Supreme Court of Canada
Merchants Bank of Canada v. Bush, (1918) 56 S.C.R. 512

Date: 1918-06-10

The Merchants Bank of Canada *(Plaintiff) Appellant;*

and

O. H. Bush *(Defendant) Respondent.*

1918: May ; 1918: June 10.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Guarantee—Bank and banking—Illegal interest charged to principal debtor—Variation of contract—Liability of guarantor.

A director of an incorporated company gave a written guarantee that he would pay any undebtedness of the company to a bank up to the sum of $3,000. The bank, in the course of its dealings with the company, charged in its books interest at 8% contrary to the provisions of the "Bank Act," but, so far as appears, without the knowledge of the company. The amount of the principal and interest legally due by the company to the bank exceeded the amount of the respondent's guarantee.

Held, that the charging of the illegal interest did not constitute a variation in the terms of the contract of guarantee; and the respondent was not thereby discharged from liability to the bank for the amount legally due.

APPEAL from a decision of the Court of Appeal for British Columbia[1], affirming, by an equal division of the court, the judgment of Hunter J. at the trial and dismissing the action of the plaintiff with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgment now reported.

F. E. Meredith K.C. and D. L. McCarthy K.C. for the appellant.

Eug. Lafleur, K.C., and Robert Cassidy, K.C., for the respondent.

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[1] [1918] I.W.W.R. 383; 38 D.L.R. 499.

THE CHIEF JUSTICE:—There are two points raised by the defence which fall to be decided on the present appeal; and first it is contended that on the pleadings the plaintiff—appellant—has not alleged that the principal debtor has made default. I am, however, of opinion that the allegations in the statement of claim which contain an averment that the principal debtor is indebted to the plaintiff and that payment has been duly demanded of the sufficiently state the claim.

It is said in the second place that the surety is not to be held liable because the bank charged the principal debtor upon advances made to him interest at the rate of 8% whereas the "Bank Act" provides that banks may take interest not exceeding 7% but no higher rate of interest shall be recoverable by the bank.

The point is not without difficulty, and if I have come to the conclusion that it cannot be allowed it is only upon the special circumstances of the case. For if the transaction were simply a loan of $3,000 and the bank had charged an exorbitant rate of interest there would be great force in the argument that the surety could say that he did not intend to guarantee a money-lending transaction, but was entitled to rely on the bank only charging interest at a rate which they were legally empowered to do, that is to say

> not exceeding 7% and the excess beyond which at any rate they could not recover.

But that is not such a transaction as the one with which we are dealing in the present case. The surety here guarantees to the bank that the principal debtor will pay to the bank all moneys which may at any time be due to the bank from him.

Now, of course, it is open to the surety to shew that the moneys alleged to be due from the principal debtor

are not recoverable by the bank, but that is not the point of the defence which is, not that there are not moneys legally due and recoverable from the principal debtor, but that because in the course of the dealings between him and the bank the latter has made a charge which it was not entitled to make though this be outside and beyond the sum sought to be recovered from the surety.

I do not think the transaction between the bank and the principal debtor can be called in question in this way by the surety. If he chooses to give a general undertaking to become liable for whatever may at any time be due to the bank from the debtor he must accept the consequences of their dealings which he can neither claim to control nor dispute as discharging his liability.

And the mere fact that advances and charges were made, which by statute are made not recoverable, cannot in the absence of any proof of prejudice to the surety be any ground for discharging his liability for the ultimate debt properly due.

The "Interest Act" provides that on any money secured by mortgage made payable on the sinking fund plan no interest whatever shall be recoverable unless the mortgage contains a statement shewing the amount of the principal money advanced and the rate of interest chargeable thereon. The fact that the bank had made an advance on such a mortgage on which no interest whatever was recoverable though the rate of interest was not excessive could not be ground for discharging the surety.

I think that the respondent must be held liable for $3,000 the amount to which his guarantee is limited with interest at 6% as also provided and I would therefore allow the appeal with costs.

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DAVIES J.—This action was one brought by the bank against respondent Bush to recover the sum of $3,000 due upon a continuing guarantee given by him to the bank for the payment to it

> of all moneys which may at any time be due to the bank from the Seafield Lumber and Shingle Co.

with provision that the sureties' liability should not exceed $3,000 with interest at 6% from the time of payment being required.

The only defences set up by the defendant were that the bank had not specifically proved the debt due to it and secondly that in its dealings with the company the bank had charged interest at the rate of 8%, which was contrary to the provisions of the "Bank Act."

As to the proof of the debt being due and not paid to the bank, I have only to say that I agree with the Court of Appeal in its holding that the pleadings admitted both facts, the debt being due and the company's default in not paying it. Mr. Lafleur's contention was that the moment the customer paid the illegal rate of interest to the bank that fact constituted a new contract between him and the bank and discharged the guarantor. But there was not a scintilla of evidence that any payment of the illegal interest charged had been made by the company with knowledge of the illegal rate. The only evidence on the point was the admission at the trial by the bank that it had charged in its books interest at 8%, but whether to the knowledge or not of the company does not anywhere appear. In my judgment, therefore, there was no change or variation in the contract as guaranteed which could discharge the guarantor.

The excess of interest charged could not possibly in any view affect the amount of $3,000 guaranteed

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because the amount of the items, principal and interest, admitted as properly charged and due by the company to the bank greatly exceeded the limited amount of the respondent's guarantee.

The charging of an excessive rate of interest would only in an accounting between the bank and the guarantor have the same result as charging improperly an item of principal. In either case they would be struck out. As I have pointed out already, apart altogether from any excess of interest the balance of account due by the company to the bank exceeded largely the limit of the guarantee and the guarantor was not and could not be prejudiced by the excess of interest charged.

I would therefore allow the appeal with costs and direct judgment to be entered for the amount guaranteed, $3,000, with interest as provided in the guarantee and with costs in all the courts.

IDINGTON J.—The respondent was a shareholder in, and director of, a corporate company known as the Seafield Lumber and Shingle Company, Limited, carrying on business in British Columbia, who, with others, gave appellant at Nanaimo, on the 17th November, 1914, their joint and several guarantee that said company would up to a named sum pay appellant all moneys which might at any time be due to it from said company.

The guarantee was of the usual kind taken by banks when requiring a customer to furnish some guarantor for the payment of the ultimate balance of the customer's indebtedness. In this case, the liability was limited to three thousand dollars and six per cent, per annum thereon from the time of payment being required.

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The company went into liquidation in February, 1916, and then owed over $4,900 to the appellant.

This action was brought by appellant to recover from respondent the sum of $3,000 on account of said indebtedness.

The appellant had been charging the company eight per cent, per annum on its loans.

The learned trial judge held that in law the respondent was thereby discharged from his guarantee.

This view was also entertained by Mr. Justice Eberts in the Court of Appeal but no one else there ventured to support it.

Mr. Justice Martin held the appeal should be dismissed because sufficient proof had not been adduced of the indebtedness in question and declined to express any opinion upon the other point as in that view he had taken it was immaterial. The Chief Justice and Mr. Justice McPhillips held that appellant was entitled to succeed. In the opinion of the latter, he suggests that the charging by banks of a higher rate of interest than the maximum statutory rate may be said to be matter of common knowledge. I think he is right in so assuming and especially so in regard to dealings in the western provinces. I should be much surprised to find any business man, of the standing which the admitted facts indicate respondent to have been, ignorant of such a common practice. The respondent in his examination for discovery denies that he knew what rate was being charged by appellant to the said company.

I accept his denial implicitly for he seems to have retired from business; but he was not asked as to his knowledge of the usual rate, as he doubtless would have been, had he been able to deny all knowledge of such rates as eight per cent, being originally required. There

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is not the slightest indication in the guarantee itself or, in the meagre evidence we have relative to the surrounding facts and circumstances, that can entitle us to read into the documents any implication of a condition relative to the limitation of the rate of interest to be charged.

No business man signing such an instrument, in recent years, can ever have conceived that the bank could not, if it chose, exact as a condition of its making advances a higher rate than seven per cent.

The well-known case of *The Union Bank of Canada* v. *McHugh* [2], referred to at the trial herein, and on argument here, had been decided in this court over three years before the guarantee in question was given. And if my memory serves me, I think cases preceding that by many years which bore the mark of dealings in what the learned trial judge referred to as killing rates had been presented for our consideration. There never was any serious doubt as to the permissive character of the provisions in the "Banking Act" and bankers in the zones where it was necessary to charge more than seven per cent, deducted from the advances made accordingly, or got out of business.

The question of what could be collected on overdue amounts gave rise to a difference of opinion here and was set at rest by their Lordships in the Privy Council in the *McHugh Case* [3], before this guarantee was given.

I therefore am unable to understand why any one, signing such documents thereafter, could pretend they were entitled to read into that writing they had so signed, a something not found there.

Nor can I find any legal principle upon which a surety could claim a discharge by virtue of any such

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supposed implication. If we refer to the cases cited there is, on examination, nothing found to maintain such a proposition of law. If we turn to DeColyar on Guarantees to find something

[2] 44 Can. S.C.R. 473.

amongst the many means, tabulated by the author, whereby a surety may be discharged, we can find nothing to give us any hint of a suggestion upon which such a proposition can rest.

In short, there was neither fraud nor variation of the contract or the contractual relation for which the respondent stood as guarantor.

The improvidence of the principal is not a legal basis for such discharge unless it has been stipulated against and is in truth the reason for the banker shifting the burden thereof, in part at least, on to him willing to become a guarantor.

To maintain the proposition that in face of an elaborate document, framed to meet every hitherto known contingency whereby a surety might escape answering for the ultimate balance due by a principal, or the part of it he had undertaken, we must find therein an implied condition, agreed to by appellant, and broken so soon as signed and accepted.

The statement relied upon for proof of the rate of interest being eight per cent, expresses the fact that such rate

> had been charged the company right along.

Is the suggestion of an implied condition under such circumstances not too absurd for acceptance?

The examination of respondent for discovery as well as the frame of the pleadings, relieves me from any discussion of the point made as the proof of indebtedness.

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[3] [1913] A.C. 299; 10 D.L.R. 562.

This appeal should be allowed with costs throughout and judgment be entered for the amount claimed

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with interest at six per cent, per annum as stated in guarantee.

ANGLIN J.—I agree with the view taken by the majority of the learned judges of the Court of Appeal as to the sufficiency of the allegation in the plaintiff's claim of the indebtedness and default of its principal debtor and as to the effect of the absence of any specific denial thereof in the plea of the defendant.

The only defence set up is an alleged variation of the contract between the bank and its debtor in regard to the rate of interest payable by the latter, which the defendant asserts has discharged him as a surety. He contends, I incline to think with reason, that his guarantee must be presumed to have been based on a contract between the principal debtor and the bank not *ultra vires* of the latter under the "Bank Act," and, therefore, importing an agreement for interest at a rate not exceeding 7%. The variation alleged is based on an admission of counsel made at the trial that the rate charged against the principal debtor in the books of the bank has been 8%.

There is no evidence of any assent by the debtor to this charge or that he was cognizant of it. No agreement to pay it would have bound him except in so far as he had actually paid it or had assented to a stated account containing items of interest charged at that rate. *McHugh* v. *Union Bank* [4]. There is no proof of any such payment or account stated. Therefore no binding agreement between the principal debtor and the bank to vary the terms of the contract guaranteed has been shewn, and in order that it hould effect the discharge of the surety an agreement for a variation in the terms of the contract of the

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[4] [1913] A.C. 299; 10 D.L.R. 562; 44 Can. S.C.R., 473.

principals must be legally binding. Both the debtor and the guarantor would have been entitled to have the account of the bank taken on a footing of interest at 7%—or, it may be, at 5%.

Had actual payment of interest to the bank by the primary debtor at a rate exceeding 7% been shewn to have been made subsequently to the giving of the defendant's guarantee, it may be that he would have been discharged, unless, indeed, it should be clearly established that the guarantor's risk—the likelihood of his being called upon under the guarantee—was not thereby appreciably affected.

Solely on the ground that the defendant has failed to shew any variation in the terms of the guaranteed contract legally binding upon either the primary debtor or himself I would allow this appeal with costs here and in the Court of Appeal and would direct the entry of judgment in the plaintiff's favour for the amount claimed by it with costs of this action.

BRODEUR J.—The action by the appellant is on a guarantee given by the respondent to the effect that if a certain company did not pay to the bank its indebtedness the respondent as guarantor would pay to the extent of $3,000.

The contract of guarantee provided that the liability would cover not only the capital sums advanced by the bank to that company but also all interests, costs, charges for commissions and other expenses which the bank, in the course of its business, could charge in respect of any advances or discounts made to the principal debtor.

It appears that the bank, in the course of its dealings with the customer, charged an interest of 8%, contrary to the provisions of the "Bank Act" which authorized an interest of 7%.

The amount representing that excess of rate could not be large for the advances covered a short period of time, and it seems very clear that the amount due by the customer was much larger than $3,000 when the action on the guarantee was instituted, even after having deducted that excess of rate of interest.

The respondent claims that he is discharged from any liability because the bank charged 8% instead of 7% on the advances made to the principal debtor.

There is no doubt that the bank had no right to charge more than 7% and the contract between the bank and its customer as to interest is void and the bank could recover only statutory interest, as it was decided in the case of *McHugh* v. *Union Bank of Canada* [5]. The guarantor may, when he is called upon to pay the debt of the principal debtor, refuse to pay more than the statutory rate of interest. He could only be compelled to make good what the company owed up to the sum of $3,000.

There is no evidence that when the contract of guarantee was signed there was a contract between the bank and the company. But later on, advances were made to the latter; and if, in making those advances, some illegal thing has been done, it does not render the contract of guarantee null and void; but the advances made as a result of such an illegal thing could not be claimed from the guarantor.

It is said, however, that it was an implied part of the contract of guarantee that no larger rate of interest than 7% should be charged, and that the bank had varied that contract.

I fail to see in this contract any implied covenant as the one suggested. The parties, on the contrary, have formally stipulated as to the interest; and it is

[5] [1913] A.C. 299; 10 D.L.R. 562.

a well-settled principle of law that the courts will not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. Beal, Legal Interpretation, p. 129.

Besides assuming that such an implied covenant would exist in this contract, the alteration would require to be substantial in order to discharge the surety. *Holme* v. *Brunskill*[6].

For these reasons, the bank should succeed and its appeal should be allowed with costs.

Appeal allowed with costs.
Solicitors for the appellant: Abbott, Macrae & Company.
Solicitors for the respondent: McKay & O'Brian.

[6] 3 Q.B.D. 495.