[2016] QCA 47

COURT OF APPEAL

FRASER JA
PHILIPPIDES JA
BOND J

Appeal No 8714 of 2015
DC No 1203 of 2012

GREGORY ALAN HORSBURGH **Appellant**

v

EMERALD ROCK PTY LTD **Respondent**

BRISBANE

THURSDAY, 3 MARCH 2016

JUDGMENT

FRASER JA: The appellant appeals a District Court judgment against it of an amount exceeding $300,000 in favour of the respondent.

There is no factual dispute in the appeal. The respondent granted a lease for a term of 10 years, commencing on 2 January 2003, with two six year options. The lessee covenanted to pay rent and other charges to the respondent. The appellant and a co-surety executed a "Guarantee & Indemnity" jointly and severally guaranteeing the performance and observance of all of the terms of the lease by the lessee. By November 2010 the lessee was in arrears under the lease in the sum of $342,930. By a "Deed of Surrender of Lease" dated 24 January 2011, the respondent and the lessee agreed to a surrender of the lease on terms and conditions, including an acknowledgment by the lessee that it was indebted to the respondent in the stated sum with

respect to rental and other monies outstanding and owing to the respondent pursuant to the lease for which the respondent was then entitled to issue proceedings and enter judgment for that amount as a liquidated debt. The lessee did not pay that sum to the respondent. In March 2012 the respondent commenced proceedings to recover that sum, together with legal costs and interest, from the appellant and his co-surety. In June 2012 the respondent and the co-surety entered into a deed of settlement under which the co-surety agreed to pay to the respondent $125,000 in full and final settlement of the dispute between them.

At the trial the appellant advanced three contentions in support of his proposition that he was not liable under the Guarantee & Indemnity. The first proposition was that the Deed of Surrender released the lessee from its payment obligations under the lease, and replaced them with an obligation to pay a debt in the stated sum, that being a new debt which was not caught by the Guarantee & Indemnity. The second proposition was that the Guarantee & Indemnity was discharged by the Deed of Surrender because it varied the lessee's obligations under the lease to the prejudice of the appellant without his consent. The third proposition was that the Guarantee & Indemnity was discharged by the Deed of Settlement because it operated to release the co-surety. The trial judge rejected each contention.

The appellant repeats each contention in this appeal.

As to the first contention, that the Deed of Surrender released the lessee from its payment obligations under the lease and replaced them with an obligation to pay a new debt not caught by the guarantee, for present purposes it may be assumed that so much is correct. But, if so, it is not an answer to the claim under the guarantee. On the agreed facts, the appellant's liability under the Guarantee & Indemnity accrued long before the lessor (the respondent) and the lessee entered into the Deed of Surrender. The guarantor – that is to say, the appellant – was not a party to it. As a matter of contract the Deed of Surrender could not discharge the appellant from his accrued liability under the Guarantee & Indemnity. Faced with that reality, counsel for the appellant acknowledged that the first contention must be based upon a principle applicable to guarantees. The proposition then was that because the obligation under the lease

which had led to the appellant's liability accruing under the guarantee had been discharged and replaced by a new liability as between lessor and lessee, a rule applicable to guarantees discharged the appellant from liability.

The appellant acknowledged, correctly, that such rules applicable specifically to guarantees may be precluded by appropriate agreement in the instrument of guarantee. In this case, clause (c) of the Guarantee & Indemnity sets out a series of circumstances which "...will not diminish or extinguish the enforceability of this Guarantee [against the guarantor]."

Paragraph (vi) sets out one such circumstance:

> "Surrender of the Lease by express agreement or operation of law."

Paragraph (xi) of clause (c) sets out another such circumstance:

> "Any abandonment, compromise, or release (in whole or part) of the Lessor's rights against the Lessee".

Clause (f) provides:

> "The Guarantor waives the benefit for the duration of this agreement of all legal or equitable defences available to the Lessee and rules of law or equity relating to contacts of guarantee which would have the effect of re-drawing or extinguishing rights of action by the Lessor against the Guarantor under this Guarantee."

On their face, the combined effect of clause (c)(vi) and (xi) preclude reliance by the appellant upon the effect of the Deed of Surrender in releasing the lessee from its payment obligations and replacing them with a different obligation under the deed from diminishing, or extinguishing the enforceability of the guarantee against the guarantor. The appellant argued that this did not catch the present situation because the effect of the relevant rule about guarantees was not merely to preclude enforceability of an existing liability, but to extinguish the liability itself. In support of that argument the appellant referred to clause (d) of the guarantee. Clause (d) provides:

> "Where the Guarantor is comprised of more than one person, the liability of the persons comprising the Guarantor will be joint and several and the enforceability of this Guarantee against any signatories will not be conditional upon any other person comprising the Guarantor signing this Guarantee or the enforceability of this Guarantee against any or all of the other persons comprising the Guarantor."

The appellant's argument was that clause (d) itself drew a distinction between liability and enforceability, and that this distinction should be recognised as applying also in the paragraphs of clause (c).

That argument, though carefully expressed, is not persuasive. Rather, clause (d) tends to equate the liability of the persons comprising the guarantor with the enforceability of the guarantee. To say, as clause (c) substantially says, that the enforceability of the guarantee will not be diminished or extinguished, is to say, necessarily, that the liability of the persons under the guarantee will remain intact. In my view, clause (c)(vi) and (xi), properly construed, preclude diminishing or extinguishing the enforceability of the Guarantee & Indemnity by the Deed of Surrender.

In reaching this conclusion it should not be thought that I have ignored the established rule that the liability of a surety is *strictissimi juris* and that contractual provisions which are ambiguous must be construed in favour of the surety. See *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561 applied, for example, in *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 256. I can see no ambiguity in these provisions.

Furthermore, the appellant's reliance upon a rule which it submits is a rule relating to guarantees is plainly precluded by clause (f) in these circumstances. The appellant argued that clause (f) did not apply because its introductory words limit its application to the duration of "this agreement". The appellant argued that clause (f) therefore did not apply after the lease was surrendered under the Deed of Surrender. However, clause (f) does not refer to the duration of the lease. The reference to "this agreement" is a reference to the agreement between the guarantor and the lessor made in the Guarantee & Indemnity.

The appellant also argued that clause (f) should not be regarded as applicable because to give that clause its literal effect would be absurd. In support of this proposition the appellant referred to the first part of clause (f), by which the guarantor waives the benefit of legal and equitable defences available to the lessee.

There is, in my opinion, nothing absurd about such a provision. In any event, the relevant part of clause (f) is that distinct and later part under which the guarantor waives the benefit of rules

of law or equity relating to contracts of guarantee, which would have effects relevantly including extinguishing rights of action by the lessor against the guarantor under the guarantee. That is the effect for which the appellant contends in this argument. Clause (f) unambiguously precludes such a contention being accepted.

As to the second contention for the appellant, that the Guarantee & Indemnity was discharged by the Deed of Surrender because it varied the lessee's obligations under the lease to the prejudice of the appellant without his consent, it is convenient to assume without deciding that that was the effect of the Deed of Surrender. Again, however, the appellant necessarily relied upon a rule applicable to guarantees. For the reasons already given, clause (f) precludes the appellant from relying upon this rule. In addition, clause (c)(iv) provides that the circumstances which will not diminish or extinguish the enforceability of the guarantee against the guarantor include "[v]ariation of the terms of the Lease without consent of the Guarantor". That clause, read with clause (c)(xi), also would appear to have the effect of precluding the appellant from reliance upon any variation of the lessee's obligation under the lease effected by the Deed of Surrender. For those reasons this contention could not succeed.

The appellant's third contention was that the Guarantee & Indemnity was discharged by the Deed of Settlement because it operated to release a co-surety who was a "guarantor" under the Guarantee & Indemnity. Again, this invoked a rule applicable to guarantees which would have the effect of extinguishing the respondent's accrued right of action against the appellant. Reliance upon this contention is therefore precluded by clause (f). More expressly, it is precluded also by clause (d). The appellant argued that clause (d) was concerned only with enforceability rather than liability. For the reasons already given, that argument should not be accepted. There seems no rational basis for limiting clause (d) to a case in which what is in issue is an existing liability which has become or would have become unenforceable by virtue of a release of a co-surety.

In any event, the legal principle upon which the appellant relied for the third contention depends upon the construction of the document by which the co-surety was released, that is, the Deed

of Settlement. Under the Deed of Settlement, clause 5 provided that the respondent released the co-surety from all claims, actions, suits etc which the respondent may have had but for the execution of the deed by reason of or arising from the dispute which was evidenced in the District Court proceedings. That is a bar to suit. The appellant relied upon that in support of its proposition that clause 6, the following provision, must amount to a release of liability. In clause 6, the respondent releases the co-surety from all claims, actions, suits etc and also:

> "… releases the Second Defendant from any further liability under the Guarantee from the Second Defendant to the Plaintiff contained in the said Lease."

The appellant argued that in the context of the release in clause 5 that must be construed as a release of liability. These provisions, however, must be understood in the context of the deed as a whole. Clause 4 provides that the Deed of Settlement "must not have any effect upon the District Court action so far as it relates to the first defendant [the appellant]". In *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475 at [41], Beazley, Tobias and McColl JJA observed:

> "It is a question of construction whether a covenant operates as a release or a covenant not to sue. If, upon its proper construction, in the context of the whole document in which the covenant is found, an intention is found not to release all joint and several promisors, that will point to a covenant not to sue. In that case a co-promisor will not be discharged from liability."

The mandatory and emphatic terms of clause 4 of the Deed of Settlement should be regarded as dictating the construction of that deed. That provision manifestly evinces an intention not to release the appellant. I do not accept the appellant's argument that clause 4 could be regarded as aspirational only or as infected by an error of law. Clause 4 should be given effect with the consequence that, construing the deed as a whole, the Deed of Settlement amounts to a covenant not to sue, with the result that the appellant was not discharged from liability.

For those reasons, none of the contentions rejected by the trial judge should be accepted. I acknowledge that the respondent advanced other defensive arguments in the appeal, at least some of which were accepted by the trial judge; but it seems to me that, for the reasons I've given, the answers provided by the provisions in the Guarantee & Indemnity sufficiently explain why the appeal should be dismissed. I would dismiss the appeal.

PHILIPPIDES JA: I agree.

BOND J: I agree.

FRASER JA: The appeal is dismissed.

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FRASER JA: The order of the Court is that the appeal is dismissed with costs. Adjourn the Court.