IN THE SUPREME COURT OF QUEENSLAND Appeal No. 67 of 1989

FULL COURT

BEFORE:

Mr. Justice Demack

Mr. Justice McPherson

Mr. Justice Williams

BRISBANE, 20 JULY 1990

BETWEEN:

TAUBMANS PTY. LTD. (Plaintiff) Respondent

- and -

PAUL EDWARD LOAKES (Defendant)) Appellant

JUDGMENT

MR JUSTICE McPHERSON: In my opinion this appeal should be dismissed with costs. I publish my reasons.

Mr. Justice Demack agrees that the appeal should be dismissed with costs. With his authority I publish his reasons.

MR JUSTICE WILLIAMS: In my opinion the appeal should be dismissed with costs. I publish my reasons.

MR JUSTICE McPHERSON: It is ordered that the appeal be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal no. 67 of 1989

FULL COURT

BETWEEN

TAUBMANS PTY. LTD. Plaintiff (Respondent)

AND:

PAUL EDWARD LOAKES Defendant (Appellant)

DEMACK J

McPHERSON J

WILLIAMS J

Reasons for judgment delivered by Demack J, McPherson and Williams JJ on 20th July 1990.

"APPEAL DISMISSED WITH COSTS"

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 67 of 1989

BETWEEN:

TAUBMANS PTY. LTD. (Plaintiff) Respondent

AND:

PAUL EDWARD LOAKES (Defendant) Appellant

JUDGMENT - DEMACK J.

DELIVERED the Twentieth day of July 1990.

In this appeal I have had the advantage of reading the reasons for judgment prepared by both McPherson J. and Williams J. I agree with them that the appeal should be dismissed.

The argument on appeal took the Court to a cluster of nineteenth century decisions which have led to the formulation of statements in the texts which seem to me to be out of place today.

Mr Heyworth Smith, for the appellant, based his argument on the proposition:—

> "A surety is not bound if the instrument when signed by him is drawn in a form showing himself and another as intended joint and several guarantors and any intended surety does not sign."

This is a direct quotation from Rowlatt on Principal and Surety 4th ed.) 182. A similar statement is made in O'Donovan and Phillips, The Modern Contract of Guarantee, 71. The authorities cited in support of this proposition include Hansard -v- Lethbridge (1892) 8 T.L.R. 346.

I would be reluctant to see the law stated in such absolute terms, if the result is that the clear intention of the parties at the time the guarantee is signed is frustrated by a rule of which they are blissfully unaware.

I do not think that the cases warrant the stating of the rule in the absolute terms for which Mr Heyworth Smith contended. Both the judgments of McPherson J. and Williams J. demonstrate this. I do not think it is necessary in this appeal to attempt some different formulation. I prefer the approach of Travers J. in Walter and Morris Ltd -v- Lymberis (1965) SASR 204 by which he sought to give

commercial efficacy to an agreement which was not consistent with the written form that was signed. This means that each case is to be decided in accordance with the intention of the parties.

I do not think it is necessary to refer to the evidence which both of my brothers have set out. It is enough to say that the evidence supports the judgment which the learned District Court Judge pronounced.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 67 of 1989

FULL COURT

Before the Full Court

Mr Justice Demack

Mr Justice McPherson

Mr Justice Williams

BETWEEN:

TAUBMANS PTY. LTD. (Plaintiff) Respondent

- and -

PAUL EDWARD LOAKES (Defendant) Appellant

JUDGMENT - McPHERSON J.

Delivered the Twentieth day of July, 1990.

CATCHWORDS

Guarantee and indemnity - Construction and effect - Joint and several guarantee - Signature by one surety only - Whether surety bound.

Counsel: A. Heyworth-Smith for the Appellant.
Sullivan for the Respondent.

Solicitors: Messrs Robin Black & Co. for the Appellant.
Messrs. C.A. Sciacca & Associates for the Respondent.
Hearing Date: 21 June, 1990.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 67 of 1989

FULL COURT

BETWEEN:

TAUBMANS PTY. LTD. (Plaintiff) Respondent

- and -

PAUL EDWARD LOAKES (Defendant) Appellant

JUDGMENT - MCPHERSON J.

Delivered the Twentieth day of July, 1990.

This is an appeal from a decision of his Honour Judge Healy in the District Court at Brisbane giving summary judgment for the plaintiff for $26,024.40 with interest and costs. The action was brought on a written contract or instrument (ex. "D") that bears the date 1 November 1988, by which the defendant had, it was alleged, agreed to guarantee the indebtedness of Rabspar Pty. Ltd. for paint supplied by the plaintiff to that company between 1 November 1988 and 31 January 1989. At the hearing of the application for summary judgment, at which the defendant was represented by counsel, his Honour allowed the plaint to be amended to allege that the written contract of guarantee ex. D was dated 6 January 1989. No point is made on this appeal about the fact that the amendment was allowed.

On the application the only material before his Honour consisted of two affidavits, together with exhibits, sworn by the plaintiff's credit manager R.T. Scott. The material discloses that Rabspar Pty. Ltd., trading as John Rumble Painting Contractors, made application in writing dated 1

November 1988 to the plaintiff to open an account with the plaintiff. The names of the directors of Rabspar were given in the written application as Paul Edward Loakes (who is the appellant defendant) and John Eric Rumble; and the application, which was signed by the defendant, contains a request for a credit account with the company for approximately $19,000 per month, the account to be settled within 30 days. Mr Scott deposes that in early January 1989 he had a conversation with the defendant, who requested that an extension be given to the credit limit allowed to the company. Scott told the defendant that such an extension would be allowed only if he signed a personal guarantee to pay for goods already supplied and to be supplied to the company. In consideration of the plaintiff's agreeing to raise the company's credit limit, the defendant agreed to give the guarantee.

The defendant attended Mr Scott at the plaintiff's premises on 6 January 1989 and signed the written guarantee ex. D the effect of which was explained to him by Scott, who witnessed the defendant's signature on the instrument. On 24 February 1989 Scott had a telephone conversation with the defendant concerning money owing to the plaintiff. The defendant said he had got into trouble painting houses and was losing money; but that he was prepared to pay $500 per week until the debt was paid out. On 2 March 1989 the plaintiff received a letter dated 28 February. It is signed by the defendant and by Rumble, each of whom describes himself as “director”, under a letterhead bearing the name “John Rumble Contractors” and the address of the company. The letter states that the company “will forward $500 per week, until the account is finalised in full”.

The money was not paid as promised. On 21 March 1989 the plaint in this action was issued. It was followed on 5 May 1989 by entry of appearance and defence. Apart from denials, the only matter of defence pleaded is that execution of the guarantee agreement ex. D was obtained without the defendant knowing that the document he was executing was in the form or had the effect of a guarantee.

On appeal the defendant relied on another ground not taken at the hearing of the summary judgment application. It is that the agreement or instrument of guarantee ex. D contemplates that it would be executed by John Eric Rumble as guarantor as well as by the defendant. Rumble never executed it in that capacity. His name and address appear below that of the defendant in a space in the form alongside which is the marginal note "insert full name and address of Guarantor/s". Although Rumble never signed the document in that capacity, his signature (or what appears to be his signature) appears on the document over the impression of the corporate seal of Rabspar Pty. Limited. As such its function is to authenticate affixing of that seal.

There was no occasion for the company Rabspar to execute the instrument ex. D, whether as guarantor or at all. It had incurred the indebtedness and was going to incur more. As such it was already liable or would be liable for the price of the goods delivered to it. It was not the intention that it should guarantee its own indebtedness, and its doing so was quite pointless. Quite plainly, impressing the corporate seal on the document was done in error. For the plaintiff respondent on appeal, Mr Sullivan of counsel submitted that the authenticating signature of Rumble on ex. D could in these circumstances be looked to as his signature for the purpose of undertaking the liability of a guarantor as contemplated by the instrument. There is a surprisingly large number of authorities in which a signature given in one capacity has been held capable of being treated as available for some other purpose. The authorities are collected in an unreported judgment of Connolly J. in Sunbird Plaza Pty. Ltd. v. Maloney (1986 Mar. 19; Qld. Sup. Ct.), to which we were referred by Mr Sullivan. Persuasive though they are, I consider it possible to resolve this appeal without resort to them.

A guarantee may be given conditionally. It may be executed subject to a condition that it is to be binding

only if another or others also execute it as guarantors. A condition to that effect may be express, or it may be capable of being inferred as the common intention of the parties. In judging whether there is such an intention, a cogent factor may be that the instrument of guarantee is in a form or in terms that imply it is to be executed by more than one guarantor who are to be jointly and severally liable. The underlying reason for regarding that factor as having, in the case of an instrument of guarantee, something more than ordinary importance is that, without execution by the other guarantor or guarantors, the signatory loses his right to contribution from the others as co-sureties in the event of his having to pay.

In some textbooks and judgments it is possible to find the matter stated in a broad and unqualified way almost as if to suggest that an instrument executed in the form referred to raises an irrebuttable presumption that all must sign before any is bound. That would make it tantamount to a rule of law to that effect. But that is plainly not so, as can be seen from the extract from Coyte v. Elphick (1874) 22 W.R. 541, at 543-544, part of which was referred in this Court in Stramit Industries Ltd. v. Reinhard [1985] 1 Qd.R. 562. "There is", said Blackburn J. in the former case:—

> "no authority for saying that because a deed contemplates several parties joining as co-sureties, therefore one of them does not bind himself if he signs unless the others also sign. There is no authority for such a contention, and the defendant must show something in the deed which indicates that such was the intention of the parties....
>
> If I say as a matter of law, where there are more than one surety on the face of a deed, one is not bound by his signature unless the others sign, then the fact of Mrs Rea not having signed would be a good defence. But that is not the law..."

What his Lordship said there shows that it is the intention of the parties that is critical. He also said that the defendant must show something in the deed that

indicates such intention. That implies, as indeed is accepted by O'Donovan & Phillips: The Modern Contract of Guarantee, at 72, that the burden of proof is on the guarantor to establish the relevant condition.

The instrument of guarantee itself is, however, not the only place to which resort may be had in order to discover the relevant common intention. It affords evidence but is not necessarily conclusive either for or against the existence of that intention. Evidence from other sources is also admissible : see Walter & Morris Ltd. v. Limbourne [1965] S.A.S.R. 204.

In Hansard v. Lethbridge (1892) 8 T.L.R. 346, at 347, Lord Esher M.R. is reported as saying:—

> "Where a surety had executed a document in the belief derived from the form of the document that it would be executed by all the sureties named as such in the document as persons who would sign, he would be relieved from his obligation if all the others did not sign."

It can be seen that the learned Master of the Rolls regarded the relevance of the form of the document as providing support for a belief on the part of the signatory as to the execution of the instrument by others; and in Stramit Industries Ltd v. Reinhard [1985] 1 Qd.R. 562, the guarantor's belief with respect to that matter was regarded by the Court as relevant. It may be asked why this should be so. Private belief, like any other mental reservation or impression on the part of one party, is ordinarily excluded in interpreting contracts, the more so if the contract is embodied in a written instrument. Why should such a belief be relevant at all?

The answer lies, I think, in the principle that a promisor is not bound to fulfil a promise in a sense in which the promisor knew at the time it was not intended : see Smith v. Hughes (1871) L.R. 6 Q.B. 597, at 610, per Hannen J. If in a case like this the signatory guarantor, basing himself on the form of the instrument, believed that

it was not intended to be binding until others had also signed as sureties; and if the creditor realises that the signatory holds that belief, he is not entitled to enforce the guarantee against the signatory alone if the others do not sign. To do so would be to bind the signatory to fulfil his promise as guarantor in a sense in which it was known he did not intend it. In those circumstances the one who signed is entitled to have the contract rectified : cf. A. Roberts & Co. Ltd. v. Leicestershire County Council [1961] Ch. 555; or to be relieved from it in equity : Evans v. Bremridge (1855) 25 L.J.Ch. 102; or simply to say it is not binding on him : James Graham & Co. (Timber) Ltd. v. Southgate-Sands [1986] Q.B. 80.

Here the defendant on the application for summary judgment offered no evidence at all about the state of his belief whether derived from the form of ex. D or otherwise. It is not, however, necessary in this instance to identify the precise juristic basis for Lord Esher's remarks in Hansard v. Lethbridge, or even to hold that the defendant has the onus of proving that the contract of guarantee was not intended to be binding unless Rumble also signed it. I say that because in the second affidavit of the plaintiff's credit manager, read at the hearing for summary judgment, Mr Scott deposed that immediately before the defendant signed the instrument of guarantee ex. D, he explained to him that "when he [the defendant] signed such guarantee he would become personally liable for all debts incurred by Rabspar Pty. Ltd...". This statement has never been contradicted by the defendant. It is true that the second affidavit of Mr Scott was filed by leave only on the day of the hearing; but the defendant was represented at the hearing by counsel; no adjournment was sought in order to meet this further material; and on appeal no application was made to adduce further evidence with a view to contradicting or qualifying it. Having regard to the fact that the point was not even raised until the appeal was instituted, it is most unlikely that any such application would have succeeded. However that may be, the evidence now stands as it did before the chamber judge in the District

Court. That being so, the plaintiff has successfully discharged any onus that may be supposed to lie upon it of showing that the contract of guarantee was intended (and, moreover, known by the defendant to be intended) to bind him as soon as he had signed it, irrespective of whether or not Rumble also signed it.

The appeal should be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 67 of 1989

Before the Full Court

Mr. Justice Demack

Mr. Justice McPherson

Mr. Justice Williams

BETWEEN:

TAUBMANS PTY. LTD. (Plaintiff) Respondent

- and -

PAUL EDWARD LOAKES (Defendant) Appellant

JUDGMENT - G.N. WILLIAMS J.

Delivered the 20th day of July, 1990.

CATCHWORDS:

Guarantee - whether or not binding because not signed by person who on face of document was intended co-surety - held intention critical - sole guarantor bound - Stramit Industries Ltd. v. Reinhardt (1985) 1 Qd. R. 562 and Hansard v. Lethbridge (1892) 8 T.L.R. 356 explained.

Counsel: A. Heyworth-Smith for Appellant.
V. Sullivan for Respondent.
Solicitors: Robin Black & Co. for Appellant.

C.A. Sciacca & Associates for Respondent.
Hearing date: 21st June, 1990.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 67 of 1989

FULL COURT

BETWEEN:

TAUBMANS PTY. LTD. (Plaintiff) Respondent

- and -

PAUL EDWARD LOAKES (Defendant) Appellant

JUDGMENT - G.N. WILLIAMS J.

Delivered the 20th day of July, 1990.

The respondent obtained summary judgment in the District Court against the appellant in the sum of $26,024.40 together with interest and costs. The action was bought on a guarantee allegedly given by the appellant on 6th January, 1989. The appellant did not place an affidavit before the Chamber Judge dealing with the merits, but counsel on his behalf sought to "otherwise satisfy" the Judge that the appellant had "a good defence to the action on the merits" (r. 153). The principal ground of appeal argued was that the appellant was not bound by the terms of the document he signed because it had not been duly executed by one Rumble who was on its face an intended co-surety.

The plaint, as originally filed, alleged that the guarantee sued upon was executed on 1st November, 1988, but on the return of the judgment summons the respondent was granted leave to amend by deleting that date and inserting 6th January, 1989. The appellant was represented by counsel at that hearing, and nothing was said on appeal to indicate that the appellant was in any way unfairly prejudiced by the making of that amendment at that stage.

Rabspar Pty. Ltd. ("Rabspar") carried on a painting contracting business. Its directors were the appellant and one John Eric Rumble. The respondent was a supplier of goods and services usually required by painting contractors. On 1st November, 1988 Rabspar applied to open a credit trading account with the respondent. That application was signed by the appellant on behalf of the company. The application form was also signed by a representative of the respondent, R. McNaught, on that date.

It appears that on the same day a form of guarantee was produced, inferentially by McNaught, and some details were inserted in blank spaces on the form. The document is addressed to the respondent, and as then completed it provided that in consideration of the respondent forbearing to sue Rabspar for moneys due, and continuing to supply goods and services to that company on credit, the appellant (Loakes) and Rumble "hereby guarantees the due and punctual payment" to the respondent by Rabspar for goods supplied. The document contained a clause providing it was a continuing guarantee in terms of which each of the appellant and Rumble were to be jointly and severely liable. The date, 1st November, 1988, was inserted as the date of execution. The form then contained provision for it to be executed by one or more individuals as guarantors and/or by one or more companies as guarantors. According to the material before the learned Chamber Judge what happened on 1st November 1988 was that Rabspar executed the document as the guarantor; its seal was affixed over the signatures of the appellant and Rumble. The appellant then signed a clause as secretary of Rabspar asserting that the seal was affixed in accordance with the company's Articles of Association.

It was clearly meaningless for the debtor company to execute the document as guarantor; the terms did not contemplate that the principal debtor should also assume the obligations of a guarantor.

Counsel for the respondent argued on the appeal that it was open to the Court to disregard the seal and to conclude that the signatures beneath the seal bound the appellant and Rumble personally as guarantors. It is possible for a court to reach such a conclusion on the evidence, particularly in circumstances where the company seal can be ignored (see, for example, N.E.C. Information Systems Australia Pty. Ltd. v. Linton, unreported, Supreme Court New South Wales, No. 16723/84, Wood J., 17.4.1985, at pp. 17-18; Sunbird Plaza Pty. Ltd. v. Maloney, unreported, Supreme Court Queensland, No. 1908/84, Connolly J., 19.3.1986, at pp. 7-12; Dutton v. Marsh (1871 L.R. 6 Q.B. 361). But it was conceded that such argument was not addressed to the Judge below, and it is by no means clear that the necessary findings of fact to support such a conclusion could be made on the hearing of a judgment summons. For those reasons I would not dispose of this appeal by considering such argument.

It appears that Scott, the Credit Manager of the respondent, did not regard what was done on 1st November, 1988 as evidencing a guarantee which was binding on either the appellant or Rumble; that is the only inference that can be drawn from statements in each of his affidavits read before the Chamber Judge.

The appellant had a conversation with Scott in early January 1989 and asked for an extension to the credit limit for Rabspar. The uncontested evidence from Scott is that he then advised the appellant that "the credit limit would only be extended if a persona" guarantee was signed by him to guarantee payment" for all goods supplied to that date and for all goods to be supplied in the future to Rabspar. Subsequently on or about 6th January, 1989 the appellant came to Scott's office and Scott explained to him the effect of the personal guarantee. It was on that date that the appellant signed the document as guarantor. The uncontested evidence from Scott is that the document already bearing the date 1st November, 1988 and the seal of Rabspar was used. Underneath the purported execution by the

debtor company, the appellant placed his name in a section designated for use where the guarantor is an individual and then placed his signature opposite that. The appellant's signature was then witnessed by Scott.

Further, the uncontradicted evidence of Scott is as follows:—

> "immediately prior to the defendant signing that guarantee, I explained to him that when he signed such guarantee he would become personally liable for all debts incurred by Rabspar Pty. Ltd., and that should they default in payment, we would be able to sue him personally for the debts of the company."

The document after that execution by the appellant still showed, as written in on 1st November, 1988, the names of the appellant and Rumble as the proposed guarantors.

The point taken on appeal was that on its face the instrument was intended to create joint and several liability in the appellant and Rumble, and that as the instrument was not signed by Rumble it was not binding on the appellant. It was frankly conceded that that specific point was not raised before the Chamber Judge.

Counsel relied heavily on the decision of this Court in Stramit Industries Limited v. Reinhardt (1985) 1 Qd. R. 562 and the passage approved and applied therein from Rowlatt on Principal and Surety (4th ed.) 182, which provides:—

> "On similar principles a surety is not bound if the instrument, when signed by him, is drawn in a form showing himself and another or others as intended joint and several guarantors, and any intended surety does not sign. It is immaterial by whom the instrument was prepared, or whether the surety omitted was solvent or not. In such cases the creditor must show that the surety consented to dispense with the execution of the document by the other or others."

The judgment in Stramit reviews a number of relevant authorities, and it will be necessary to look at them again. In my view vide it is the intention of the party signing the guarantee which is of critical importance, and the form of the document signed can never of itself be conclusive. The form of the document will often be relevant when the intention of a party signing it is in issue, and it may also be appropriate for the court to consider on that question other surrounding circumstances. Those propositions are derived in my view from a number of authorities, and if the statement from Rowlatt has wider import then to that extent it must be rejected.

The facts in Stramit established that the purported guarantor signed with the belief (primarily based on the form of the document) that both named guarantors had to sign before the agreement was effective; his statements quoted at 563 were the only evidence as to that. The document was in a form prepared by too creditor and with respect to it Matthews J. said at 563:—

> "From the form of exhibit 1 it could clearly be said that if a person who was one of two directors of a company read it, he would understand that the respondent required guarantees from all of such company's directors and that in the event that this term was not satisfied, might refuse credit; but he could also understand that his liability as a guarantor was to be joint and several with that of his fellow director."

The Full Court in Stramit allowed the appeal by the surety and the critical reasoning is to be found at 566 of the judgment:—

> "With respect to His Honour, I think that in dealing with the facts His Honour was not applying the principle which emerges from Hansard v. Lethbridge & Ors.; that the respondent did not make it a condition of granting credit that all directors give guarantees and that the appellant did not offer his - personal guarantee on the express term that his co-director also give a guarantee, are not answers to the equitable proposition which is comprehended by the question which, in such a case, one

> should ask. From the form of the document did the appellant understand that he would be one of two known sureties? ... In the matter with which we are concerned, and in view of the two documents to which I have referred and the naming of the directors in the application part of it, I think it sufficiently emerges that there were, so far as the appellant was concerned, to be two named directors as sureties."

In order to evaluate that reasoning it is necessary to refer to the authorities, including Hansard, considered by the court in Stramit.

Evans v. Bremridge (1856) 8 De.G.M.&G. 100; 44 E.R. 327 is the case in which the principle was first discussed. There, as was known to Evans, the creditor required a guarantee from two responsible persons. The debtor requested Evans to be one of the two, and named the person who would be the other. On that basis Evans placed his signature on the document, believing that the second signature would be duly obtained. In fact it was not. The court held that Evans was not liable. In the view of Knight Bruce L.J. the creditor was seeking to enforce a contract into which the surety had not entered. Turner L.J. agreed with that observation and went on to say:—

> "I concur in thinking that as the plaintiff entered into the obligation upon the understanding and faith that another person would also enter into it, he has a right in equity to be relieved, on the ground that the instrument has not been executed by the intended co-surety."

The use of the word "understanding" is, in my view, significant. On the facts it appears clear that the "understanding" to which the surety was a party involved not only the debtor but also the creditor; it was generally the understanding of all parties that the loan would only be forthcoming if two responsible persons became sureties.

The next decision in point of time was that in Coyte v. Elphick (1874) 22 W.R. 541. The question came before the court on demurrer, and it was conceded that certain facts

included in the plea were not proved at trial. As the report notes at 543 it was "argued, therefore, as if it had alleged only that Jane Rea had not executed the deed, and the ground of demurrer had been that her execution of the deed was not a condition precedent." Cockburn C.J. merely said as to the plea in question: "It is good as it stands because on the facts stated by the plea the deed was not to become effectual unless the different parties severally executed, and in fact Mr. Rea did not Blackburn J. dealt with the matter as follows:—

> "As to the fifth plea, if in fact the deed (as the plea alleges) was not to be operative until Mrs. Rea had executed, that would be a good defence. It would amount to a plea of non est factum. But Mr. Wood contends that rejecting all but the averment that Mrs. Rea did not in fact execute the deed, still the plea is good but I do not think that that is so. There is no authority for saying that because a deed contemplates several parties joining as co-sureties, therefore one of them does not bind himself if he signs unless the others also sign. There is no authority for such a contention, and the defendant must show something in the deed which indicates that such was the intention of the parties ... I think the agreement is between the mortgagor and the mortgagee that the mortgagee shall lend the money if three sureties are found for its repayment over and above the security of the mortgage. If, I say, as a matter of law, where there are more than one surety on the face of a deed, one is not bound by his signature unless the others sign, then the fact of Mrs. Rea not having signed would be a good defence. But that is not the law, and unless either of the parties expressly stipulated that one surety should not be bound unless the others were, or the defendant delivered the deed as an escrow, the fact that she did not sign is no defence."

With respect it seems to me that the latter observations of Blackburn J., which were cited by Matthews J. in Stramit, were obiter, and given the way in which the question arose for determination little weight should be attached to them. Of more importance, in my view, is the earlier reference to the "intention of the parties". The intention of the parties can, in my view, be established in

many ways, and "express stipulation" is but one means by which such intention may be made manifest. Looked at in that light the reasoning in Coyte supports the proposition that the form of the document will be relevant to the determination of the question of intention, but will not necessarily be determinative thereof.

To similar effect, in my view, is the decision of the Full Court in The City Bank v. Reynolds (1888) 5 W.N. (N.S.W.) 64. The creditor sued upon a guarantee executed by five directors to secure the repayment of moneys advanced to the debtor company. At all material times there were seven directors of the debtor company and the creditor had agreed in writing to make the loan requested upon joint and several guarantees being received from all seven directors. Evidence accepted at the trial established that the creditor advanced the money at the express request of four of the defendants that such should be done before the signatures of the remaining two directors were obtained. Because of that conduct, judgment stood against the four directors who made that express request. But the fifth signatory was not on the evidence a party to that express request, and in consequence judgment against him was set aside. As was said in the judgment at 65 when that surety "called at the bank and signed the guarantee before any of the others did so, he must have done so on the faith and understanding that no money would be advanced except on the terms mentioned in the letter", namely that all seven directors would have to give guarantees. Again, in my view, it is significant that the word "understanding" was used. In the context that clearly meant an understanding between the surety and the creditor.

I turn now to Hansard v. Lethbridge (1892) 8 T.L.R. 356, which appears to be the critical authority. The creditor sued upon a guarantee signed by a number of persons and obtained judgment against each of those who had signed. The relevant defence was that the signatories "agreed to sign the indenture, and did sign it, upon the condition that Sir Henry Isaacs also signed it". The

evidence established that Isaacs did not sign, and it was contended that therefore the signatories were not liable. The defence was unsuccessful at the trial because the jury found that one of the signatories (Bottomley) agreed to dispense with the signature of Isaacs and had the authority from the others to so agree. The signatories, other than Bottomley successful appealed; it was held in the Court of Appeal (Lord Esher M.R., Fry and Lopes L.JJ.) that there was no evidence that the other signatories gave Bottomley authority to dispense with Isaacs' signature. But the Court went on to consider the question of law. Relevantly, the Master of the Rolls said:—

> "Where a surety had executed a document in the belief derived from the form of the document that it would be executed by all the sureties named as such in the document as persons who were to sign, he would be relieved from his obligation if all the others did not sign. This document on its face required all the sureties to sign. . . . When this document was laid before the defendants, it appeared upon its face that all the directors were to sign. They had a right to insist upon all signing before becoming liable themselves. They had a right to have the signatures of each other for the purpose of contribution, and the plaintiff must have known that they had that right, because upon the face of the document he saw that all were to sign. The plaintiff could not do away with that right without their consent. There was no evidence that the defendants gave up that right."

The report records Fry L.J. as saying that:

> ". . . knowledge that all the sureties were to sign the document might be communicated to the obligee either by words or by the form of the instrument itself. Here the form of the instrument showed that the intention was that all the directors should sign it, and therefore knowledge of that in the obligee must be assumed".

The reference to the creditor knowing of the guarantor's right to have all sign is critical; It is tantamount to saying that there was an "understanding" - to use the term found in other judgments - between those who

signed and the creditor that the signatures of all named as sureties were required before any were bound. On that analysis Hansard is not authority for the proposition that the mere form of the document may be decisive. On the evidence of that case, the form of the document placed in the context of the surrounding facts led to a conclusion that there was an understanding between the signatories and the creditor that no surety would be bound until all those named had signed.

The passage from Rowlatt quoted above is claimed to be based on the reasoning in Hansard; insofar as it might be taken as going beyond that decision as I have analysed it, then, in my view, the statement is too broad. I say that notwithstanding the observation of Walton J. in The National Provincial Bank of England v. Brackenbury (1906) 22 T.L.R. 797 that that passage accurately states the principle. I think it interesting that Walton J. did not consider there to be any difference between the formulation of principle in Evans v. Bremridge and in Hansard. It seems to me that on the evidence in Brackenbury the "understanding" at all material times was that Johnson's signature should be obtained; on that basis the actual decision was undoubtedly correct.

The relevant principle has been considered by the Full Court in South Australia: Walter & Morris Ltd. v. Lymberis (1965) S.A.S.R. 204. The defendant signed a guarantee of payment for goods supplied to a company of which he was managing director. The guarantee was in a form appropriate to a joint, and not to an individual guarantee; but on the evidence it was held that when he signed the guarantee, the director knew that no other person was intended to be liable jointly with him. Travers J. at trial observed:—

> "This creates a very different situation from that which exists where A says in effect, 'I agree that together with B, C and D I will guarantee'. The intention of both parties, that is to say, Wilson on behalf of the plaintiff, and the defendant personally, at the relevant time was that the defendant alone would be the guarantor.

> In my opinion, in those circumstances, notwithstanding the expressions importing plurality, I can and should read the document in such a way as to give it commercial efficacy." (208)

Napier C.J. in the Full Court reiterated that there was no suggestion that there was ever any intention of any guarantor other than the defendant joining in the guarantee. He went on to say (209):—

> "in these circumstances there can be no doubt or uncertainty with respect to the intention with which the document was signed. But the argument addressed to us is that it is expressed in terms which cannot be applied literally. It purports to be a guarantee by more than one person, and the contention is that the Court has no authority to disregard the words used, and to give effect to the intention with which the document was signed by the defendant, and accepted, and acted upon, by the plaintiff company."

Later at 211 he said:—

> "I think that the argument addressed to us, upon cases in which guarantees have been signed upon the understanding that other persons would join in the engagement, are beside the point. In such circumstances it is a condition precedent to the liability of the guarantor that all who are to participate with him, should be likewise bound, and, if that condition is not satisfied, then the guarantee fails to become effective. But these cases are nothing to the point in the present case, in which the finding of the learned Judge is that the defendant well knew what the document was when he signed it, namely, a document which was to operate as his personal guarantee to the plaintiff for the price of goods, which would not otherwise have been supplied to the defendant's company."

It must be stressed, as was adverted to in the South Australian case, that in many instances the document is no more than a note or memorandum satisfying s. 56. of the Property Law Act 1974 (or its equivalent), and that the substantive promise guaranteeing the liability of the debtor is established by the antecedent verbal contract. If the promise is that only one will provide surety then I

cannot see how that promise can be rendered unenforceable merely because the memorandum is recorded in a form of document which is equally capable of applying to one or more sureties. The memorandum has, of course, to record the essential terms of the promise, and if there were major discrepancies between the two then there may in truth be no memorandum of the promise; but it was not contended that such was the case here.

The actual decision in Stramit was clearly correct, particularly given the oral evidence of the guarantor to which I have already referred. Given the authorities to which the Full Court in that case referred, in my opinion the remarks quoted above from the judgment should be read as saying no more than that the understanding on which the document was signed was that it was only to be binding when executed by the second surety, and that such understanding was, at least in part, derived from the form of the document.

The passage from Rowlatt to which reference has been made must be read in the light of what I have said. In my view that statement is not inconsistent with the principle as I have formulated it; particularly if emphasis is placed on the word “intended” in Rowlatt's formulation there is no necessary inconsistency.

The respondent's case is that on 6th January, 1989 an oral agreement or understanding was reached between Scott and the appellant that credit would only be extended if the appellant then and there signed a memorandum evidencing his own promise to guarantee payment of the company's indebtedness. The case for the respondent as put to the Chamber Judge was that the agreement was that the appellant alone should become the guarantor; no material was placed before the Judge in opposition to that contention. It follows, in my view, that on the material before him, unchallenged as it was, the learned District Court Judge was entitled to make the orders which he did. I can see no

reason for reversing his decision in the light of submissions made to this Court.

I would dismiss the appeal with costs.