IN THE SUPREME COURT OF QUEENSLAND No. 3751 of 1981

BETWEEN:

BANK OF NEW SOUTH WALES Plaintiff

AND:

WILLIAM JOHN FLACK First Defendant

AND:

JOHN BEECHEY Second Defendant

AND:

ANTHONY LA ROACH Third Defendant

JUDGMENT: CONNOLLY J.

Delivered the 22nd day of March, 1984.

CATCHWORDS:

Guarantee - alleged representation that guarantee limited in amount - availability of representation as defence to claim for larger amount

Counsel:	Mr Chesterman Q.C.	)
	Miss O'Reilly	) Respondent
	Mr McGill	for Appellants
Solicitors:	Feez Ruthning	for Respondent
	Carter Capner & Co.	for Appellants
Hearing dates:	16th March, 1984.	

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BETWEEN:

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JUDGMENT - CONNOLLY J.

Delivered the day of 1984.

The first and second defendants are sued as guarantors of the account of Adrahil Pty. Ltd. with the Beenleigh branch of the Bank of New South Wales as it then was. On 2nd March, 1984 a Master gave summary judgment against them for $55,122.99 and they appeal against that judgment on the footing that they have a triable issue and ought to have been given leave to defend.

Adrahil was incorporated on 26th March, 1980 and carried on a boat hire business under the name "Coomera Hire Cruises". The company's returns to the Commissioner of Corporate Affairs would appear to have disclosed the third defendant and another person as directors but the first and second defendants each believed themselves to be directors and on 7th August, 1980, the company being in need of accommodation, the three defendants attended on the manager of the bank at the Beenleigh branch. Each of the defendants swore affidavits in relation to this meeting to the effect that if each of them signed personal guarantees in favour of the bank the company would be allowed an overdraft with a limit of $10,000.00. They say further that they were assured by the manager that their liability under the guarantee would not exceed the amount of $10,000.00. The second defendant whose account is somewhat more detailed than that of the others deposes that in accordance with the manager's statements and in reliance on them he and the other two directors then signed a letter in the following terms:—

> "I/We hereby note the amount of my/our advance limit is the sum of $10,000 during the pleasure of the bank and that that limit is in any event to be reviewed on 31/10/80."

It is agreed that the three signatures which appear are those of the three defendants and beneath the three signatures the words "Coomera Hire Cruises" are printed in blocks.

The second defendant swears that immediately thereafter the three defendants executed a guarantee in favour of the bank, in reliance upon the manager's statements. Now the form of guarantee is printed and it would appear to be the bank's standard form. It guarantees monies "already advanced or paid or now or hereafter advanced or paid by the bank to or for the accommodation of or on behalf of" Adrahil. Clause 14 provides that the bank may from time to time increase or otherwise vary the limit if any of advances and accommodation to the debtor at its absolute discretion and without any consent by the guarantors being necessary to the intent that the guarantee shall extend to cover the contracts or arrangements from time to time in force between the bank and the debtor provided that if any limit to the guarantors' liability is stipulated by cl. 9 of the guarantee the guarantors' liability to the bank shall not by reason of cl. 14 exceed the amount of such limit. Now cl. 9 provides that the guarantee is to be security for the whole of the monies secured by the guarantee. Provision is made in the form as printed for a limitation of the liability of the guarantors but that provision has been struck out and the alteration is initialled, the initials being agreed to be those of the three defendants. Thus the instrument of guarantee and the letter of the same date are wholly consistent. The company was given an advance limit of $10,000.00 but, according to the tenor of the instrument, the bank might, without consulting the defendants, or any of them, increase that limit with the result that they would become liable for the full indebtedness of the company on its overdraft.

The question then is whether the assurance by the bank manager, should it be established that such an assurance was given, would afford a defence to the bank's action.

Now it is clear that the manager's assurance could not be set up as a collateral contract if only for the reason that it is inconsistent with cl. 14 of the instrument of guarantee. See Hoyt's Pty. Ltd. v. Spencer (1919) 27 C.L.R. 133 cited by Mason J. in Deaves v. C.M.L. Fire and General Insurance Co. Ltd. (1979) 143 C.L.R. 24 at p. 65. The Master recognised that this was the position and in my opinion rightly so.

That however is not the end of the matter. Depending upon the state of the evidence the bank manager's assurance, assuming again that it be established to the satisfaction of the tribunal of fact, is capable of being regarded as a representation of fact, or at least of mixed fact and law. See Spencer Bower and Turner, Estoppel by Representation (3rd ed.) at p. 40. I was strongly urged by Mr. Chesterman that at the most the statement would have been a representation of law but the authorities do not appear to support this view. As long ago as 1890 in Bank of Australasia v. Adams 8 N.Z.L.R. 119 a bank was held estopped from asserting personal liability against several signatories to a bond, who had been assured by the manager of the bank on executing the bond that they did not thereby bind themselves personally, but were to be taken as signing on behalf of a building society of which they were directors. The basis on which a statement such as is here alleged is actionable or affords a defence is variously stated. Thus in 31 Halsbury (4th edition) paragraph 1016 it is said that statements as to the actual wording or tenor of a document, as to the object or effect of a document, or as to the class, character or description of a document, are all statements of fact and as such are representations. Thus in MacKenzie v. Royal Bank of Canada [1934] A.C. 468 a statement as to a proposed guarantor's right to certain shares, which depended on the outcome of insolvency proceedings against a company, was regarded as plainly a

question of fact. See at p. 476 per Lord Atkin. The passage was cited with approval by the Privy Council in Senanayake v. Cheng [1966] A.C. 63 at p. 84.

Accurate identification of the nature and extent of the obligatio undertaken by a guarantor may well call for the application of legal principles in the construction of the instrument he is asked to sign, but in principle, that would not seem to make a statement as to the extent of his liability other than one of fact. However in Kai Nam v. Ma Kam Chan [1956] A.C. 358 a landlord contending that his tenants were not within the protection of the Landlord and Tenant Ordinance of Honk Kong was not estopped from so contending by reason of his having previously served notices of rent increase under that ordinance. Their Lordships observed that if the documents relied upon could be regarded as containing representations such representations were representations of law not of fact and that they could not therefore found an estoppel. See at p. 367. And cf. the observations of the High Court in Vitosh v. Brisbane City Council [1961] Qd. R. 388 at p. 406.

On the other hand resort may always be had to the principle that insofar as a statement involves an assertion that the maker of it entertains an opinion to that effect, a question of fact is clearly involved. See e.g. Brown v. Raphael [1958] Ch. 636 at p. 641 per Lord Evershed M.R.

It is the fact that fraudulent misrepresentations of law have been held actionable in a number of cases conveniently collected by Kay J. in Public Trustee v. Taylor [1978] V.R. 292 at pp. 297-8. It would indeed be a curious legal system in which a deliberate misstatement as to the legal effect of a document knowingly made by a person with superior knowledge of the class of document involved to a person with no such knowledge and which led to the making of a contract had perforce to be disregarded by the Court so that no relief could be founded upon the misrepresentation.

The appellants in this case must satisfy the tribunal of fact that the assurance was in fact given by the manager of the Beenleigh branch of the bank. Should they surmount this hurdle the next question will be as to the state of mind of the manager. Thus the matter may be tested by asking oneself how it would stand if the manager not only made the statement but believed it to be true. The defendants might well have a basis for seeking rectification by inserting a limitation of liability in cl. 9 on the footing of a common mutual intention up to and including the time of execution of the instrument of guarantee. On the other hand should it emerge that the manager made the statement but with full knowledge of the implications of the alteration to cl. 9, the defendants would at least arguably be in a position to set up a case of fraud. At the worst the defendants could rely on the decision in A. Roberts & Co. v. Leicestershire County Council [1961] Ch. 555 in which a party who had executed a contract knowing that the other entertained a mistaken belief that a term for his benefit had been included when in fact it had not must submit to rectification. Now all of this depends upon the defendants making out their allegation that the bank manager gave them the assurance in question. This is of course a question of fact and it seems to me that the defendants ought not have been shut out by summary judgment from their right to establish at the trial that the assurance in question was given to them. The law is by no means so clear that they should be denied their day in Court. I should emphasize that this is not the type of situation in which the person to whom the representation is made seeks to avoid the instrument which he has executed as against an innocent third party. The appellants in this case do not have to go so far as to establish that the guarantee is not their deed and to satisfy the principles laid down in Gallie v. Lee [1971] A.C. 1004 and Petelin v. Cullen (1975) 132 C.L.R. 355.

The defendants however do not contend that they are not bound by the guarantee to the extent of $10,000.00. Plainly enough therefore the judgment of the Master must

stand as to that sum. Such a conclusion would ordinarly carry an order for costs of the proceedings before the Master. It was however pointed out to me that if the plaintiff recovers no more than $10,000.00, there will be a real question as to the scale upon which the costs should be taxed. Moreover there is the fact that the plaintiff's right to a judgment for $10,000.00 was not conceded before the Master. This factor is relevant to the costs of the appeal from the Master because, on the concession made by the defendants the plaintiff has had on this appeal a partial success. All in all it seems to be the better course to take what I regard as the unusual step of reserving costs of the appeal and of the proceedings before the Master. The order will be: Appeal allowed, judgment of the Master varied by substituting for $55,122.99 the sum of $10,000.00. Reserve costs of proceedings before the Master and of this appeal. Certify for speedy trial. Order that defences be delivered within seven days and that reply and answer if any be delivered within seven days of date of delivery of defences. Order that each party make discovery upon oath within fourteen days of the close of pleadings. Liberty to apply.