IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. No. 1885/89

BETWEEN FLETCHER MERCHANTS LIMITED trading as PLACEMAKERS TRADEBASE

Plaintiff

A N D B R TAYLOR

First Defendant

A N D M B ANTONIEVICH

Second Defendant

Hearing: 14th May 1990

Counsel: Mr Dale for the Plaintiff
Miss Manuel for the Second Defendant

Judgment: 14 June 1990

RESERVED JUDGMENT OF MASTER TOWLE

This was the hearing of an application for summary judgment against the Second Defendant, the Plaintiff having already obtained judgment against the First Defendant on the 20th February 1990 for a total sum of $113,558.17. The claim arises in the following circumstances.

The Plaintiff is a supplier of building materials. In May 1978 two companies named D L France Developments Limited (hereinafter known as "France") and Sussex Securities

Limited (hereinafter known as "Sussex") were trading in close association and the Second Defendant was a director of both companies. A property was purchased in Great South Road, Auckland with the intention of being developed as a motel complex with finance being arranged from a firm called Advisercorp Nominees Limited. After completion of the purchase, Sussex entered into an agreement with a firm called Wimpey Construction Limited (hereinafter known as "Wimpey") for the construction work and Wimpey in turn arranged to purchase its needs for builder's supplies from the Plaintiff.

After the work was well under way Sussex's source of finance from Advisercorp became in serious jeopardy because of the financial difficulties of that company and it had to seek other sources of finance. In the meantime Sussex was pressing to have the motel development work proceed and by the end of November 1988 Wimpey had done work on the complex to a value of $360,000. During this time Sussex was frantically trying to find other backers to complete the project but Placemakers itself indicated to Wimpey that it could not continue supplying unless it was assured that its account would be paid. As a result discussions took place in January 1987 between a representative of the Plaintiff, the First Defendant as the director of Wimpey and the Second Defendant. The Second Defendant urged Placemakers to continue to supply

equipment and materials and the parties agreed to consider their positions. A further meeting took place on the 25th January 1989. Wimpey's representative made it clear it could not pay Placemakers until it was paid by Sussex and eventually in order to keep the supplies going two documents were drawn up and signed. Under the first of these the First Defendant personally as a director of Wimpey in consideration of Placemakers agreeing to continue the supply of goods and services guaranteed the due and punctual payment of Wimpey's account and made himself liable as a principal debtor. That document related both to the outstanding account and to the further indebtedness to be incurred by Wimpey through the continuing supply.

The second document signed by the Second Defendant was expressed as being in consideration of the Plaintiff's forbearance to sue for one day for the balance on account now due by Wimpey. The Second Defendant guaranteed and indemnified Fletchers in respect of the amount then due by Wimpey Construction Limited. No statement of that amount was included in the guarantee document but from the facts I have recited which led up to its signing which are largely deposed to by the Second Defendant himself, it was clearly understood that the intention was that the Second Defendant would personally make himself responsible for any outstanding amount up to the time when the guarantee

was given on the 25th January 1989. There is no suggestion in that document that he made himself personally liable to guarantee payment for any supplies made by the Plaintiff after that date.

As a result of the measures taken on the 25th January, the supply did continue for a time but was cut off entirely on the 23rd February 1989 after the attempts by Sussex to obtain any long term finance had finally failed. Both Sussex and France are now in liquidation. The statement of claim sought a total amount of $86,950.34 plus interest but no breakdown was given as to what part of this claim related to materials supplied prior to the 25th January 1989 and how much subsequently. No interest figure was stated in the document signed by the Second Defendant although it was a term of the contract made between the Plaintiff and Wimpey that unpaid accounts should carry interest at 2½% per month if not paid on the 20th of the month following delivery.

In a notice of opposition filed on behalf of the Second Defendant it was claimed that the document of guarantee, relied upon by the Plaintiff, was unenforceable; that certain misrepresentations had been made to the Second Defendant to induce him to enter into the agreement, and that the Plaintiff had been guilty of deceptive or misleading conduct or had acted in an unconscionable way.

It was further suggested that the Second Defendant had been induced to enter into the arrangement by oppressive means and that the Plaintiff had failed to make disclosure to him in terms of the Credit Contracts Act. In the alternative it was submitted that the Second Defendant's liability should be limited to such amount as was due and owing by Wimpey to the Plaintiff at the 25th January 1989.

In reply to the Second Defendant's affidavit a further one was sworn on behalf of the Plaintiff giving additional background to the circumstances under which the motel development project eventually ground to a halt and deposing that in fact the Plaintiff had been one of the last suppliers who had stopped providing materials to the site. A further affidavit was also filed by Mr Key, the representative of the Plaintiff who had attended the meetings held in January 1989, who deposed that the actual amount owned by Wimpey to the Plaintiff at the 25th January 1989 was $52,485.18.

Miss Manuel for the Second Defendant acknowledged that the suggested defence relating to the Credit Contracts Act was not being pursued but primarily relied upon gaps in the original guarantee document in failing to specify the amount that was outstanding at the date it was signed on the 25th January. She submitted there was no evidence to

say whether the Second Defendant was ever advised the amount that was due when he signed. She also took objection to the fact that no documentary evidence was provided either in the original affidavits or in the affidavit in reply deposing as to how the $52,485.18 was made up. On this particular point as to whether or not there is an obligation upon a creditor to disclose to a guarantor the amount of previous indebtedness of the person whose account was being guaranteed, I invited submissions from Counsel and have been referred particularly to a decision in the Commercial Bank of Australia Limited v Amadeo and Anor 1983 46 ALR 402 at page 431 and to a statement in O'Donovan and Phillips on the Modern Contract of Guarantee, pages 115 - 126, particularly page 119. The authors of the text at page 119 state the proposition thus:

> "The minimal requirements of the creditor's duty to inform the guarantor of any unusual features of the account to be guaranteed or matters which are not naturally to be expected in the principal transation are more starkly revealed by an account of what need not be disclosed. There is no obligation to volunteer information about any of the following matters:
>
> (i) The principal debtor's existing indebtedness to the creditor, his previous default or credit rating.
>
> (ii) The fact that the principal debtor whose account is guaranteed who is consistently exceeding his overdraft limit and that his cheques were being dishonoured.
>
> (iii) The likely future indebtedness or liability of

the principal debtor to the creditor.

(iv) That the principal debtor has himself guaranteed to the creditor the amount of another party, thereby exposing himself and his surety to an additional contingent liability.

I believe that statement and the Australian decision which was given by five judges sitting in the High Court of Australia and the principle is thus as stated in a portion of the judgment of Gibbs C.J. at p.407 when he said:

> A contract of guarantee is not uberrimae fidei. The principles governing the extent to which a creditor is bound to make disclosure to a surety were stated in Hamilton v Watson (1845) 12 Cl & Fin 109; 8 ER 1339. Lord Campbell there said (at 119; 1343-4 of ER) that, unless questions are particularly put by the surety, a creditor taking a guarantee is not bound to make disclosure of material facts. He continued (at 119; 1344 of ER): "... I should think this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires."

I do not believe the Plaintiff was under any such duty and do not consider that the Second Defendant can establish any arguable defence.

The Plaintiff has satisfied the onus of showing that there is no reasonably arguable defence and there will be judgment accordingly for $52,485.18 and interest thereon at 11% from the 25th January 1989 to the date of judgment. I allow costs of $1400 plus disbursements to be fixed by the Registrar.

MASTER R P TOWLE

Solicitors

Grove Darlow & Partners, Auckland, for the Plaintiff
Hesketh Henry, Auckland, for the Second Defendant

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