IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA666/2017
[2019] NZCA 401

BETWEEN	CHRISTINE ANNA ELIZABETH REGAN AND MARK JEFFEREY TUFFIN Appellants
AND	BRYCE BROUGHAM First Respondent
	RACHAEL CHRISTINA DEY Second Respondent

Hearing:	25 July 2019
Court:	French, Collins and Wild JJ
Counsel:	F A King and M A Thomson for Appellants J K Mahuta-Coyle for First Respondent No appearance for Second Respondent
Judgment:	2 September 2019 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Judgment is entered for the appellants against the first respondent for $50,000 together with interest on that sum from the date of demand (5 October 2012) to the date of payment at the applicable rate(s) stipulated in the Term Loan Agreement.

C The first respondent must indemnify the appellants for their reasonable costs of this appeal and of the application for leave to appeal.

D Costs in the District Court and High Court are reserved in terms of [36] of this judgment.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This is a second appeal, by leave.[1] It is against a judgment of Simon France J delivered in the High Court at Wanganui on 24 May 2017.[2] The issue is whether the first respondent, Mr Brougham, guaranteed a loan. Agreeing with the judgment of Judge Ross in the District Court,[3] Simon France J held he had not.

Facts

[2] On 15 February 2010 the appellants entered into a Term Loan Agreement (the Agreement) whereby they lent $50,000 to B & R Enterprises Ltd (the Borrower). The Agreement was on the printed Auckland District Law Society form. The first page of the Agreement set out the parties to, and the guarantors of, the loan in the following way:

Lender(s) (We/us):	**Winchester Trust (Trustees - Rachael Christina Dey and Christine Anna Elizabeth Regan)**
Physical address:	**c/- 42 Golf Road Paraparaumu 5032**
Postal address:	**PO Box 471 Paraparaumu 5254**
Fax:	
Email:	**rachdey@xtra.co.nz**

Borrower(s) (You):	**B & R Enterprises Ltd**
Physical address:	**42 Golf Road Paraparaumu 5032**
Postal address:	**42 Golf Road Paraparaumu 5032**
Fax:	
Email:	

Guarantor(s): ~~**Covenantor(s):**~~	**Rachael Christina Dey and Bryce Brougham**
Physical address:	**42 Golf Road Paraparaumu 5032**
Postal address:	**PO Box 471 Paraparaumu 5254**
Fax:	
Email:	**rachdey@xtra.co.nz**

1 *Regan v Brougham* [2018] NZCA 157.
2 *Regan v Brougham* [2017] NZHC 1091.
3 *Regan v Brougham* [2016] NZDC 18553.

[3] The second page of the Agreement contained the terms of the agreement to repay, essentially "You agree that … you will repay all amounts that you borrow from us …". Conditions precedent to advance and the signatures of the parties and the guarantor followed in this format:

Conditions precedent to advance

Before we can make the first advance to you under this contract:

(a) you must have signed this agreement together with all of the securities;

(b) the conditions set out in the Annexure Schedule (if any) and any other pre-settlement requirements that we ask you to complete must have been completed to our satisfaction; and

(c) if any person is named in this agreement as a guarantor, the guarantor must have signed a deed of guarantee and indemnity in the form required by us and the conditions precedent to the acceptance of that guarantee (if any) must have been completed to our satisfaction.

Signed

R Dey. 15/2/10

Signed by the ~~borrower~~/director/~~authorised signatory~~ Date

Signed by the ~~borrower~~/director/~~authorised signatory~~ Date

15/2/10

Signed by the guarantor/~~covenantor/director/authorised signatory~~ Date

15/2/10

Signed by the guarantor/~~covenantor/director/authorised signatory~~ Date

[4] The first of those signatures is that of the second respondent, Ms Dey, as a director of the Borrower. The next two signatures are those of Mr Brougham. It is common ground that Mr Brougham's first signature was in his capacity as the other director of the Borrower (although it is on the wrong signature line), and his second signature is as guarantor (and is on the correct signature line).

[5] At trial in the District Court there was some disagreement in evidence between Ms Dey and Mr Brougham as to how Ms Dey came to be named in the Agreement as a guarantor, but did not sign as a guarantor. We deal with this in [15] and [16] below.

[6] As might be expected, the later parts of the Agreement specified all the terms of the loan including: the principal sum lent ($50,000); the term expiry date and the repayment date (both upon written demand to the Borrower); interest commencement and payment dates (1 February 2010 and the first days of February and July if demanded in writing within six months of the due date commencing with a first payment on 1 July 2010) and the lower and higher interest rates (respectively 3 per cent and 8 per cent above the BNZ floating rate for residential home loans current at the time of demand). The Agreement contains other clauses but they are ancillary and not in issue. Clause 12 stipulated the costs payable by the borrower. We revert to that in [32] below.

[7] The loan principal was advanced. The Borrower made a number of interest payments before it failed and was put into liquidation. When the loan, interest and costs proved irrecoverable from the Borrower, demand was made on Mr Brougham as guarantor. He refused to pay, maintaining that he had not given a guarantee enforceable at law.

The judgments in the Courts below

[8] We need not make detailed reference to these. We intend no disrespect. The reason is simply that the argument advanced to us, which we intend upholding, was not put to the Courts below. The cases relied upon in this Court, which we find persuasive, were not referred to the Courts below or, in one case, post-dated the judgment under appeal. Conversely, the main argument rejected by Simon France J was not advanced to us. This was an argument that the word "you" in the agreement to repay clause referred to in [3] above encompassed the guarantor. The Judge rightly rejected that misconceived argument. As the Judge held, "you" was the Borrower.[4] As is fundamental to a guarantee, Mr Brougham did not directly undertake the Borrower's obligations, but rather guaranteed them, his liability accruing only if and when the Borrower defaulted on its obligations under the Agreement.

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4 *Regan v Brougham*, above n 2, at [20]–[24].

[9] Simon France J did, however, go on to say this:[5]

> … The Agreement clearly contemplates that any guarantee will be found in a separate contract. Consistent with this, and unlike for both the borrower and any covenantor, there are no operative clauses within the document imposing any obligation at all on a guarantor. Nowhere is it said what the guarantor is agreeing to, nor when that obligation might arise. I acknowledge that with a simple term loan arrangement the nature and extent of a guarantor's obligations may be easy to infer, but one would still expect clarity around matters such as when the guarantee will be triggered and what notice is required. Further, I do not accept that a consumer protection requirement such as s 27 of the Property Law Act 2007, which requires that a guarantee contract be in writing, is met by a document which merely describes a person as a guarantor, and which is then signed by the guarantor. The essential terms of a guarantee contract must be in writing and here they are not.

For the reasons that follow, we respectfully disagree with that conclusion.

The opposing arguments in this Court and our analysis

[10] In its leave judgment this Court noted there was previous authority, not cited to Simon France J, dealing with a guarantee in a comparable fact situation.[6] The Court referred to *Bradley West Solicitors Nominee Co Ltd v Keeman*.[7]

[11] Before us the appellant submitted the Agreement in and of itself constitutes an enforceable guarantee. It sets out clearly and completely the terms of the loan, and the borrower's obligations. It contains writing sufficient to bind the first respondent as guarantor. And the first respondent signed the Agreement as guarantor. So the Agreement complied with s 27(2) of the Property Law Act 2007 which provides:

> **27 Contracts of guarantee must be in writing**
>
> …
>
> (2) A contract of guarantee must be—
>
> (a) in writing; and
>
> (b) signed by the guarantor.

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5 At [25].
6 *Regan v Brougham*, above n 1, at [4].
7 *Bradley West Solicitors Nominee Co Ltd v Keeman* [1994] 2 NZLR 111 (HC).

[12] Mr Mahuta-Coyle, for Mr Brougham, responded with several arguments. First, addressing the situation referred to in [5] above, he referred to the evidence at trial that Ms Dey, shortly before the Agreement was signed, told Mr Brougham she was not going to sign as guarantor but he should. At the time the two were in a domestic relationship. Mr Mahuta-Coyle submitted the consequence was that the appellants were now contending for an oral variation of the Agreement: a change from two guarantors to one guarantor. This oral variation did not comply with s 27(2).

[13] Mr Mahuta-Coyle's second argument was closely related. Because the Agreement contemplated two guarantors, the guarantee was not enforceable unless and until both guarantors signed it. In support, counsel relied on the decision of the English Court of Appeal in *Harvey v Dunbar Assets plc*.[8]

[14] Third, Mr Mahuta-Coyle argued that the separate deed of guarantee contemplated by condition precedent (c) had not been executed. Completion of that deed was necessary because there was insufficient detail in the Agreement itself to constitute an enforceable guarantee. In particular, Mr Mahuta-Coyle submitted there were no words of guarantee binding Mr Brougham as guarantor.

[15] We do not accept any of these three arguments. As to the first, we do not consider evidence as to what Ms Dey and Mr Brougham, as the proposed guarantors, did or did not discuss or intend prior to signing the Agreement is admissible. In our view this evidence is covered by the third principle of contractual interpretation spelt out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:[9]

> The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.

The task of the Courts below was — and our task is — to construe the Agreement as it was signed, in accordance with the now well-established principles.

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8 *Harvey v Dunbar Assets plc* [2013] EWCA Civ 952, [2013] BPIR 722 at 735.

9 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912–913.

[16] But, even if the evidence comes in, we do not think it assists Mr Brougham. Having listened to both Ms Dey and Mr Brougham give evidence, particularly under cross-examination, Judge Ross said this:[10]

> I think it more likely than not that the issue of whether or not [Ms Dey] was continuing to be a guarantor of the Trust loan to B & R was raised by her before the document was placed before [Mr Brougham] for signature. [Mr Brougham] has acknowledged that he paid [the] matter little real attention at the time that he signed them, and that they were signed in a hurry. Ms Dey's reasons for standing aside as a guarantor were plausible and understandable. Ms Regan's evidence was that she believed that only the guarantee from [Mr Brougham] would be required from the company for the Trust loan.
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> So, if [Mr Brougham] had been found liable on the guarantee, this defence and claim that Ms Dey was jointly and severally liable with him would have been unsuccessful.

That is a finding that Mr Brougham's evidence that he signed the Agreement believing that Ms Dey was also going to sign as guarantor is not credible.

[17] Turning to the second argument, *Harvey* does not assist Mr Brougham. It was a different type of case. It involved a single composite document which the Court held imposed joint and several liability on four individuals together defined as "the guarantor" and which envisaged that it would be signed by all four individuals. Accordingly, on the assumed basis that one of the individual's signatures was forged, the Court allowed the appeal of another of the four individuals comprising "the guarantor". The guarantee provisions in the Agreement before us cannot be construed in that way. There was provision for one or more guarantors: "Guarantor(s)". Two were named. The words in condition precedent (c) "If any person is named in this agreement as a guarantor, the guarantor must have signed …" are consistent only with liability resting on each guarantor who signs. Finally — and really a neutral point — there is a signature line for each guarantor. Mr Mahuta-Coyle accepted that each guarantor who signed would have joint and several liability.

[18] That brings us to Mr Brougham's third argument. We accept that a separate deed of guarantee was contemplated. Indeed, the lender could insist upon one before advancing the loan moneys: condition precedent (c). The appellants say they waived that condition because they considered a separate deed of guarantee was unnecessary.

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10 *Regan v Brougham*, above n 3, at [60]–[61].

As they did that by advancing the loan moneys without requiring the execution of a separate deed of guarantee, that waiver was implicit rather than express.

[19] We do not regard the absence of the separate deed of guarantee that the lenders could have, but did not, insist upon as fatal. As Tipping J pointed out in *Bradley West*:[11]

> A guarantee does not have to be in any particular form, nor does it have to use any particular words. What has to be clear is that the alleged guarantors have bound themselves to answer for the default of the principal debtor.

[20] The question then is whether the Agreement itself constituted an enforceable guarantee. In our view it does. Unsurprisingly, since this was the Term Loan Agreement, all the terms of that loan are in the document. So are the full names and details of the two proposed guarantors, entered in the "Guarantor(s)" box. And Mr Brougham has signed the document as guarantor. The legal consequences were explained by Tipping J in *Bradley West*. Because we adopt the Judge's reasoning, and cannot improve upon his concise expression, we set it out at some length:[12]

> Although the document in question is economical in the extreme — skeletal was Mr Squire's apt description of it — I am of the view that it constitutes a sufficient guarantee. The purchasers have signed "as guarantors". That can only mean that they, by their signatures have agreed to guarantee something. The vital question is whether it is sufficiently clear from the document as a whole what they have agreed to guarantee? If, as here, it is clear objectively that the parties intended to enter into a legally binding obligation the Court should and will do its best to give effect to that intention: see *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495 and *Marxen v Smith* [1990] 3 NZLR 585, 596.
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> …
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> Although the document contains no express covenants of a conventional kind for a guarantee it would, in my judgment, be commercially unrealistic to take the view that, what on its face is clearly intended to be an instrument constituting the four purchasers as guarantors, should have no legal effect from the point of view of construction. It is clearly apparent from the document that the persons named as guarantors, and who have signed as such, have undertaken a liability to guarantee to the mortgagee the due performance by the mortgagor of the mortgage referred to. All the parties are fully identified. The instrument creating the principal obligation is clearly identified. The maximum principal sum is apparent on the face of the document. There is therefore no want of particularity. It is untenable, in

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11 *Bradley West Solicitors Nominee Co Ltd v Keeman*, above n 7, at 116.

12 At 116–117.

> my view, as a point of construction for parties who have signed as guarantors in those circumstances to say that although they have signed a formal legal instrument it fails to constitute an enforceable obligation.

[21] In terms of the required "particularity" (to adopt Tipping J's word), the Court inquired of Mr Mahuta-Coyle what was not clear in the Agreement in terms of what Mr Brougham had agreed to guarantee. He said his best answer was that two guarantors were contemplated and Mr Brougham was entitled to know who was guaranteeing the loan. We have already accepted that two guarantors were contemplated. But the fact is that only Mr Brougham signed. He is fixed with that position. And the evidence — if admissible — is that Mr Brougham probably knew he alone was signing as guarantor.

[22] *Bradley West* was decided before s 27(2) of the Property Law Act came into force. When *Bradley West* was decided, the comparable law was s 2 of the Contracts Enforcement Act 1956. That provided that no contract of guarantee was enforceable unless "the contract or some memorandum or note thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him".

[23] Section 27(2) sets a more exacting requirement for enforceability than did s 2 of the Contracts Enforcement Act. The requirement that a contract of guarantee must be in writing dispensed "with the possibility of the enforcement of an oral guarantee by reason of the existence of a signed memorandum of its terms".[13] That is clear from a comparison of the two provisions and is confirmed by the Law Commission's paper which was the genesis of the change in the law.

[24] So does the approach in *Bradley West* survive s 27(2)? In our view it does. The Agreement (and thus the obligations being guaranteed) is in writing, as is the full name and details of the guarantor and the words below his signature "signed by the guarantor". And Mr Brougham has signed the Agreement as guarantor. So there is compliance with each of the two requirements set out in s 27(2). We do not see that s 27(2) renders the reasoning in *Bradley West* no longer appropriate.

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[13] Law Commission *A New Property Law Act* (NZLC R92, 1994) at [42].

[25] There is support for that view in the judgment of Associate Judge Matthews in *Kung v DVD Advance Ltd*.[14] *Kung* involved an Agreement to Lease on the approved ADLS/REINZ form. As in this case, the printed form contained spaces for the names of the parties (the Landlord and Tenant) and for their signatures. These had been duly completed and the parties had signed. But, unlike this case, the printed form did not contain a space for the name of, nor for the signature of, a guarantor. The second defendant, Mr Ferguson, had signed as the sole director of the lessor. He had also signed the document next to the handwritten added words "[Guaranteed] by DANIEL FERGUSON". The Agreement to Lease contained all the essential terms of the lease. It also contained a provision requiring the tenant to enter into a formal lease the covenants in which were to be "no more onerous than those contained in the Auckland District Law Society commercial lease form 3rd Edition 1993". There was also this clause:

> 6. Where the Tenant is a company and if the Landlord so requires, the Tenant shall arrange for its shareholders to guarantee the obligations of the Tenant.

[26] The contemplated formal Deed of Lease was prepared but never signed. It provided for Mr Ferguson to be a guarantor and set out the terms of his guarantee.

[27] Adopting the reasoning of Tipping J in *Bradley West*, the Associate Judge held there was an enforceable guarantee by Mr Ferguson.[15] The fact that all the necessary terms were in the agreement to lease which Mr Ferguson had signed as guarantor meant there was compliance with s 27(2) of the Property Law Act.

[28] In the course of his judgment Associate Judge Matthews referred to several other cases. Two of these are relevant. The first in time was this Court's decision in *Inglis v Clarence Holdings Ltd*, decided in 1996.[16] *Inglis* does not refer to *Bradley West*. This Court upheld liability on two guarantors where there was a guarantee clause in an agreement to lease, but neither a deed of lease nor the proposed form of guarantee had been signed. Liability was upheld by application of the

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14 *Kung v DVD Advance Ltd* [2018] NZHC 3319.
15 At [55].
16 *Inglis v Clarence Holdings Ltd* [1997] 1 NZLR 268 (CA).

principles in *Walsh v Lonsdale* that equitable obligations should be enforceable.[17] Thus, although the route taken to liability on the guarantors was different, the outcome was the same.

[29] The second case is the High Court's decision in *Chambers v Chatfield*.[18] That case concerned the enforceability of a covenant to guarantee in an agreement to lease. Edwards J held that specific performance of the covenant should be ordered because there was no uncertainty as to the terms of the guarantee and requiring the guarantor to sign the deed containing the contract of guarantee would meet the requirements of s 27.[19] This Court's approach in *Inglis* was discussed, but *Bradley West* was, again, not referred to. Again, in a comparable situation, liability was imposed on the guarantors but by a different route.

[30] Our conclusion is that the Agreement here contains everything necessary to constitute a guarantee enforceable against Mr Brougham. All the details and terms necessary to determine with certainty what Mr Brougham guaranteed are in the Agreement. And, by signing the Agreement as "guarantor", Mr Brougham accepted those guarantee obligations. In those circumstances, we agree with Tipping J that it is "untenable" for Mr Brougham to say that "although [he has] signed a formal legal instrument it fails to constitute an enforceable obligation".[20]

[31] This conclusion renders it unnecessary to consider the other two grounds of appeal. For the record, these were:

(a) An equitable estoppel operates against Mr Brougham: he cannot be heard to say that he did not guarantee the loan.

(b) The High Court erred in not ordering specific performance of the Deed of Guarantee contemplated by condition precedent (c) in the Agreement. The Court ought to have directed Mr Brougham to sign that Deed once it was tendered to him.

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17 *Walsh v Lonsdale* (1882) 21 Ch D 9.
18 *Chambers v Chatfield* [2016] NZHC 1871, (2016) 18 NZCPR 1.
19 At [51].
20 *Bradley West Solicitors Nominee Co Ltd v Keeman*, above n 7, at 117.

Costs

[32] If successful, the appellants sought indemnity costs of this appeal against Mr Brougham. They invoke cl 12 of the Agreement which provides:

> 12. COSTS
>
> (a) Costs payable by you: You must pay to the lender upon demand, the lender's legal costs (as between solicitor and client) for:
>
> …
>
> (ii) costs on default: legal services arising from or relating to any default under this contract or the enforcement or exercise or attempted enforcement or exercise of any of the lender's rights, remedies and powers under this contract …

[33] Mr Mahuta-Coyle advised us he could not resist such costs if the appeal succeeded, subject only to the reasonableness of their quantum. Accordingly, we order Mr Brougham to indemnify the appellants for their reasonable costs of this appeal. Leave is reserved to revert to the Court if these costs cannot be agreed.

[34] Mr Brougham must, likewise, indemnify the appellants for their reasonable costs of the application for leave to appeal. Those costs were reserved in the judgment granting leave. Again, leave is reserved to revert failing agreement.

[35] Costs in the District Court were reserved, the parties to file memoranda if costs could not be resolved. Counsel informed us that costs were neither resolved nor fixed. Unfortunately, Judge Ross has died. In the High Court, Simon France J allowed Mr Brougham 70 per cent of 2B scale costs together with reasonable disbursements.[21]

[36] Before us, after some discussion, counsel requested that we deal with costs in the two Courts below after receiving memoranda. Accordingly, if these costs cannot be resolved, memoranda are to be filed and served:

(a) for the appellants, by 13 September 2019; and

(b) for Mr Brougham, by 27 September 2019.

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[21] *Regan v Brougham*, above n 2, at [57].

Result

[37] The appeal is allowed.

[38] Judgment is entered for the appellants against the first respondent, Mr Brougham, for $50,000 together with interest on that sum from the date of demand (5 October 2012) to the date of payment at the applicable rate(s) stipulated in the Term Loan Agreement.

[39] The first respondent must indemnify the appellants for their reasonable costs of this appeal and of the application for leave to appeal.

[40] Costs in the District Court and High Court are reserved in terms of [36] of this judgment.

Solicitors:
Macalister Mazengarb, Wellington for First Respondent