Privy Council Appeal No. 8 *of* 1963

The National Bank of Nigeria Limited – – – – – *Appellant*

v.

Oba M. S. Awolesi – – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JULY 1964

Present at the Hearing:
LORD REID.
LORD HODSON.
SIR BENJAMIN ORMEROD.
[*Delivered by* LORD HODSON]

This is an appeal from a judgment, dated the 30th March 1962, of the Federal Supreme Court of Nigeria consisting of Federal Justices Unsworth, Taylor and Bairamian allowing by a majority an appeal by the respondent from the judgment of Irwin J. in the High Court of Justice in the Western Region of Nigeria and ordering that the appellant's claim against the respondent be dismissed with costs. Federal Justice Unsworth gave a dissenting judgment agreeing with Irwin J.

The claim by the appellant, the National Bank of Nigeria Ltd. (hereinafter called the Bank) was made against E. O. Adeyemi Taiwo, sued as first defendant and principal debtor, and the respondent, sued as second defendant and guarantor, for the sum of £10,023 14s. 3d. This sum represented money lent to Taiwo by the Bank at his request together with interest and Bank charges.

The material facts are these: Taiwo, who is a nephew of the respondent was a customer of the Bank at their Shagamu Branch. Over the period from 26th September 1955 to 24th December 1955 Taiwo issued 14 cheques drawn on his account at this Branch for a total of £9,844. Each cheque was endorsed " Refer to Drawer ". One cheque dated 26th September 1955 for £1,120 was honoured on the 29th December and the remaining 13 cheques drawn for a total of £8,724 were honoured on the 30th and 31st December 1955. After payment of those cheques the account was on the 31st December 1955 overdrawn to the extent of £10,096.

On the 30th December 1955 the respondent executed a guarantee of Taiwo's account in favour of the Bank, such guarantee not to exceed the sum of £10,500.

The terms of the guarantee were as follows:—

GUARANTEE, AWOLESI TO BANK

Singular—For an Individual

TO THE NATIONAL BANK OF NIGERIA LIMITED

In consideration of the Bank (which expression shall include their successors and assigns) continuing the existing account with Emanuel Olaseni Adeyemi Taiwo of 140 Akarigbo Street, Shagamu (hereinafter called the Principal), for so long hereafter as the Bank may think fit, or otherwise giving credit or accommodation or granting time to the Principal, I, the undersigned, Moses Sowemimo Awolesi, Afin Akarigbo, Shagamu hereby guarantee, on demand in writing being made to me,

the due payment of all advances, overdrafts, liabilities, bills and promissory notes, whether made, incurred or discounted before or after the date hereof, to or for the Principal, either alone or jointly with any other person or persons together with interest, commission and other banking charges, including legal charges and expenses.

(2) It is mutually agreed that the total amount recoverable hereon shall not exceed Ten thousand and five hundred pounds in addition to such further sum for interest thereon and other banking charges in respect thereof, and for costs and expenses as shall accrue due to the Bank within six months before or at any time after the date of demand by the Bank upon me for payment.

(3) And further, that this guarantee shall be applicable to the ultimate balance that may become due to the Bank from the Principal.

(4) I agree that this guarantee shall be a counting security to the Bank, and shall not be determined except at the expiration of six calendar months, written notice given to the Bank of my intention so to do, and in the event of my death the liability of my legal personal representatives and of my estate shall continue until the expiration of six months' notice in writing given to the Bank of the intention of my executors or administrators to determine this guarantee.

(5) A demand in writing shall be deemed to have been duly given to me or my legal personal representatives by sending the same by a messenger or by post addressed to me at the address hereon and shall be effectual notwithstanding any change of residence or death and notwithstanding notice thereof to the Bank, and such demand shall be deemed to be received by me or my legal personal representatives after the despatch thereof, and shall be sufficient if signed by any officer of the Bank, and in proving such service it shall be sufficient to prove that the letter containing the demand was properly addressed and despatched by a messenger or put into the post office.

(6) I agree that a copy of the account of the Principal contained in the Bank's books of account, or of the account for the preceding six months if the account shall have extended beyond that period, signed by the manager or any officer for the time being of the Bank, shall be conclusive evidence against me of the amount for the time being due to the Bank from the Principal in any action or other proceedings brought against me or my legal personal representatives upon this guarantee.

(7) I also agree that any admission or acknowledgment in writing by the Principal or any person on his behalf of the amount of the indebtedness of the Principal, or otherwise in relation to the subject matter of this guarantee, or any judgment or award obtained by the Bank against the Principal shall be binding and conclusive on me and my legal personal representatives.

(8) I waive in the Bank's favour all or any of my rights against the Bank or the Principal far as may be necessary to give effect to any of the provisions of this guarantee.

Dated at Shagamu this 30th day of December 1955.

(Sgd) M. S. Awolesi,
Guarantor.

Witness: Emanuel Amusan,
Ishokun Street,
Shagamu.

On the 12th January 1956 a new (No. 2) account was opened by Taiwo at the Bank's Shagamu branch. Its opening and subsequent operation took place without the knowledge of the respondent. After the number 2 account was opened no cheques were drawn on the first account which remained overdrawn. The amounts paid in to the first account after that date did not represent a serious attempt to reduce the overdraft and interest thereon but

were enough to pay off the monthly debits on account of interest. The resultant total overdraft on the 24th July 1957 after debiting interest due on the 23rd July was £10,023 14s. 3d.

During the year 1956 approximately £29,000 was paid into the number 2 account, and from 1st January 1957 to 31st March 1957 approximately £4,000 was paid in. The Bank ledger shows that the number 2 account was at times in credit to the extent of over £2,500 but that in May 1957 the credit balance was only £2 19s. 4d. Taiwo also had an account with the Bank's Lagos Branch, and on the 30th December 1955 he issued a cheque for £520 payable to the Bank and this amount was transferred to the Lagos branch account.

On the 21st May 1957, by letter addressed to Taiwo and to the respondent, the Bank demanded collateral security for the overdraft and payment of a substantial amount in reduction thereof before the close of business on the 10th June 1957. Legal proceedings were threatened in the event of non-compliance with the demand. Compliance not having been made proceedings for recovery of the debt due were begun on the 21st August 1957 against Taiwo and the respondent. Taiwo submitted to judgment for £10,023 14s. 3d. and judgment was given against the respondent as guarantor for £9,610 14s. 4d. found to be due to the Bank after a reference at which the resulting figure was obtained by the referee combining the two accounts at Shagamu with the Lagos account and taking the balance due on the 24th July 1957 after treating all three as one unbroken account. It is unnecessary to consider in detail how the total figure of indebtedness was ascertained but the basis of the calculation, in accordance with the judge's direction, was that the three accounts had been operated as one account from the 30th December 1955 to the 24th July 1957.

It is clear according to the terms of the guarantee that it was a continuing security to the Bank and it is assumed by their Lordships that the letter of the 21st May 1957 constituted a sufficient demand made upon the respondent for the purposes of the guarantee.

The question for consideration which depends in the main on the construction of the document of guarantee itself is whether the majority of the Federal Supreme Court were right in arriving at the conclusion that in the events which have happened the respondent was discharged from his responsibility as guarantor.

The guarantee refers to " the continuing of the existing account " as consideration for the guarantee which suggests that the parties had agreed that the account of the principal debtor existing on the 30th December 1955 should be continued in an unbroken state and that they did not contemplate the opening of a second account. It is true that the way in which consideration for a contractual obligation is expressed is not conclusive but it is relevant in construing the terms of the contract itself. It would appear also that the words " ultimate balance " in clause 3 and " account " in clause 6 can most naturally be read in the light of clause 1 as relating to the existing account and that the words " or otherwise giving credit or accommodation or granting time " in clause 1 prima facie refer to the existing account. Their Lordships agree with Federal Justices Taylor and Bairamian in construing the guarantee in the narrow sense of a guarantee of the account as it existed at the date when the guarantee was given. When the Bank allowed Taiwo to open the second account they were permitting the position of the respondent to be prejudiced as to his guarantee for, as happened thereafter, it was possible for Taiwo to make payments into the Bank without releasing the respondent from his liability under the guarantee. The opening of the new current account was an unauthorised departure from the terms of the contract of guarantee.

In *Ward* v. *National Bank of New Zealand* 8 App. Cas. 755 their Lordships at p. 763 said: " A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed ". The same judgment adopted the language of Cotton L. J. in

Holme v. *Brunskill* 3 Q.B.D. 495 at p. 505 where he said: "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an enquiry into the effect of the alteration....". In *In re Sherry, London and County Banking Company* v. *Terry* 25 Ch.D 692 Lord Selborne L.C. referred to the rule at p. 703 saying:—"A surety is undoubtedly and not unjustly the object of some favour both at law and in equity and I do not know that the rules of law and equity differ on this subject".

On the construction of the contract so far accepted there was a substantial variation of the contract of guarantee to the prejudice of the respondent without his knowledge for he lost the benefit of all sums paid in by the principal debtor into his number 2 account which was as the ledger shows at times in credit to the extent of as much as £2,500. The respondent's guarantee therefore must be taken to have been discharged.

If on the other hand the contracts should be construed, as the Bank contends, so as to cover any account which Taiwo opened at their Branches the opening of the number 2 account would not necessarily be a variation of the contract and the guarantee being a continuing security would cover all the accounts since ultimately there would be only one debt due from the debtor to the Bank. The various accounts were not however operated as one entity and each had its own independent existence. In the ordinary way there is no objection to a Bank allowing a customer to open a number of accounts but, where there is a guarantor of the customer's indebtedness, his position may be affected. An examination of a copy of the Bank's ledger shows that, in the original account, monthly debits were entered in respect of interest charged on the amounts outstanding by way of overdraft. If all the sums that Taiwo paid into the Bank had been paid into this account this would have produced a reduction of the principal debt and a consequent reduction of the interest. Since this course was not followed the position of the respondent was prejudiced and the amount for which he became liable on his guarantee was increased.

Taiwo as principal debtor was bound under clause 6 of the guarantee to accept a copy of these accounts of the principal contained in the Bank's books of account as conclusive evidence against him of the amount for the time being due to the Bank. He submitted to judgment for the full amount stated in the original account as being due from him to the Bank. By clause 7 of the guarantee the judgment obtained against Taiwo was binding and conclusive against the respondent. On this footing the Bank would be entitled to judgment for the full amount of £10,023 14s. 3d. as claimed and not for the lesser sum of £9,610 14s. 4d. awarded by the trial judge. The Bank is now content to accept the lesser sum as representing an approximation of the amount which would be due if the various accounts had in truth been operated as one. They were not operated as one and the question is whether the respondent has been substantially prejudiced by the way in which the accounts were in fact operated. Their Lordships are of opinion that by acting as it did, outside the terms of the guarantee, the Bank increased the burden on the respondent as guarantor and that the respondent's guarantee was discharged whichever construction of the document is adopted.

They have accordingly humbly advised Her Majesty that the appeal be dismissed.

(90576) Wt. 8069/113 90 10/64 Hw.

In the Privy Council

THE NATIONAL BANK OF NIGERIA LIMITED

v.

OBA M. S. AWOLESI

DELIVERED BY
LORD HODSON

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
HARROW
1964