12|3

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY M.261/83

178

BETWEEN BROADLANDS FINANCE LIMITED
Appellant

A N D ALAN CAMPBELL WILLIAMSON
Respondent

Hearing : 7th February 1984

Counsel : A.W. Grove for Appellant
P.F. Gorringe for Respondent

Judgment : 7th February 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an appeal against the decision of Judge Wallace given in the District Court at Auckland on 23rd February 1983. The learned District Court Judge entered judgment for the defendant, the present respondent, on a claim brought by the appellant, the plaintiff, under a document which, for want of a better term, has been referred to as a "guarantee".

Virtually uncontested evidence showed that, on 19th March 1979 at Palmerston North, a memorandum of terms of contract, required by the Moneylenders Act 1908 (then in force) was signed by one Keith Bruce Coppell of Ashhurst, Sales Manager. He was to borrow $5,300 from the appellant at an interest rate of 24.4%. Principal and interest was to be repaid by 35 monthly instalments of $210 and one final instalment of $215.

The respondent signed this document as "guarantor" or "additional party". The document stated that the loan was to be made on 9th April 1979 and that security was to be an "Instrument by Way of Security over the chattels and Debenture over the chattels, assets, property and land more particularly described therein, together with a Deed of Indemnity and Guarantee from the Guarantor or Additional Party, which documents are in the form annexed hereto and which together with all terms and conditions implied therein by law form part of this Memorandum".

The document concluded the following provision:

> "THAT the covenantor will indemnify and save harmless the beneficiary against all actions proceedings claims and demands which may hereafter be made against the beneficiary and against any monetary loss it may suffer by reason of its having made the loan as aforesaid or any further loans to the borrower however such loss should arise and without limiting the generality of the foregoing words whether by the beneficiary and/or the borrower having failed to comply with any requirement of any enactment or regulation that may in any manner or form result in the moneys expressed to be payable under a (blank) (hereinafter referred to as "the said security document") being reduced to a lower figure than was intended by the beneficiary or by reason of any enactment regulation judgment or order of any Court postponing or otherwise affecting payment of money or reducing rates of interest or by any other reason or cause whatsoever and such indemnity shall include an obligation to reimburse the beneficiary the total amount of all legal costs (including costs as between solicitor and client) charges and expenses whatsoever which the beneficiary may incur or suffer by reason of its having at its absolute discretion and with or without the consent of the covenantor or the borrower undertaken and litigiaton for the purpose of establishing the validity of the said security document and/or any other document collateral therewith."

The only evidence before the District Court Judge came from an official of the appellant; he had no personal knowledge of the transaction but stated, without contradiction that the only documents relating to this contract were stapled together; they were the memorandum of terms of contract to which I have just referred, the so-called deed of guarantee signed by the respondent and an instrument by way of security signed by Mr Coppell.

The documentation of the appellant leaves much to be desired. In the memorandum of terms of contract, there was this reference to a "debenture". Yet, there was nothing at any stage to suggest that the borrower, Mr Coppell, had a company or that he was giving any security over any company's assets.

The attached instrument by way of security was given over a motor vehicle. I am entitled to assume that all the documents were together because of the evidence of system from the appellant's witness and, more importantly, from the acknowledgement in the document which I have just cited which must be taken as meaning what it says in the absence of any evidence to the contrary. The respondent gave no evidence in the lower Court.

Another unsatisfactory aspect of the documentation is found in Clause 1 of the deed of guarantee or indemnity (supra) which contains a blank; probably what was meant to have been inserted were the words "instrument by way of security". However, in my view, it does not matter for the purposes of this

case whether or not the words should have been inserted because of the first part of Clause 1; the covenant there requires the guarantor to indemnify the lender against "any monetary loss it may suffer by reason of its having made the loan as aforesaid or any further loans to the borrower however such loss should arise".

Mr Gorringe submitted that the following part of the covenant, whereby the covenantor expressly guaranteed due and effectual repayment of the principal sum, dealt more with the situation that transpired, namely, where there was a loss to the appellant on this transaction. Mr Coppell failed to pay; the car was realised at a loss which was quantified by the appellant before the District Court Judge at $3,253.35.

I am unable to accept this submission which would make nonsense of the clear wording of Clause 1. As so often happens in documents of this nature, lenders seek to extract several undertakings and covenants from guarantors in several different ways. This document is no exceptipn to this general rule. In my view, the wording in the first part of Clause 1, without any reference to blanks, makes it clear that the respondent was to indemnify the appellant against any loss which may result by reason of having made the loan to Mr Coppell.

The learned District Court Judge, in an oral judgment, declined to read the documents together. In this, I consider she was incorrect; for the reasons mentioned earlier, all the documents should be read together; when this is done, it becomes quite clear what was envisaged by the parties. The only

real area of doubt arises from the reference to the debenture. In my view, this was a clear mistake; there was never any reference to an advance being made to a company or to a company being a guarantor. Therefore, there could be no possibility of a debenture arising; therefore, reference to it was mere surplusage which can be excised from the contract.

The learned District Court Judge considered that the gap in the guarantee document was fatal; that she could not read the documents together because there was no debenture. She was not prepared to speculate as to the existence of a debenture.

In my view, looking at the documents together, it is perfectly clear what was envisaged, namely, that the respondent was to be liable for any loss that the appellant might suffer through making the loan to Mr Coppell. The basis on which the learned District Court Judge sought to exclude the respondent from liability cannot be sustained.

The argument made by Mr Grove today based on the first part of Clause 1 was not really put in issue before the learned District Court Judge; I am quite able to consider it because there is no question of credibility or any evidential foundation.

The point as to the debenture was not considered by the learned District Court Judge as material to her decision and, as I indicated, it is not a matter of any substance.

The learned District Court Judge considered whether

she should have entered a judgment of non-suit as distinct from judgment for the defendant; she decided to enter judgment for the defendant, the present respondent.

For the reasons I have articulated, the appeal must be allowed; the matter will be remitted to the Registrar of the District Court with the instruction that judgment be entered for the appellant in the amount of the claim, together with costs to be fixed by the Registrar in terms of the appropriate Rules.

Because the appellant advanced an argument not advanced previously in the lower Court and because the whole case was brought about by the unsatisfactory nature of the appellant's documentation, I do not think it appropriate to make any order for costs in this Court.

R.D. Barker J.

SOLICITORS:

Grove & Darlow, Auckland, for Appellant.

Maltby, Hare & Willoughby, Tauranga, for Respondent.