JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 15/1967

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Hercules, J.A.(Ag.).

B E T W E E N OLDS DISCOUNT COMPANY OF JAMAICA LTD - PLAINTIFFS-APPELLANTS

A N D EDWIN DUNKLEY - DEFENDANT-RESPONDENT

J. Leo-Rhynie for the Plaintiffs-Appellants

J.W. Kirlew for the Defendant-Respondent

22nd, 23rd February
2nd April, 1971

HERCULES J.A. (Ag.):

This is an appeal from a judgment of Parnell J. delivered on 9th March, 1967.

The Plaintiffs-Appellants, a Limited Liability Company with offices at 9 King Street, Kingston, (hereinafter referred to as the Plaintiffs) sought to recover from the Defendant-Respondent (hereinafter referred to as the Defendant) the sum of £362.11.0d., being the amount owing by the Defendant's wife, Veronica Dunkley, (nee Chung) under and by virtue of a Hire Purchase Agreement dated 5th August, 1960, the performance of which was guaranteed by the Defendant under and by virtue of a written contract of guarantee dated 6th April, 1962.

In the statement of Defence, the Defendant denied being indebted to the Plaintiffs in the sum of £362.11 under the Hire Purchase Agreement dated 5th August, 1960, or at all. The Defendant further denied that he guaranteed the said Agreement on 5th August, 1960, but that on 6th April, 1962, while employed to the Plaintiffs, at the request of the Plaintiffs, he signed the said Agreement as guarantor without any consideration for so doing.

The Defendant also counter-claimed for the sum of £263.8.5 being:-

(a) salary due to the Defendant for the months of May/June, 1962 - £145.18.5

(b) amount due under the Pensions Scheme - £117.10.-

He averred that he was employed to the Plaintiffs as a Collector at a salary of £83 per month and that on 7th May, 1962, the Plaintiffs wrongfully dismissed him from the employment without notice and without salary in lieu of notice. Moreover nothing was refunded to him under the Pensions Scheme.

In Reply, the Plaintiffs denied requesting the Defendant to sign the contract of guarantee and averred that it was the Defendant who offered to sign the same if the Plaintiffs would forbear from forthwith exercising their right to terminate the Hire Purchase Agreement No. 327/52894/5 dated 5th August, 1960, between the Plaintiffs and Defendant's wife, and to repossess the motor vehicle, the subject of the said agreement. In consideration of the Defendant signing the contract of guarantee, the Plaintiffs agreed to forbear as aforesaid, but Defendant's wife continued to be in breach of her obligations under the Hire Purchase Agreement.

In their Defence to the Counter-Claim, the Plaintiffs averred that the dismissal of Defendant on 7th May, 1962, was lawful, and that in pursuance thereof the following amounts were credited by the Plaintiffs to the account of the Defendant:-

Salary (2 months) after deduction of income tax ...	£143. 18. 5
Pensions Scheme Refund	117. 10. -
	£261. 8. 5

This sum of £261.8.5 was credited to the account of the Defendant in respect of a contract of guarantee dated 6th April, 1962, by which the performance of hire purchase agreement No. 227/77591/28 dated 28th February, 1961, and entered into between the Plaintiffs and Edward G. French, was guaranteed by the Defendant.

The evidence disclosed that the Defendant was employed to the Plaintiffs as a Collector from 2nd March, 1959, till 7th May, 1962, when he was summarily dismissed. At the time of his dismissal he was in receipt of salary at the rate of £83 per month and he was also a contributor to the Plaintiffs' Pension Scheme.

On the 5th August, 1960, the Defendant's wife hired from the Plaintiffs one 1957 used Bedford truck lettered and numbered L 6967 under a Hire Purchase agreement. The agreement has at the back thereof a section headed "guarantee", but no guarantee was executed until Defendant signed as guarantor on 6th April, 1962. This was done, according to the Defendant, at the request of the Assistant Manager of the Plaintiff Company and without the prior knowledge or consent of Defendant's wife.

When the Defendant executed the guarantee in respect of his wife's account on 6th April, 1962, he also executed another guarantee in respect of the account of one Edwin French involving an indebtedness of over £1000. -. -. The guarantee, presumably in common form, reads as follows:-

> "In consideration of your supplying the within goods at my request on Hire Purchase Agreement the terms of which Agreement I/WE have seen, I/WE hereby guarantee to you, your successors and assigns the due performance of the said Agreement. I/WE also undertake as a separate agreement to indemnify you against any loss which you may sustain by reason of your having entered into the said Agreement the amount of such loss to be payable by me/us on demand at any time after the Hirer has committed any breach of the said Agreement or has returned the goods to you. The measure of such loss shall be the total hire purchase price under the said Agreement plus any further sums other than rent payable to you by the Hirer thereunder after deducting (a) any sums already paid to you by the Hirer and (b) in the event of the goods being returned to or recovered by you either the net proceeds of sale of the goods or if not sold the trade value thereof in whatsoever condition the goods may then be.
> I/WE agree that any time or indulgence granted by you to the Hirer and any compensation or arrangement made by you with the Hirer shall not affect my/our liability under this Agreement. Dated this 6th day of April, 1962."

On 7th May, 1962, Defendant was summarily dismissed by the Plaintiffs and the Plaintiffs followed this up by seizing the Bedford truck on 29th May, 1962, for arrears of instalments and other items amounting to £362.11.-. The Plaintiffs now appeal against the order of the learned trial judge dismissing their Claim for this sum and entering judgment for the Defendant on the Counter-claim for £261.8.5,

being £143.18.5 salary due for the months of May and June, 1962, and £117.10 due under the Pensions Scheme.

Fifteen grounds of appeal were filed and it seems convenient to deal with them in the manner adopted by learned Counsel for the Plaintiffs, especially as this order was also followed by learned Counsel for the Defendant. The argument by both sides was presented under three broad Heads as follows:-

(1) Nature of a guarantee:
under which were subsumed grounds 1,2,3,4,5,6,7 and 8,

(2) Consideration:
under which were subsumed grounds 9,10 and 11,

(3) Termination of Contract of Employment:
under which were subsumed grounds 12,13,14 and 15.

As regards Head (1), learned Counsel for the Plaintiffs did not advert at all to grounds 1,2 and 3 and expressed the view that grounds 5 and 7 were irrelevant to the appeal. He confined his argument to grounds 4,6 and 8 in view of certain statements made by the learned trial judge. In the judgment, on page 31 of the record, is to be found the following:-

> "The essence of the Agreement is that the guarantor agrees to discharge his liability if, and only if, the principal debtor fails to discharge his duty. There must therefore be three parties to the Agreement, the creditor, the principal debtor and the guarantor or secondary debtor ...."

Then on page 33 the following:-

> "The real point in this case is that on the 6th April, 1962, there were not three but two parties only to what the Plaintiff has called 'the guarantee to the Agreement of the 5th August, 1960.' The Court holds that the document signed on 6th April, 1962 by the Defendant is not a guarantee within the meaning of the Hire Purchase Agreement and is unenforceable as such."

It was submitted by learned Counsel for the Plaintiffs that it is not necessary that the principal debtor should have requested or consented to the guarantor entering into a contract of guarantee for the principal debtor's benefit; neither is it necessary that the principal debtor should be in any manner a party to that transaction.

In support of that submission the following statement in paragraph 981 of the 22nd Edition of Chitty on Contracts was cited:-

"The statute, (Statute of Frauds) however, applies as well to contracts to be answerable for the debt of another as to engagements to satisfy damages recovered or recoverable against another; <u>and it is not necessary that the third party should have requested the person giving the guarantee to enter into the engagement, or that he should be in any manner a party thereto</u>."

In addition, at paragraph 769, page 413 of Vol. 18 of the 3rd Edition of Halsbury's Laws of England, there is this statement of the law, which was also cited:-

"The principal debtor (or principal) is the person primarily liable to the creditor for the debt, default or miscarriage answered for by the surety. The principal debtor, though sometimes bound by the same instrument as his surety, is not a party to the latter's contract to be answerable to the creditor: there is no privity between the surety and the principal debtor, and they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts."

In his turn, learned counsel for the Defendant declared that "the learned trial judge was in some error in holding that there was no guarantee within the meaning of the Hire Purchase Agreement." He submitted that this was never part of the defence and indeed a consideration of that matter was not necessary for deciding the case. In the circumstances he indicated that he would refrain from dealing with grounds of appeal 1 to 8 and added that the defence was the absence of consideration as pleaded in paragraph 5 of the Defence.

In the light of the submissions of Counsel on both sides relating to the question of the guarantee, it seems clear that the findings of the learned trial judge on this aspect of the case were somewhat misconceived and cannot be upheld.

The next head that falls for attention is Head (2) - consideration. On page 35 of the record, the learned trial judge stated in his judgment as follows:

"The Court is of the opinion that there is no consideration moving from the Plaintiffs to the Defendant and rejects entirely the evidence which the Plaintiffs sought to introduce to show what the real consideration purports to be."

He held further on the same page that in the contract of guarantee dated 6th April, 1962, the consideration mentioned therein is neither nominal nor ambiguously stated - he held that it is a past consideration. Quite clearly, if it is a past consideration that would not be sufficient (Roscorla v. Thomas - (1842) 3 Q.B. 234).

The Plaintiffs were however endeavouring at the trial to introduce evidence of extrinsic circumstances to show that the real consideration lay in the words of paragraph 2 of the Reply and Defence to the counter-claim, viz:-

> "The Defendant offered to sign the said contract of guarantee if the Plaintiffs would forbear from forthwith exercising their right to terminate the said Hire Purchase Agreement dated the 5th August, 1960, between the Plaintiffs and Defendant's wife and to repossess the motor vehicle the subject of the said Agreement."

The questions that fall for determination are:

(1) On the state of the pleadings and on the evidence, was there consideration?

(2) Could extrinsic evidence be admitted to prove real consideration?

Learned Counsel for the Defendant answered the first question by supporting the findings of the learned trial judge. He contended that this was a guarantee given for past consideration and was therefore void. He answered the second question by conceding that extrinsic evidence can be introduced for certain purposes only and it should however not be introduced in this case since there was no ambiguity in the words of the guarantee. He further invoked in aid the Contra Proferentem Rule so that the guarantee may be construed in favour of the guarantor - the Defendant.

Prior to the enactment of the Mercantile Law Amendment Law, Chapter 243, section 2, a guarantee had to state the consideration relied upon, but since that enactment it is no longer necessary that the consideration should appear in writing.

Learned Counsel for the Plaintiffs submitted that the consideration stated in the pleadings was that the Plaintiffs would forbear to exercise their right to terminate the Hire Purchase Agreement and he asked that the consideration stated in the guarantee be construed to read "In consideration of your continuing to supply the within goods ...."

He contended that there was a patent ambiguity on the face of the whole instrument, since the guarantee, which was executed on 6th April, 1962, refers to the Hire Purchase Agreement which was executed nearly two years before i.e., on 5th August, 1960. Moreover there was no evidence that the principal debtor made any request of the guarantor in August, 1960, so the supplying of the within goods was more consistent with the construction he was asking the Court to draw, i.e., "In consideration of your continuing to supply the within goods ....", connoting a state of supplying as distinct from an act of supplying. On this construction there is no ambiguity.

If however, the submission continued, the construction suggested is inapplicable or inappropriate, then the guarantee and in particular the words importing the consideration, is prima facie ambiguous and would entitle the Plaintiffs to adduce evidence of extrinsic circumstances explaining the true consideration. In support of this submission there is the following passage in Volume 11 of the 3rd Edition of Halsbury's Laws of England at paragraph 655:-

> "Where no consideration or a nominal consideration is expressed in general terms or is ambiguously stated, extrinsic evidence is admissible to prove the real consideration; and where a substantial consideration is expressed in the instrument, extrinsic evidence is admissible to prove an additional consideration, provided this is not inconsistent with the terms of the instrument."

It seemed clear that the extrinsic evidence of a consideration which the Plaintiffs' Counsel sought to adduce was not by any means inconsistent with the terms of the instrument. The point is what was in the contemplation of the parties. Was it not that a continuing supply was contemplated? If so, in the circumstances, the instrument was on the face of it ambiguous and in the absence of extrinsic evidence the maxim "Ut res magis valeat quam pereat" would apply. It must have been the intention of the parties to make this contract of guarantee valid and the Court should not insist on a construction that would render it nugatory.

Several authorities were cited in support of these submissions viz:

Broom v. Batchelor 1 H. & N. 255.
Edwards v. Jevons (1851) 8 C.B. 436.
Steele v. Hoe 19 L.J.N.S. 89.
Goldshede v. Swan (1847) 1 Exch. 154.
Colbourn and Others v. Dawson (1852) 10 C.B. 765.
Turner v. Forwood (1951) 1 All E.R. 746.

All these cases establish the principle that extrinsic evidence is admissible to prove the real consideration. These cases show that the Courts throughout the years have unalterably adhered to the principle in favour of validity.

Before leaving this Head (2) of the grounds of appeal, the only other matter requiring attention is whether forbearance on the part of the Plaintiffs was for a reasonable time so as to substantiate consideration. This can very readily be disposed of by reference to the terms and conditions of the Hire Purchase Agreement wherein the monthly rental of £27.10 was due to the Plaintiffs on the 5th day of each consecutive month and regard must be had for the rapid depreciation of the Bedford truck. With the guarantee executed on 6th April, 1962, a payment became due on 5th May and seizure of the unit was not carried out until 29th May, 1962. Forbearance could not have been intended to abrogate the strict terms of the contract.

The submissions of learned Counsel for the Plaintiffs under this Head (2) of the argument were sound and there is no hesitation in concluding that there was real consideration with the admission of extrinsic evidence.

There remains now only Head (3) to be dealt with - Termination of Contract of Employment. It was common ground that the Defendant

was due 2 months salary	......	......	......	£143. 18. 5
and Pensions Scheme Refund	...	......	......	117. 10. -
making a total of	....	......	......	£261. 8. 5.

Learned Counsel for the Defendant conceded that that total sum would have to go to the account of Edwin French, guaranteed by the Defendant, if it be held that the guarantee is enforceable.

In view of this concession, it does not appear necessary to examine the arguments advanced by both sides under this Head (3). It only remains to state again that the guarantee was enforceable and having regard to the stand of learned Counsel for the Defendant, it is not

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necessary to examine the relevant Rule 13 of the Pensions Scheme. The Defendant was entitled as aforesaid to the Pensions refund claimed and the Plaintiffs could properly apply that sum (£117.10) to the account of Edwin French.

I would therefore allow the appeal and enter judgment for the Plaintiffs on the claim in £362.11 with costs. As to the Counterclaim, the Plaintiffs pleaded in their Reply that the sum of £261.8.5 was credited to the account of Edwin French. This was not traversed. Evidence in support was given and not challenged. Consequently, I would dismiss the Counter Claim and again enter judgment for the Plaintiffs with costs.

R. H. Luckhoo(?) J.A. Ag.

LUCKHOO, J.A.

I agree.

J. A. Luckhoo J.A.

FOX, J.A.

I also agree.

J.A.