term Loan account shall at the option of the Bank become payable in any of the following events:

(a) If default is made in the payment of any of the periodical instalments or of principal or interest in the Term Loan account:

(b) If, at any time, there is any breach or default under any covenant term or provision of any security held by the Bank from you or your surety:

(c) If at any time you fail to pay to the Bank any other moneys owing by you to the Bank as they fall due or if there is any default under the terms of any arrangements between you and the Bank or if any event has happened entitling the Bank to demand payment under any guarantee or other security held by the Bank in respect of all or any part of your indebtedness to it:

(d) If you or your surety do not execute the securities mentioned in paragraph (5) to the satisfaction of the Bank:

(e) If, in the opinion of the Bank, your assets or position are not sufficiently maintained:

(f) If any attachment or other process of any court or authority or any distress is sued out against or in respect of or levied upon any of your assets.

7. If default shall be made in the payment of interest or any instalment of principal in respect of the Term Loan the Bank shall be at liberty to debit and charge such interest or instalment of principal in respect of which default shall have been made to any other account kept by you with the Bank.

8. In addition to the abovementioned Term Loan, overdraft accommodation to the limit of $ or such other amount as may from time to time be agreed to by the Bank is to be available to you during the Bank's pleasure and on the terms and provisions of the securities held from time to time by the Bank.

Should these conditions be acceptable to you, would you please sign the attached duplicate of this letter where indicated and return it to us.

Yours faithfully

Signed: C.E. Knutson

Manager.

I have received the original letter of which this is a copy and advise that the conditions contained therein are acceptable to me.

Signed: M.A. Bird

Signed: T.R. Bird

Signed: Kenneth R. Bartrum

3rd July, 1974."

It was acknowledged by all three defendants who also advised in writing that the conditions contained in the letter were acceptable. On the same day all three defendants signed a guarantee in favour of the bank in the standard form provided by the bank. They signed in addition an acknowledgement that at the time of executing the guarantee they were aware that the company had already incurred liabilities to the bank. A request to open a term loan account was signed and the defendant Kenneth Reginald Bartrum also signed an acknowledgement obliging him to pay the sum of $30,000 on or before 3 October and thereafter the sum of $1,000 on 3 November 1974 and on the third day of each subsequent month until 3 August 1975.

The venture was not successful and in addition Mr Bartrum as a result of completely unrelated problems, was unable

to meet the obligations which he had personally accepted. By 6 December 1974 the bank had become sufficiently alarmed to make demand on the company in respect of alleged default. On 12 December 1974 it made demand on all three guarantors for $50,659.86 and were advised "this sum carries interest at the prevalent rate for the time being charged to other customers on the like account until payment."

There then commenced a long period when initially the bank endeavoured to recover moneys from Mr Bartrum. In this it was unsuccessful. The bank now claims to recover not only the amount which was outstanding when the demand was made but interest thereon up to date calculated at overdraft rates current from time to time and compounded. In December 1974 the amount demanded was $50,798.53. The sum now claimed by the bank taking into account interest and compound interest is $153,256.77.

The defendant Marshall Andrew Bird is in the United States of America. He has taken no part in these proceedings and the bank asks that insofar as he is concerned, the action should be adjourned sine die. That will be done.

The bank seeks to recover the full amount which it now claims, jointly and severally from the defendants Thomas Robert Bird and Kenneth Reginald Bartrum. The defendant Kenneth Reginald Bartrum took no part in the proceedings. The bank claims to recover on the basis of the guarantee which was signed by the defendants.

The defendant Thomas Robert Bird says firstly, that liability of the defendants must be ascertained from the whole of the documents which constitute the transaction and that it cannot be considered solely on the basis of the terms of the guarantee. He submits that when the documents are considered together it becomes clear that the liability of the defendant Thomas Robert Bird is limited to the sum of $10,000, together with interest thereon at the rate of 3½% for 5 years and thereafter at current interest rates. He contends that the bank is not entitled to compound the interest. He further contends that since the sum of $7,500 was paid by the bank to Mr Bartrum and not to the company, then credit must be given for this sum and he says that on the evidence the certificates given by the bank and on which the bank purports to rely under the provisions of the guarantee, are probably wrong and accepted by the bank's witnesses as such so that the bank has failed to establish its case.

As far as the first point is concerned, Mr Howley for Mr Thomas Robert Bird argues that the bank in bringing its claim is not entitled to rely solely on the document of guarantee, but is obliged to base any claim on the obligations revealed by the transaction as a whole. He contends that the instrument of guarantee is only one document in a much more complex transaction and when the transaction is looked at as a whole, then the liability of the defendant Thomas Robert Bird is limited to $10,000. He draws attention to the fact that the

bank would not have been prepared to make any advances if the defendant Kenneth Reginald Bartrum had not become involved; that the transaction clearly imposed an obligation on Kenneth Reginald Bartrum to repay the sum of $40,000 from the advance and that when the guarantee is construed in this light, then the obligation of the defendant Thomas Robert Bird is seen to be confined to the balance, that is, $10,000.

Some argument has turned on construction and the way in which the documents are to be interpreted. I think in fact that the parties here entered into one transaction with a number of facets, each of which is dealt with in varying ways, but I agree that the transaction is one and must be looked at as a whole rather than piecemeal. Put in its simplest terms, the company required a substantial amount of money from the plaintiff bank. The bank agreed to advance this on terms which are substantially set out in its letter of 3 July 1974. This required, as is common, the borrowers to accept certain obligations designed to secure the bank. These obligations were not confined to the company itself, but extended to guarantees to ensure the performance of the company. It is significant that the letter of 3 July made it clear that the term loan contemplated by the offer would not be advanced until such time as securities had been executed in favour of the bank in accordance with the printed form "currently used by the bank". One of those requirements was the guarantee. There is no doubt that the defendant Kenneth Reginald Bartrum accepted independent

obligations but there is nothing inconsistent in these obligations being co-terminous with those of other parties. The defendant Thomas Robert Bird agreed to guarantee the transaction. There is nothing in any of the documents which specifically state that his obligations are only to come into existence after the bank has proceeded against Kenneth Reginald Bartrum. Nor is there anything which suggests that his obligation is limited to the balance over and above that which the defendant Kenneth Reginald Bartrum agreed independently to repay. It is true that the bank required and obtained security from Kenneth Reginald Bartrum and that the bank required him to enter into a personal obligation to make capital repayments as set out in the documents evidencing the transaction. It also however, required him to enter into a guarantee as it required the defendant Thomas Robert Bird to enter into a guarantee.

The overall scheme of the transaction effectively involves the bank securing itself by ensuring the availability of a series of remedies against more than one party. Undoubtedly it would have been open to the parties to agree that the liability of any one of the parties was more than the provisions of the guarantee indicate, but this would have had to be done specifically and it has not. In fact the document of guarantee simply refers to a total liability and makes no distinction between the three persons who are jointly referred to as the guarantor. The document makes it clear that the liability is joint and several (see para.21 (k)). It includes a specific limitation of liability

in para.9 and I do not consider having regard to the circumstances that this is in any way inconsistent with any other aspect of the transaction looked at as a whole.

I therefore conclude that the plaintiff is entitled to recover against the defendant Thomas Robert Bird under the provisions of the guarantee and that the amount it is entitled to recover is limited only by the provisions of the guarantee itself. Those limitations are set out in para.9 which is in the following terms:-

> "That this guarantee is to be security for the whole of the moneys hereby secured but nevertheless the total amount payable hereunder by the Guarantor shall not exceed the sum of FIFTY THOUSAND DOLLARS NEW ZEALAND CURRENCY (NZ$50,000-00) together with a sum equal to one year's interest on the said sum at the rate aforesaid (the sum of which two amounts is hereinafter called "the stated sum") and the costs charges and expenses of obtaining or attempting to obtain payment from the Guarantor referred to in the last preceding clause and interest on the stated sum at the rate aforesaid from the date when demand shall have been made hereunder by the Bank upon the Guarantor until payment of the total amount payable hereunder by the Guarantor AND it is expressly agreed and declared that nothing in this clause shall in any way give rise to or support any inference that the Bank is hereafter to be affected in any way in its dealings with the Debtor by the amount of such stated sum and it is further expressly agreed and declared that the amount and extent of the advances or accommodation which the Bank may hereafter from time

to time grant to the Debtor need not bear any relationship to the amount of such stated sum."

It is the contention of the bank that the full term loan of $50,000 was advanced. Mr Howley contends that the sum of $7,500 which was paid to Mr Bartrum cannot be taken into account since it was not advanced to the company, it was not for the purposes of the company and had nothing to do with the company. He relies on comments contained in National Bank of New Zealand Limited v. West (1978) 2 N.Z.L.R. 451. The letter of 3 July 1974 constituting the offer is directed to the company, Mirror Newspapers Limited. It simply refers to financial accommodation and there is no reference to the purposes to which the money is to be put. The money was paid to Mr Bartrum at the request of the company and the evidence is that it was paid by the bank to Mr Bartrum on the instructions of the directors with their full knowledge. The guarantee is specifically worded to cover moneys paid by the bank on behalf of the company or advanced on its behalf. There was nothing inconsistent in this with the rest of the transaction and it would be, in my view, quite unreal having regard to the circumstances, to hold that this did not form a part of the advance. The evidence in fact is clear that the whole of the $50,000 was taken up by the company and it is my view that this forms the basic amount for which the guarantors are liable in terms of para.9.

The payment to Mr Bartrum is one which met an obligation of the company - it could have been paid by the company

itself from the moneys advanced on the term loan. The fact that it chose to deal with the matter by one transaction instead of two and in fact arranged for Mr Bartrum to be paid by direction, does not in my opinion affect the situation. Mr Howley relied upon the decision of the Court of Appeal in West's case. In that case it was held that the liability under the guarantee in question was limited by the words used to describe the consideration for which it had been given. The Court was also influenced by the fact that the guarantors had not been involved in, nor were they aware of, the further commitment which the company whose indebtedness had been guaranteed, had entered into. In my view, this case is quite different. Here, the guarantors were directly involved in the transaction and participated in the payment now disputed.

Para.9 of the guarantee is that which limits the liability of the guarantors. It provides that this is limited to the sum of $50,000 New Zealand currency "together with a sum equal to one year's interest on the said sum at the rate aforesaid.....". The words "the rate aforesaid", must refer back to the provisions of para.(g) on the first page of the guarantee which deal with the payment of interest. This paragraph provides that the rate of interest is to be that:-

> ".....agreed upon in writing if any and in the absence of any such agreement then without prior or other notice to the Guarantor or the Debtor at such rate as the Bank from time to time determines.....".

In this case the term loan letter makes it quite clear that the offer was advanced at the rate of 8½% p.a.. In my view, this must be the rate which is contemplated by para.9 and the amount which the guarantor is liable therefore to pay is the amount outstanding at the date of demand together with interest thereon for 1 year at the rate of 8½%. It is true that para.6 of the term loan letter provides that the whole indebtedness for principal and accruing interest is at the option of the bank to become payable if any of the events referred to in that paragraph should occur. In this case, I accept that default sufficient to allow the bank to exercise its rights under the provisions of para.6 occurred. I also accept that the bank did purport to exercise its option to effectively terminate the term loan by reason of the default in making the capital payments contemplated as part of the arrangements. When the bank did this, it effectively converted the amount owing into overdraft on current account in so far as the company was concerned and therefore changed the obligations of the company. Although it may have been entitled to substitute the appropriate current account interest rate in its dealing with the company, in my view the liabilities of the guarantor were fixed by the guarantee and limited by that document.

While I have concluded that the year's interest which forms part of "the stated sum" is to be calculated at 8½%, para.9 of the guarantee does provide that the bank is entitled to recover interest from the guarantor on "the stated

sum" until such time as the total amount payable under the guarantee has been paid. The paragraph provides however, that the interest to be paid under such circumstances is "at the rate aforesaid". I have already concluded that that term as used in the document of guarantee provides for a rate of 8½% p.a..

Para.4 of the term loan letter specifically provides that the rate of interest charged on the term loan is to be 8½% p.a. -

> "provided that where the term of repayment of the Term Loan extends over more than five years the Bank may after the expiration of five years from the date hereof at its discretion vary the rate of interest charged on the Term Loan provided that the rate as varied shall not exceed the then prevalent rate charged or chargeable by the Bank at the time of such variation in respect of other loans of like term and like nature to other customers....."

Para.6 of the term loan letter does contemplate termination of the term loan before the expiration of 5 years, but there is nothing contained in that paragraph to alter the clear statement contained in para.4 that the bank's ability to alter the rate of interest does not occur until after the expiration of 5 years from the date of the term loan letter. The possibility that the term loan might be terminated before 5 years is not contemplated in para.4 and the bank has clearly enough overlooked the need to make such provision in such a case. The guarantor is entitled to know the extent of his obligations and

if there were an ability to substitute a current account interest rate, then this should have been specified. In my view therefore, the bank is entitled to claim interest on the outstanding amount at the rate of 8½% p.a. until 3 July 1979 and thereafter at the rate which would have been charged on equivalent term loans. I have no evidence of this, but this is an accounting matter and it should be possible for the parties to agree on the appropriate figure.

The bank also claims the right to compound the interest payable. In general terms, compound interest must be regarded as unusual and the subject in each case of a special agreement unless it can be shown that the person concerned acquiesced in an account being kept on that basis, see Halsbury's Laws of England 41 ed. Vol.3 para.160 and the cases there cited. Mr McKenzie referred to the decision of the Privy Council in National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co. (1879) 4 A.C. 391, at 409 and also the decision of the House of Lords in Yourell v. Hibernian Bank (1918) A.C. 372 at 385. In both cases the compounding of interest as between the customer and the bank was accepted as usual practice. It had also been acquiesced in by the customer concerned. I consider this case to be different. It does not deal with a customer as such, but with a guarantor and moreover a guarantor whose obligations were expressly limited. I consider that in such a case it cannot be assumed that the guarantor has agreed to or acquiesced in the charging of compound interest and my view is reinforced by the

distinction between para.(g) and para.9 of the guarantee relating to the calculation of interest.

The bank has further relied on the provisions of para.11 of the guarantee which provides that a certificate produced by the bank is to be regarded as conclusive evidence of the amount due and payable. Such a clause has been considered in a number of cases. I consider that it is in nature evidential. It enables the plaintiff as a matter of convenience to prove its case without being confronted with a series of disputes on calculation, but it is not a clause which in my view gives a power of decision. The plaintiff is still required to make its calculation in accordance with the terms of the agreement. In ANZ Banking Group (NZ) Limited v. Gibson (1981) 2 N.Z.L.R. 513, Holland J. accepted the conclusiveness of a certificate based on a comparable clause. In doing so he rejected a submission that the clause was contrary to public policy as being designed to prevent access to the Courts. With respect, I agree with his conclusion in this regard but it is a very different thing to say that a certificate is conclusive even although the evidence makes it clear that it has not been completed in terms of the agreement entered into by the parties. In Dobbs v. National Bank of Australasia Limited (1935) 53 C.L.R. 643, the High Court of Australia rejected an argument that such a certificate was contrary to public policy.

In this case, the point at issue is not that a certiticate is contrary to public policy which the authorities clearly conclude it is not, but that it has on the evidence before the Court been calculated on a basis contrary to the provisions of the agreement between the parties. Although there are observations in Dobbs' case which would suggest that a certificate is conclusive, those observations must, in my respectful view, be considered in context and I do not believe that the Court contemplated a situation such as that which has occurred in this case. I am reinforced in this view because the reasoning of the learned Judges in that case is based on analogies with arbitration and other situations where the parties have contracted on a basis which provides for a nominated person to make decisions. A further example given in the case is that of an engineer who certifies under a building contract. I do not consider that in the situation in this case there is any element of decision involved in the provision of the certificate which, as I have already concluded, is evidentiary rather than decisive in nature. Even if there were however, I should have thought that this was an appropriate case for a Court to consider the validity of the decision bearing in mind those principles which are to be taken into account when a Court is asked to consider the decision of an arbitrator or some person having that status. It would be extraordinary that a bank in a situation where clearly it was given no power of independent decision, could conclusively obtain a result which was not based upon the matters agreed by the parties. No doubt it would be open to

contracting parties to enter into such a transaction, but in my view they would need to do so in exceedingly clear terms and in this case they have not done so.

The plaintiff has also claimed bank charges in respect of the operation of the overdraft. The bank is entitled to claim such charges as against the company. Its rights against the guarantor are limited by the terms of the transaction under which the parties entered. These are set out substantially in the first part of the document of guarantee. Sub-pard.(d) refers to commissions, charges and expenses according to the usage in course of business of the bank and there is no doubt that the amounts claimed come within this definition. However, the limitation of liability is not extended to take such matters into account in addition to the total sum referred to in the limitation. That is confined to the $50,000 together with interest calculated in the way to which I have referred. The charges being additional to this sum, I hold that the plaintiff is not entitled to recover them as against the guarantor.

There will therefore be judgment for the plaintiff as against the defendant Thomas Robert Bird, in the sum of $50,000 together with interest at 8½% thereon for 1 year and interest on the total of those two figures at the rate of 8½% p.a. from the first date on which demand was made up until 5 years from the date of the term loan letter and thereafter at the rate which was charged or chargeable by the bank in

respect of other loans of like term and like nature to other customers, but not calculated on a compound basis. The plaintiff is entitled to costs on the total sum according to scale, together with disbursements to be fixed by the Registrar.

There will also be judgment against the defendant Kenneth Reginald Bartrum, in the same amount.

The proceedings against the defendant Marshall Andrew Bird are adjourned sine die.

Leave is reserved to any party to apply in respect of any matter arising out of this judgment.

R L Salmon J

Solicitors for Plaintiff: Messrs Maltby, Hare and Willoughby, Tauranga

Solicitors for Defendant, Kenneth Reginald Bartrum: Messrs Samuel Ellis and Company, Auckland

Solicitors for Defendant, Thomas Robert Bird: Messrs Jackson, Reeves and Friis, Tauranga