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The New Guarantee Trust of Jersey Limited

- v -

Aneurin Terrence Brain

In this action the plaintiff company is a deposit taking institution, registered in accordance with the necessary legislation in force in this Island and the defendant is an experienced business man who has been living in the Island for some years and has extensive business interests. The facts, which are not disputed, in this case, may be summarised thus.

The defendant was interested in the business of the Hayward Group of Companies in South Wales and he put up certain terms to the plaintiff company for that company to take over the banking facilities accorded to the Hayward Group which hitherto had been carried out by the Midland Bank at Usk. This was after the visit to South Wales by Mr. B.M.Hewett, a director and the banking manager of the plaintiff company, with Mr. Brain, when they were shown the Hayward Group's premises and business. On their return from that visit, Mr. Hewett wrote down the defendant's proposals and put them into his own words, because he told us that that was the way Mr. Brain wished it to be, and typed these out at his house on a particular sort of typewriter with a definite and individual type script. That document , number eleven in the bundle, which included draft accounts of the Hayward Group up to the 31st March, 1977, was considered at a meeting either the same day or on the following day at which certainly Mr. Matchan, the effective controller - I put it that way - of the plaintiff company was present, Mr. Brain and Mr. Hewett. There is some doubt as to whether Mr. E. Hayward was present, but we think he probably was not. As a result of that meeting, a letter was written on the 21st September, 1977, by Mr. Hewett to Mr. Brain in the following terms:-

"Dear Terry,

The Hayward Group

I refer to our most interesting meeting yesterday when you placed your proposals before Mr. Matchan and myself for the acquisition of the Hayward Group.

Your proposals for dealing with the assets appear to us to be both viable and profitable, although there may be even more remunerative possibilities. No doubt we shall be meeting again shortly to discuss a fully detailed plan of campaign.

In the meantime, I confirm that the bank can agree in principle to the £500,000 overdraft which you will require against a fixed and floating charge over the company's assets.

With kind regards.

Yours sincerely,
B.M.Hewett "

As a result of those arrangements the bank paid the Midland Bank off and got all the securities held by the Midland Bank. Also in the course of business following the 4th October, 1977, which was the take-over date, if I can put it like that, paid and honoured outstanding cheques which had been issued by the Hayward Group of Companies and drawn on the Midland Bank. It also subsequently honoured a number of standing orders adressed to the Midland Bank.

On the 7th December, 1977, Mr. Brain signed a guarantee, which was unconditional as to the form itself, but which had a collateral letter issued and signed by Mr. Hewett on the same date. We note that it was not disputed that the guarantee was signed and the letter produced to Mr. Brain at the same time by Mr. Hewett. The letter is in the following terms:-

"

7th December, 1977

I acknowledge receipt of the Guarantee dated 7th December 1977 which you have signed in favour of the Hayward Group of Companies.

It is our understanding that this Guarantee will be returned to you on the 31st January, 1978 ...."

I interpose here to say that originally that date had been the 31st December, 1977, but on the occasion when that guarantee and the letter

was produced to him by Mr. Hewett, the defendant requested that that date be changed to the 31st January, 1978, and it was so altered and initialled, I read on:-

> "....provided that the net liability of the Group has been reduced to below £500,000.
>
> In the meantime we hope to have the benefit of a sight of the Audited Accounts of the Comapny and a Statement of Affairs at 30th September. The Board will review the situation in the light of these and decide what action is necessary to protect the interests of the Company and this Bank.
>
> Yours sincerely,
>
> B.M.Hewett.
> Director "

On or about the 16th January, 1978, the bank received the guarantees which had been previously given to the Midland Bank by the Hayward Brothers, jointly and severally, for £100,000. During the whole of the banking operations from the 4th October, 1977, onwards until matters blew up in January, 1978, we are satisfied that the bank had been pressing, as is clear from the last paragraph of the letter of the 7th December, 1977, for a sight of the audited accounts up to March, 1977, and a statement of affairs as at the 30th September, but they had not received them. On the 2nd February, 1978, the plaintiff company called up the guarantee and the defendant did not pay it. The company accordingly now sues Mr. Brain for it.

His defence is that for three reasons he has been released from his obligations arising from the signing of the guarantee (as amended by the collateral letter of the 7th December). First, he says that when he signed the guarantee he made a condition that the bank's facilities to the Hayward Group would not be extended beyond the figure of £600,000. Mr. Valpy has pointed out that that was the evidence which was given by Mr. Brain to the Court whereas in the pleadings it is said that that figure should not be exceeded until after the 31st January, 1978. That is not an important matter because obviously having regard to the second paragraph of the letter of the 7th December,

1977, beyond that date Mr. Brain would have no further interest; he would be released from his guarantee.

The second line of defence is that the figure certified by the bank of £551,308-12 as at the close of business on the 31st January, 1978, is wrong because some of the items debited to the Hayward Group's consolidated account of several of their companies, had not been properly authorised to be so debited. I refer to the allegations set out in the particulars of the defence, upon which we have heard evidence from Mr. R. Rumboll, an experienced accountant, who conducted investigations into these matters with the consent of the plaintiff company, who did not rely on one of the clauses of the guarantee which would have allowed them, had they wished to do so, to certify the debit figure and that certification would have been binding on the defendant. However, the plaintiff company allowed the investigation by Coopers and Lybrand, on the figures which, they said, showed that on the 31st January, 1978, £551,308-12 was owed by the Group to the bank. Of course if the plaintiff company is right, leaving aside the question of the £600,000 limit which I have just mentioned, then of course the guarantee was payable. However, the amounts which the defendant says were quite wrongly and unauthorisedly debited to the Hayward Group of Companies, thereby of course increasing the overall indebtedness and thus putting the figure at the 31st January, 1978, well beyond the limit were these: (1) the original £390,673-37 which was the balance of the Midland Bank account at Usk; (2) a number of cheques drawn on the Midland Bank that were honoured totalling £19,946-87; (3) interest which in fact the plaintiff admitted was wrongly debited and corrected; and (4) a sum of £43,684-50 which was paid in respect of standing orders. It is said therefore, that all these payments were made without authority and should not have been debited. There is a further sum of £2,316-73 which again is said to have been paid without authority. So far as that last figure is concerned we are satisfied that it has not been possible to find any authority at all for it,

either express or implied and therefore we are satisfied that that sum was not properly paid.

The third line of defence is that when the Hayward brothers eventually gave their guarantee in January, 1978, Mr. Brain was, if I may put it colloquially, let off the hook by Mr. Matchan, who indicated to him that he really wanted to substitute the Hayward brothers' guarantee for Mr. Brain's guarantee of December, 1977. In this connection of course, we will observe this. If Mr. Brain's recollection is correct and if we were to accept it, that would mean that, whereas when the plaintiff company took over the indebtedness to the Midland Bank and the account of the Hayward brothers in October, 1977, and prepared to give them facilities of £500,000 with the guarantee of the Hayward brothers to come, if that was so - and I will mention that in a moment - they were apparently prepared to increase that figure of £500,000 to £650,000, a further £150,000, with the same security. In other words substituting, as Mr. Brain alleges, the security of the Hayward brothers' joint and several guarantee of £100,000 for his own guarantee in the same amount. If that is so, we find it extraordinary that the bank would be prepared to increase the overdraft facilities without effectively achieving greater security, because the effect of doing that, according to Mr. Brain, it did, would be to increase the facilities without obtaining greater security. Lastly it is said by Mr. Birt for the defendant that even if all these defences are not accepted by the Court, and fail, nevertheless after the guarantee had been called up, Mr. Brain called at the New Guarantee Trust office on the 3rd February, 1978, where he made an unconditional offer to take over the debt and place himself in the shoes of the bank and pay off the amount owed by the Hayward Group of Companies. That that offer having been made, the plaintiff company was not entitled in law to refuse it.

Now there is a great deal of conflict of evidence arising out of

these points. The main conflict of evidence really of course stems from the defence that there was a limit placed by Mr. Brain on the overdraft facilities which were accorded to Hayward Brothers of £600,000 at the time he gave his guarantee of £100,000 in December, 1977. The conflict is mainly between Mr. Hewett and Mr. Brain. I have to say this, that where there is such a conflict of evidence , the Court unhesitatingly prefers the evidence of Mr. Hewett, who is an experienced banker and had been with a reputable clearing bank for many years.

As regards Mr. Brain and his allegations concerning the £600,000 it is interesting to note, and I read from my note which I took down verbatim, that when Mr. Brain was asked in cross-examination what he would do if he were lending money, he said this: "If you asked me for a loan, I'd have everything signed and your guarantee before you had my cheque". Now if that is so and he is so careful in that kind of affair, why was he not equally careful and cautious on the 7th December, 1977, and insisting on the amendment either of the guarantee itself or the collateral letter if he preferred - it does not matter in what way - so as to have some record in writing that he had so restricted his liability, and that he would be released if the facility rose above £600,000? In any case Mr. Hewett denied that that limit was made by Mr. Brain. Again we have to consider the evidence about the signing of the guarantee itself and decide whose evidence we prefer. Mr. Brain said first of all in examination in chief that he did not read the guarantee in the form itself but concentrated on the letter. Later in cross-examination, he said that he read the basis of the guaramtee form itself. We think he was very careless or else, as Mr. Valpy said, he already knew the form of a guarantee because he himself had been involved in guarantees on a number of previous occasions, although he had denied, we find in a rather equivocal way, that he had not been involved, or given guarantees himself before.

Therefore, so far as the first line of defence is concerned which is that the guarantee was limited in the sense that Mr. Brain would be released if the bank increased the facilities of the Hayward brothers over £600,000 we are quite satisfied that that condition was not made. Moreover we should add that if it was made, it would not have had much practical effect because at the time he gave his guarantee there was only roughly, £27,000 worth of credit, so to speak, left in the account if it was limited to £600,000, and having regard to the way in which the account had been operating it is clear to us that that would have been quite impractical.

As regards the second line of defence, which is that the bank had wrongly debited the Hayward Group account with certain amounts paid to the Midland Bank and later to other people on standing orders and possibly direct debits, we are satisfied that the bank's authority to do so stemmed from the original decision for them to take over from the Midland Bank, Usk. We have already mentioned the small matter of £2,316-73 and it follows that being so satisfied that the bank was entitled to make the appropriate payments as it did, it therefore follows that the question of estoppel does not arise.

Thirdly, we reject the evidence of Mr. Brain that when the Hayward brothers gave their guarantee, he was released from his guarantee by Mr. Matchan. We reject also his claim that after the guarantee had been called up he offered to pay the debt. Therefore the question of mitigation likewise does not arise. At the same time the Court has asked me to express some surprise at the unilateral decision of the bank to change the usual method of charging interest from bi-monthly or three-monthly or six-monthly as is the practice of clearing banks, to fortnightly, even indeed to change it to bi-monthly, although in fact, of course, even if it were to disallow some items under this head it would make no difference to the amount due on the 31st January, 1978. The decision of the Court therefore is that there will be judgment for the plaintiff with costs and interest from the date when the guarantee became due at ten per cent.