ANDREW HAWRISH (*Defendant*) .....APPELLANT;

AND

BANK OF MONTREAL (*Plaintiff*) .....RESPONDENT.

1968
*Nov. 6
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Guarantee in writing—Alleged collateral oral agreement—Terms of two contracts in conflict—Whether parol evidence of collateral agreement admissible.

The appellant, a solicitor, signed, without having previously read, a guarantee to the respondent bank for the indebtedness and liability of a company which was formed for the purpose of buying the assets of a second company in which the appellant had an interest. The guarantee was on the bank's usual form and stated that it was to be a continuing guarantee and to cover existing as well as future indebtedness of the company to the amount of $6,000.

The company having become insolvent, and being indebted to the bank in an amount in excess of $6,000, the bank brought an action against the guarantor for the full amount of his guarantee. The defence was that when he signed the guarantee, the guarantor had an oral assurance from the assistant manager of the branch that the guarantee was to cover only existing indebtedness and that he would be released from his guarantee when the bank obtained a joint guarantee from the directors of the company. Two such guarantees were received by the bank.

The trial judge dismissed the action. On appeal, the Court of Appeal reversed this decision and gave judgment for the bank. On appeal to this Court, the argument was confined to two submissions of error contained in the reasons of the Court of Appeal: (*a*) that the contemporaneous oral agreement found by the trial judge neither varied nor contradicted the terms of the written guarantee but simply provided by an independent agreement a manner in which the liability of the appellant would be terminated; and (*b*) that oral evidence proving the making of such agreement, the consideration for which was the signing of the guarantee, was admissible.

Held: The appeal should be dismissed.

The appellant's argument failed on the ground that the collateral agreement allowing for the discharge of the appellant could not stand as it clearly contradicted the terms of the guarantee bond which stated that it was a continuing guarantee.

Lindley v. Lacey (1864), 17 C.B.N.S. 578; *Morgan v. Griffith* (1871), L.R. 6 Exch. 70; *Erskine v. Adeane* (1873), 8 Ch. App. 756, distinguished; *Pym v. Campbell* (1856), 6 E. & B. 370; *Byers v. McMillan* (1887), 15 S.C.R. 194, considered; *Heilbut, Symons & Co. v. Buckleton,* [1913] A.C. 30; *Hoyt's Proprietary Ltd. v. Spencer* (1919), 27 C.L.R. 133, applied.

* PRESENT: Abbott, Judson, Ritchie, Hall and Spence JJ.

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HAWRISH v. BANK OF MONTREAL

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Davis J. Appeal dismissed.

The Honourable C. H. Locke, Q.C., for the defendant, appellant.

S. J. Walker, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This action was brought by the Bank of Montreal against Andrew Hawrish, a solicitor in Saskatoon, on a guarantee which the solicitor had signed for the indebtedness and liability of a newly formed company, Crescent Dairies Limited. This company had been formed for the purpose of buying the assets of Waldheim Dairies Limited, a cheese factory in which Hawrish had an interest.

By January 1959, the line of credit granted by the bank to the new company was almost exhausted. The bank then asked Hawrish for a guarantee, which he signed on January 30, 1959. The guarantee was on the bank's usual form and stated that it was to be a continuing guarantee and to cover existing as well as future indebtedness of the company up to the amount of $6,000.

The defence was that when he signed the guarantee, Hawrish had an oral assurance from the assistant manager of the branch that the guarantee was to cover only existing indebtedness and that he would be released from his guarantee when the bank obtained a joint guarantee from the directors of the company. The bank did obtain a joint guarantee from the directors on July 22, 1959, for the sum of $10,000. Another joint guarantee for the same amount was signed by the directors on March 22, 1960. Between the dates of these two last-mentioned guarantees there had been some changes in the directorate.

Hawrish was never a director or officer of the new company but at the time when the action was commenced, he was a shareholder and he was interested in the vendor company. At all times the new company was indebted to the vendor company in an amount between $10,000 and $15,000. Hawrish says that he did not read the guarantee before signing. On February 20, 1961, Crescent Dairies Ltd., whose

[1] (1967), 61 W.W.R. 16, 63 D.L.R. (2d) 369.

overdraft was at that time $8,000, became insolvent. The bank then brought its action against Hawrish for the full amount of his guarantee—$6,000.

The trial judge dismissed the bank's action. He accepted the guarantor's evidence of what was said before the guarantee was signed and held that parol evidence was admissible on the ground that it was a condition of signing the guarantee that the appellant would be released as soon as a joint guarantee was obtained from the directors. He relied upon *Standard Bank v. McCrossan*[2]. The Court of Appeal[3] reversed this decision and gave judgment for the bank. In their view the parol evidence was not admissible and the problem was not the same as that in *Standard Bank v. McCrossan*. Hall J.A. correctly stated the *ratio* of the Standard Bank case in the following paragraph of his reasons:

> In my opinion the learned trial Judge erred in holding that the respondent was able to establish such condition by parol evidence. The condition found, if indeed it is one, was not similar to that which existed in *Standard Bank v. McCrossan, supra,* in that it did not operate merely as a suspension or delay of the written agreement. It may be permissible to prove by extraneous evidence an oral agreement which operates as a suspension only.

The relevant provisions of this guarantee may be summarized as follows:

(a) It guarantees the present and future debts and liabilities of the customer (Crescent Dairies Ltd.) up to the sum of $6,000.

(b) It is a continuing guarantee and secures the ultimate balance owing by the customer.

(c) The guarantor may determine at any time his further liability under the guarantee by notice in writing to the bank. The liability of the guarantor continues until determined by such notice.

(d) The guarantor acknowledges that no representations have been made to him on behalf of the bank; that the liability of the guarantor is embraced in the guarantee; that the guarantee has nothing to do with any other guarantee; and that the guarantor intends the guarantee to be binding whether any other guarantee or security is given to the bank or not.

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[2] (1920), 60 S.C.R. 655.

[3] (1967) 61 W.W.R. 16, 63 D.L.R. (2d) 369.

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The argument before us was confined to two submissions of error contained in the reasons of the Court of Appeal:

(a) that the contemporaneous oral agreement found by the trial judge neither varied nor contradicted the terms of the written guarantee but simply provided by an independent agreement a manner in which the liability of the appellant would be terminated; and

(b) that oral evidence proving the making of such agreement, the consideration for which was the signing of the guarantee, was admissible.

I cannot accept these submissions. In my opinion, there was no error in the reasons of the Court of Appeal. This guarantee was to be immediately effective. According to the oral evidence it was to terminate as to all liability, present or future, when the new guarantees were obtained from the directors. But the document itself states that it was to be a continuing guarantee for all present and future liabilities and could only be terminated by notice in writing, and then only as to future liabilities incurred by the customer after the giving of the notice. The oral evidence is also in plain contradiction of the terms of para. (d) of my summary above made. There is nothing in this case to permit the introduction of the principle in *Pym v. Campbell*[4], which holds that the parol evidence rule does not prevent a defendant from showing that a document formally complete and signed as a contract, was in fact only an escrow.

The appellant further submitted that the parol evidence was admissible on the ground that it established an oral agreement which was independent of and collateral to the main contract.

In the last half of the 19th century a group of English decisions, of which *Lindley v. Lacey*[5], *Morgan v. Griffith*[6] and *Erskine v. Adeane*[7] are representative, established that where there was parol evidence of a distinct collateral agreement which did not contradict nor was inconsistent with the written instrument, it was admissible. These were

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[4] (1856), 6 E. & B. 370, 119 E.R. 903.
[5] (1864), 17 C.B.N.S. 578, 144 E.R. 232.
[6] (1871), L.R. 6 Exch. 70.
[7] (1873), 8 Ch. App. 756.

cases between landlord and tenant in which parol evidence of stipulations as to repairs and other incidental matters and as to keeping down game and dealing with game was held to be admissible although the written leases were silent on these points. These were held to be independent agreements which were not required to be in writing and which were not in any way inconsistent with or contradictory of the written agreement.

The principle formulated in these cases was applied in *Byers v. McMillan*[8]. In this case Byers, a woodcutter, agreed in writing with one Andrew to cut and deliver 500 cords of wood from certain lands. The agreement contained no provision for security in the event that Byers was not paid upon making delivery. However, before he signed, it was orally agreed that Byers was to have a lien on the wood for the amount to which he would be entitled for his work and labour. Byers was not paid and eventually sold the wood. The respondents, the McMillans, in whom the contract was vested as a result of various assignments, brought an action of replevin. It was held by a majority of this Court that they could not succeed on the ground that the parol evidence of the oral agreement in respect of the lien was admissible. Strong J., with whom the other members of the majority agreed, said at p. 202:

> . . . *Erskine v. Adeane* [*supra*]; *Morgan v. Griffith* [*supra*]; *Lindley v. Lacey* [*supra*], afford illustrations of the rule in question by the terms of which any agreement collateral or supplementary to the written agreement may be established by parol evidence, provided it is one which as an independent agreement could be made without writing, and that it is not in any way inconsistent with or contradictory of the written agreement.
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> These cases (particularly *Erskine v. Adeane* which was a judgment of the Court of Appeal) appear to be all stronger decisions than that which the appellant calls upon us to make in the present case, for it is difficult to see how an agreement, that one who in writing had undertaken by his labor to produce a chattel which is to become the property of another shall have a lien on such product for the money to be paid as the reward of his labor, in any way derogates from the contemporaneous or prior writing. By such a stipulation no term or provision of the writing is varied or in the slightest degree infringed upon; both agreements can well stand together; the writing provides for the performance of the contract, and the consideration to be paid for it, and the parol agreement merely adds something respecting security for the payment of the price to these terms.

[8] (1887), 15 S.C.R. 194.

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In *Heilbut, Symons & Co. v. Buckleton*[9], a case having to do with the existence of a warranty in a contract for the sale of shares, there is comment on the existence of the doctrine and a note of caution as to its application:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100 £., and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

Bearing in mind these remarks to the effect that there must be a clear intention to create a binding agreement, I am not convinced that the evidence in this case indicates clearly the existence of such intention. Indeed, I am disposed to agree with what the Court of Appeal said on this point. However, this is not in issue in this appeal. My opinion is that the appellant's argument fails on the ground that the collateral agreement allowing for the discharge of the appellant cannot stand as it clearly contradicts the terms of the guarantee bond which state that it is a continuing guarantee.

The appellant has relied upon *Byers v. McMillan*. But upon my interpretation that the terms of the two contracts conflict, this case is really against him as it is there stated by Strong J. that a collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement. To the same effect is the unanimous judgment of the High Court of Australia in *Hoyt's Proprietary Ltd. v. Spencer*[10], which rejected the argument

[9] [1913] A.C. 30 at 47.

[10] (1919), 27 C.L.R. 133.

that a collateral contract which contradicted the written agreement could stand with it. Knox C.J., said at p. 139:

> A distinct collateral agreement, whether oral or in writing, and whether prior to or contemporaneous with the main agreement, is valid and enforceable even though the main agreement be in writing, provided the two may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral agreement. This proposition is illustrated by the decisions in *Lindley v. Lacey* [*supra*], *Erskine v. Adeane* [*supra*], *De Lassalle v. Guildford,* [1901] 2 K.B. 215, and other cases.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellant: Schmitt, Robertson, Muzyka, Beaumont & Barton, Saskatoon.

Solicitors for the plaintiff, respondent: Walker, Agnew, MacKay & Hercus, Saskatoon.