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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

**NOT
RECOMMENDED**

CP No 1089/90

BETWEEN

FLETCHER
LIMITED

MERCHANTS

Plaintiff

399

A N D

STEPHEN KEVIN FORD

Defendant

Date of Hearing: 5, 12 March 1991

Counsel: Elizabeth C Lockhart for Plaintiff
D G Dewar for Defendant

Date of Judgment: 12 March 1991

ORAL JUDGMENT OF MASTER J H WILLIAMS QC

This is an application for summary judgment brought by the plaintiff Fletcher Merchants against the defendant for building materials which Fletcher Merchants says that it supplied to a company called S K Ford Construction Ltd between April and June 1990. The amount claimed is \$19,298.92. Fletcher Merchants claims that the defendant, Mr Ford, guaranteed the obligations of S K Ford Construction and sues him accordingly.

On a date which would appear to be 13 September 1982, Mr Ford signed two documents. One was an application for a credit account for S K Ford Construction which was addressed to Winstone (Wgtn) Ltd at its Wellington Branch and the other was the form of guarantee on which this proceeding is based. All that the Court has before it are photocopies of those documents but the form of the photocopies is such that it appears possible that the guarantee was printed on the reverse of the credit account application. The application for the credit account contained details of S K Ford Construction and of its business including some business references and at the foot of the form there is what is described as an "undertaking to pay

interest and collection expenses", directed not to Winstone (Wgtn) Ltd but to Winstone Ltd. It is that part of the form that Mr Ford has signed. Broadly put it obligates him to pay interest at 18% if "I do not honour before the due date pay to you the price of such goods". It is to be noted that the credit application form nowhere suggests that the supply of credit by Winstone (Wgtn) Ltd to S K Ford Construction was dependent on the provision of a guarantee of the purchaser's account.

The form of guarantee is also addressed to Winstone (Wgtn) Ltd and since its form is critical to the resolution of this matter it is of advantage to set out the whole of the form:

"TO: WINSTONE (WGTM) LIMITED

a duly incorporated company having its registered office at Wellington and carrying on business throughout New Zealand as a builders supply merchant.

I S K Ford of Maungaraki IN CONSIDERATION of your supplying and at my request agreeing to continue to supply builders materials and other goods and services and to make advances to (hereinafter referred to as 'the principal debtor') (which you have done) DO HEREBY GUARANTEE to you the due and punctual payment therefor and the payment of all monies and obligations now due or to become due by the principal debtor and agree to be answerable and liable to you therefor AND the following provisions shall be applicable to this guarantee:-

1. THIS guarantee is a continuing guarantee.
2. NO granting of credit extension of former credit or granting of time to the principal debtor and no waiver indulgence or neglect to sue on your part nor the release of any securities held by you nor the winding up or bankruptcy of the principal debtor shall affect my liability to you hereunder and as between you and me I shall be deemed to be a principal debtor and shall be liable to you accordingly.
3. THIS guarantee shall continue in force notwithstanding that the principal debtor's account with you may from time to time be in credit.
4. WITHIN seven (7) days from my receipt of notice in writing of any default on the part of the principal

debtor I shall make payment to you of all sums in respect of which such default has been made."

It will be necessary to return to that document and examine it in greater detail but, for the present, it is convenient to complete the narrative.

Mr Ford says that the account with Winstones was at its then Melling branch and he says in an affidavit sworn on 1 February 1991 that the account was closed about four years before he swore his affidavit and the branch itself was closed about two years before he swore the affidavit.

He then says that at the end of 1987 or the beginning of 1988 S K Ford Construction opened an account with Hargoods Limited at Seaview. He says that he was approached to open that account and neither he nor the company were required to sign any credit account application or guarantee. S K Ford Construction traded with that branch thereafter until it ceased business. He says:

"Hargoods subsequently became a 'Placemakers' branch. I presume that Placemakers is a trade name used by the Plaintiff and that the Plaintiff had taken over Hargoods Ltd."

Mr Ford also speaks of S K Ford Construction having an account with a Placemakers branch at Kaiwharawhara but he says that that account had not been operated for about two years and that that account too was not guaranteed by him.

A Mr Penney, who is a credit manager employed by Fletcher Merchants, says that in December 1988 "Winstones sold the business now known as Fletcher Merchants Ltd trading as Placemakers to Fletcher Merchants Ltd" and he continues:

"When the Winstone business was transferred to Fletcher Merchants Ltd it was a term of the sale that all assets and liabilities of Winstones as incurred or owed to Winstones were transferred to Fletcher Merchants Ltd. The guarantee of Mr Ford was one of those assets."

It must immediately be noted:

- (1) That, there being no proof, this Court is asked to assume that Winstone (Wgtn) Ltd was a wholly owned subsidiary of Winstone Ltd
- (2) That Mr Penney, as an employee of the purchaser, is in a position to be able to make admissible statements concerning matters which occurred prior to December 1988
- (3) That no part of the contract for the sale of the Winstone business to Fletcher Merchants Ltd and, in particular, no part of the contract relating to the claimed sale of Mr Ford's guarantee is before the Court
- (4) It is to be noted that Mr Penney nowhere says that Winstones or Winstone (Wgtn) Ltd ever traded as Placemakers or that if they did, for what period they so traded.

On 23 October 1990 S K Ford Construction wrote, effectively, saying that it was insolvent and was ceasing to trade. The plaintiff received a copy of that letter but the Court notes that it is addressed to the Manager, Placemakers, Seaview, Lower Hutt. Mr Penney, on behalf of Placemakers, replied on 29 October 1990 saying amongst other things:

"You no doubt are aware that we do hold your Personal Guarantee and will be proceeding to recover this debt from you personally."

It is now convenient to return to the form of guarantee on which this proceeding depends. The first and most obvious comment that requires to be made is that the name of the principal debtor nowhere appears in the form of guarantee and that Mr Ford is careful in his affidavit to admit that he signed a guarantee to Winstone (Wgtn) Ltd but he expressly refrains from saying that that was a guarantee of S K Ford

Construction. He does not say if he operated other companies at the time.

Secondly the guarantee is of "all monies and obligations now due or to become due by the principal debtor" but when the principal debtor is not identified it is difficult to say that the guarantee relates to the debt on which this proceeding is based. Similarly, the fact that the form provides for Mr Ford to be deemed to be a principal debtor is of little assistance to the plaintiff, since, of course, if the principal debtor is not identified then the debt owing is similarly difficult to identify.

It was submitted on behalf of Fletcher Merchants that if the guarantee and the credit account application were on the obverse and reverse of the same form, then this Court should infer that the principal debtor was intended to be S K Ford Construction. The answer to that, it seems, is twofold. First there is no evidence that these two documents were necessarily on the same piece of paper. Secondly, the fallacy in that argument can be exposed by posing the question: Could either of these documents have operated without the other? The answer must be: yes. The credit account application not being conditional on the provision of a guarantee, it is clear that credit could have been supplied by Winstone (Wgtn) Ltd to S K Ford Construction without a guarantee but still within the terms of the agreement between the parties, particularly when the undertaking relates only to interest and collection expenses.

Looked at from the point of view of the guarantee it is clear that, provided the principal debtor was appropriately identified, that document was capable of existence and operation independent of the credit account application once goods were supplied to whoever was the principal debtor (Donovan and Phillips The Modern Contract of Guarantee 41). The construction of guarantees as with all documents is primarily concerned with endeavouring to discern the intention

of the parties (Pogoni v R & W H Simington & Co (NZ) Ltd [1991] 1 NZLR 82, 84), but in this case the onus of proving that intention is on the plaintiff, this being an application for summary judgment, and the Court in the light of the matters discussed is unable to conclude that the plaintiff has satisfied it that S K Ford Construction was to be the principal debtor in the guarantee to Winstone (Wgtn) Ltd of 13 September 1982.

Following on from that, although the evidence shows that S K Ford Construction traded with Winstone (Wgtn) Ltd up until about 1987 at the Melling and Kaiwharawhara branches, there is no evidence concerning the debt which it might have owed to that company at any point during that period, still less that the debt might ever have been overdue.

The next problem facing Fletcher Merchants is that it seems clear that S K Ford Construction traded with Hargoods Ltd at its Seaview branch from 1987 or the beginning of 1988 onwards, and, from the fact that that company wrote to that branch on 23 October 1990, it seems probable that the debt which is the subject of this proceeding may have been incurred at the Placemakers Seaview branch. The difficulty is that the only evidence that Hargoods became Placemakers, and that Fletcher Merchants may have taken over Hargoods, comes in Mr Ford's speculation. He clearly challenges Fletcher Merchants to adduce evidence on that topic in reply, but Mr Penney in his affidavit in reply nowhere refers to that matter. If the debt owed by S K Ford Construction to Hargoods is now owed to Fletcher Merchants because Fletcher Merchants has taken over Hargoods, then one might have expected the plaintiff to have said so. If, as also seems possible, the debt was owed to Hargoods and Winstones took over Hargoods before selling the business to Fletcher Merchants as part of the contract referred to, then again one might have expected the plaintiff to say so.

For all those reasons, this Court concludes that there are areas where the proof of the necessary links in the chain of

evidence is missing, or is insufficiently strong to satisfy it to the standard required by R 136 that Mr Ford has no defence arguably available to him, and the application for summary judgment requires to be dismissed on that ground.

In the light of that finding, it is not necessary for the Court to deal with an additional matter raised by the defendant other than briefly. The benefit of Mr Ford's guarantee, if it is to be regarded as a guarantee of S K Ford Construction, may amount to a chose in action. A benefit of a contract can fall within that category (6 Hals 4th ed Reissue Para 8 p 5). Certainly the learned authors of Donovan and Phillips (op cit p 390-1) say that:

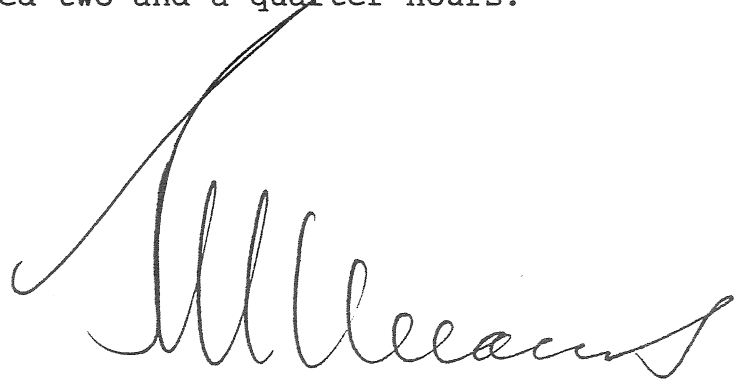
"A contract of guarantee is assignable as a legal chose in action. Usually notice of the assignment of the benefit of the guarantee needs to be given to the guarantor to make it effective but is otherwise unnecessary."

They cite the authority of Loxton v Moir (1914) 18 CLR 360, 368 in support of that proposition but a reading of that case suggests that the decision of the High Court of Australia in that case may be affected by trustee considerations. It may, however, be arguable in this matter that the benefit of Mr Ford's guarantee amounted to a chose in action and, if so, there is at least a possibility that to make it effectual notice of the assignment from Winstone (Wgtn) Ltd to Fletcher Merchants required to be given him pursuant to the provisions of the Property Law Act 1952 s 130(1) - but the case having been decided on other grounds, this Court does no more than notice the possibility and reaches no decision on it.

In the light of all those matters, the Court's formal orders are:

1. The application by the plaintiff for summary judgment against the defendant is dismissed.

2. Costs are reserved, the Court noting that the hearing of this matter over the two days, including the delivery of judgment, has occupied two and a quarter hours.

A handwritten signature in cursive script, appearing to read 'J H Williams', is written above a horizontal dotted line.

Master J H Williams QC

Solicitors: Leishmans, Lower Hutt for Plaintiff
Gibson Sheat, Lower Hutt for Defendant