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1989 S.H. No. 70515

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

THE ROYAL BANK OF CANADA

Plaintiff

- and -

ISSAM AYOUB and **SALAH AYOUB**

Defendants

HEARD: At Halifax, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy, on December 3, 1990.

DECISION: December 19, 1990

COUNSEL: Jean McKenna, Solicitor for the Plaintiff

John A. Black, Solicitor for the Defendants

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Plaintiff

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GRUCHY, J.

This is an action by The Royal Bank of Canada against Issam Ayoub and Salah Ayoub to realize upon a guarantee and postponement of claim ("the guarantee"). The guarantee was signed by the defendants on September 16, 1987. It is apparently in a standard form used by the plaintiff and was referred to by one of the witnesses as Royal Bank Form 812. The liability arising under the guarantee was limited to the sum of $10,000.00 together with interest from the date of demand for payment. To that extent, it guarantees the repayment of a loan by Riad Ayoub.

At a pre-trial conference counsel made it known to me that the defendants proposed to introduce parol evidence with respect to the guarantee and the transaction involving that document. At the opening of trial counsel for the plaintiff

asked for directions on this point. I indicated that I would hear parol evidence.

While it appeared that the form of the guarantee, save one particular, was clear and unambiguous on its face, it was in my view necessary to determine whether it constituted the complete contractual arrangement between the plaintiff and defendants. (See Sopinka and Lederman, **The Law of Evidence in Civil Cases**, p.269; **Fleet Express Lines Ltd. v. Continental Can Co. of Canada Ltd.** (1969), 4 D.L.R. (3d) 466; **Gallen et al v. Butterley, Nunweiler and Allstate Grain Company Ltd. et al** (1984), 53 B.C.L.R. 38) In the latter case Lambert, J.A., of the British Columbia Court of Appeal examined the so-called parol evidence rule closely. He said, (at page 49):

> "**Is evidence of the oral representation admissible?**
>
> The parol evidence rule is not only a rule about the admissibility of evidence. It reaches into questions of substantive law. But it is a rule of evidence, as well as a body of principles of substantive law, and if the evidence of the oral representation in this case was improperly admitted, the appeal should be allowed.
>
> The rule of evidence may be stated in this way: Subject to certain exceptions, when the parties to an agreement have apparently set down all its terms in a document, extrinsic evidence is not admissible to add to, subtract from, vary or contradict those terms.
>
> So the rule does not extend to cases where the document may not embody all the terms of the agreement. And even in cases where the document seems to embody all the terms of the agreement, there is a myriad of exceptions to the rule. I will set out some of them. Evidence of an oral statement is relevant and may be admitted, even where its effect may be to add to, subtract from, vary or contradict the document:

(a) to show that the contract was invalid because of fraud, misrepresentation, mistake, incapacity, lack of consideration, or lack of contracting intention;

(b) to dispel ambiguities, to establish a term implied by custom, or to demonstrate the factual matrix of the agreement;

(c) in support of a claim for rectification;

(d) to establish a condition precedent to the agreement;

(e) to establish a collateral agreement;

(f) in support of an allegation that the document itself was not intended by the parties to constitute the whole agreement;

(g) in support of a claim for an equitable remedy, such as specific performance or rescission, on any ground that supports such a claim in equity, including misrepresentation of any kind, innocent, negligent or fraudulent;

(h) in support of a claim in tort that the oral statement was in breach of a duty of care.

I do not consider that I am setting out an exhaustive list. I am only showing that appropriate allegations in the pleadings will require that the evidence be admitted.

So if it is said that an oral representation, that was made before the contract document was signed, contains a warranty giving rise to a claim for damages, evidence can be given of the representation, even if the representation adds to, subtracts from, varies or contradicts the document, if the pleadings are appropriate, and if the party on whose behalf the evidence is tendered asserts that from the factual matrix it can be shown that the document does not contain the whole agreement. The oral representation may be part of a single agreement, other parts of which appear in the document (the one contract theory). Alternatively, the document may record a complete agreement, but there may be a separate collateral agreement, with different terms, one of which is the oral representation (the two contract theory).

...

> I should add that I can see very little residual practicality in the parol evidence rule, as a rule of evidence, in cases tried by a judge alone."

For purposes of this decision, I respectfully adopt the reasoning of Lambert, J.A.

Three brothers were directly involved in this transaction: Riad, Issam and Salah Ayoub. Riad had decided that he wanted to buy a small grocery store in Elmsdale, Nova Scotia. The then current owner of the store was one Jebeli who is a brother-inlaw of Salah. Accordingly, Salah was familiar with the store. The store was also known to the plaintiff. The record of the store, according to Mr. Francis Alan Blatch, a manager of the Dartmouth Shopping Centre Branch of the plaintiff, who gave evidence, was that it had not particularly prospered under Mr. Jebeli. It had, however, done well under a previous owner and the Bank felt that it had some potential.

The three brothers had dealt with Mr. Blatch in his capacity as bank manager. They knew him and trusted him. Mr. Blatch apparently loaned them money from time to time and he gave them banking advice. Riad needed funds in order to buy and run the store. He had been unemployed for some time. When he approached Mr. Blatch about the financing of such a purchase, Mr. Blatch indicated that he would require security from Riad's family. Both Salah and Riad gave evidence before me and each of them remarked that they are a family and that they support

one another. A strong familial relationship undoubtedly existed among the brothers.

A number of discussions occurred between Riad and Mr. Blatch. Mr. Blatch said that Riad came into the bank frequently to see him and Salah came in somewhat less frequently. They discussed the possibility of Riad buying the store.

On September 16, 1987, Issam and Salah attended at Mr. Blatch's office and the guarantee was signed on that day by them. The father of the then owner of the store, the senior Mr. Jebeli, Salah's father-in-law, also attended. Salah says that he had been asked to come along to the bank to see what was going on. Salah and Issam were experienced businessmen. Each of them had owned various properties and businesses in Nova Scotia and had participated in different ventures, some of which required loans and guarantees. During the meeting neither of them requested counsel. Neither of them read the document. Mr. Blatch says that they knew what they were signing and that he gave them sufficient explanation. In one particular respect, however, Mr. Blatch's personal knowledge appeared to be somewhat deficient and I will speak further about this below.

There was a discussion about the guarantee and its term. The form of the guarantee itself is not limited in time, except that by virtue of paragraph 4 any of the guarantors may have requested the determination of his liability in accordance with that paragraph.

The discussion was to the effect that the guarantee

was limited to a loan for $19,000.00 which was to be advanced by the plaintiff to Riad in connection with the purchase of the store. That loan was, in fact, made on September 28, 1987. On that date Riad and Issam signed a term promissory note for $19,000.00 repayable in two years from its date and on the terms and conditions set forth in it. The discussion further dealt with how and when Issam and Salah could be released from the guarantee. Salah and Riad say that Mr. Blatch told them that the guarantee was for one year only. Mr. Blatch says that he said that the guarantee could be reviewed in one year from the date of the loan provided the business was demonstrated to be sound by means of an audited statement.

Salah and Riad further say that Mr. Blatch told them that the guarantee was for $5,000.00 each, for a total of $10,000.00. On cross-examination it was suggested to Mr. Blatch that it was possible that the figure of $5,000.00 was mentioned and Mr. Blatch agreed that it was possible, but not probable. In fact, at the time of the trial, both Mr. Blatch and another bank manager, Mr. F.E. Wood, thought that the joint and several guarantee in the amount of $10,000.00 meant that both of the guarantors were liable for the full sum guaranteed, for a total of $20,000.00. I found it surprising that two apparently knowledgeable bank managers would be uninformed in this respect.

Riad, with the aid of the $19,000.00 loan, together with a property loan from the plaintiff as well, purchased the store and went into business. When the business did not prosper, Riad was not able to make payments regularly. The brothers, fearing the consequences of a failure, arranged to make payments for him. During the first year of operation, or for that matter thereafter, no financial statements of the business were prepared and submitted to the bank.

On September 25, 1989, the bank made demand on the three brothers. Issam had, in addition to the guarantee, signed as co-maker the promissory note for $19,000.00 dated September 28, 1987. The letter of demand to him was as now set forth:

"Mr. Issam Ayoub
18 Old Sambro Road, Apt. 3
Halifax, Nova Scotia
B3P 1Z2

Dear Mr. Ayoub:

Please find enclosed a copy of the demand for payments of a fixed rate personal note cosigned by you for your brother, Riad Ayoub, to The Royal Bank of Canada. This note was dishonored when presented for payment and the balance of the monies secured by the note remain due and owing and unpaid.

Fixed Rate Personal Loan

Principal Balance Owing		$17,498.38	
Interest & Insurance To Date		1,594.02	
Subtotal		$19,092.40	$19,092.40
Per Diem Interest	$6.23		

We also hereby demand immediate payment in full from you of: $10,000 Fixed Rate Personal Loans in the name of Riad Ayoub, guaranteed by you under the provisions of an agreement of Guarantee and Postponement of Claim dated September 16, 1987, to a limit of $10,000.

We also demand payment of interest on the above accrued and unpaid to the date of payment at the rate of 13% per annum.

Yours truly,

F.E. Wood (Mr.)

Manager"

On the same date the bank made demand upon Riad pursuant to the promissory note and to certain other securities given by Riad to the bank. Also, on the same date the bank made demand upon Salah, pursuant to the guarantee. The plaintiff has not been paid.

On the above described circumstances, I make the following findings:

1. With respect to Issam, the guarantee was intended to be restricted to a guarantee of the promissory note in the amount of $19,000.00 and, accordingly, any liability arising under that guarantee is restricted to the amount due under the note and not in addition to it. The letter addressed to Issam set out above is, accordingly, somewhat misleading. Further, during the course of these proceedings, it was disclosed that the plaintiff had prior to this action taken another action against Issam pursuant to the note and had reduced that action to judgment. The bank is not entitled to two judgments for the same amount of money. Accordingly, this action, as against Issam Ayoub, is dismissed. However, as no extra costs were

incurred by Issam relative to this action, it being clear that the thrust of the defence was put forward on behalf of Salah, such dismissal is without costs to either party.

2. During the course of the trial, as a result of questions put to the plaintiff's witnesses, it appeared that the guarantee and postponement of claim had been incorrectly completed. I set forth that portion of the guarantee incorrectly completed including the marginal note:

"(*Insert rate over Prime or for fixed rate, delete 'the Bank's Prime Interest Rate plus' and insert rate applicable)	...the liability of the undersigned hereunder being limited to the sum of Ten Thousand Dollars together with interest from the date of demand for payment at the rate of the Bank's Prime Interest Rate plus * 13 per cent per annum;"

While the words of the guarantee itself are clear, the inclusion of the marginal notes discloses that the form was not properly complete. The guaranteed promissory note fixes the interest rate at 13 percent. Based upon that and the parol evidence given by Mr. Wood, I find that the interest rate on the promissory note was 13 percent per annum.

3. During the course of the trial, Salah's evidence was that he had been asked to come along to the bank on the morning of September 16, 1987, to see what was going on. I find that difficult to accept. The meeting with Mr. Blatch on that morning was undoubtedly for the express purpose of signing the guarantee.

4. I find that Mr. Blatch, on the morning of September 16, 1987, explained to the defendants what they needed to know. Salah is an experienced businessman. He knew what he was signing and he appreciated the effect of a guarantee. It is also to be noted that the plea of **non est factum** was not raised. While Salah did say that he had not read the document, he nonetheless knew and appreciated that it was a joint and several guarantee and that if his brother failed to pay the debt, he, Salah, could be called upon pursuant to the guarantee.

5. The defendants say that the guarantee was limited to $5,000.00 each on the basis of what they say Mr. Blatch told them on September 16, 1987. As noted above, Mr. Blatch was under the impression that the joint and several guarantee in the amount of $10,000.00 meant that both of the guarantors were liable for the full sum guaranteed for a total of $20,000.00. The effect of that error militates against the defendants in that I, consequently, am asked to believe that Mr. Blatch limited the liability of each of the guarantors to $5,000.00. That proposition strains credulity. I find on the balance of probabilities that Mr. Blatch did not limit the guarantee to the sum of $5,000.00 each, but rather, limited it as he has set forth in his evidence; that is, that the guarantee could be reviewed in one year, provided the business was demonstrably sound. The guarantee was further restricted by Mr. Blatch to the $19,000.00 loan although that does not appear in the guarantee itself.

6. I find that the supplying of an audited financial statement demonstrating that the business was sound was an essential pre-condition to a review of the guarantee. That essential pre-condition of the potential release of the guarantee was never met.
7. I find that subject only to the explanation concerning the interest rate, the guarantee and postponement of claim in question is clear and unambiguous on its face. Certain collateral agreements were made between the defendants and the bank, as set forth above.

I have referred above to the decision of Lambert, J.A., in **Gallen et al v. Butterley et al.** Having stated as I have quoted, the learned Justice then proceeded to make comments on the parol evidence rule and in his second comment on that rule, remarked on the principle stated by Markland, J., for the Supreme Court of Canada in **Carman Construction Limited v. Canadian Pacific** Railway Company and CP Rail, [1982] 1 S.C.R. 958 at p.969 when he said, "...a collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement". In examining that principle, Lambert, J.A., gave a factual example of where he considered the principle would not apply. The example is remarkable in that it is factually similar to the case at hand. He said:

> "The second (comment) is that the principle cannot be an absolute one. Let us suppose that a bank manager, acting

> within his authority, agrees that if his customer will agree to sign and be bound by the bank's standard form of guarantee, then the guarantee will only be in effect for one year. The customer agrees on the basis of that assurance and he signs the standard form of guarantee which contains no mention of the one-year period. Two years pass by. The bank manager is replaced. The principal debtor goes bankrupt and the bank sues the guarantor, who pleads the collateral agreement as a defence. At trial, evidence is given by the former bank manager. He says that he agreed on behalf of the bank that the guarantee would only be in effect for a year. The second bank manager says that he knows about the agreement made by the first bank manager, but he also knows about the **Hawrish** case (**Hawrish v. Bank of Montreal**, [1969] S.C.R. 515; 66 W.W.R. 673; 2 D.L.R. (3d) 600) which he thinks says that the agreement made by the first bank manager on behalf of the bank does not bind the bank, and that, if that is so, then he thinks that his duty to the bank's shareholders is to sue on the written guarantee. I do not consider that the bank would succeed in that case. The principle in **Hawrish** is not a tool for the unscrupulous to dupe the unwary."

But the distinction between the case at hand and the factual example described in the second comment is found by the application of the burden of proof to the evidence. Any oral collateral agreement to a written agreement must be strictly proved and this is particularly so where the collateral agreement is at variance with the written contract. It is necessary to consider the totality of the evidence and to make the required conclusions on the balance of probabilities.

The defence evidence in this case falls short of convincing me, and a balance of probabilities, that the guarantee was either limited in time or in amount other than as appears in the document or as I have found above.

The plaintiff shall have judgment against the defendant

Salah Ayoub in the amount of $10,000.00 together with interest from the date of the demand for payment at the rate of 13 percent per annum. The plaintiff shall have its costs on the basis that the amount involved in this action is $10,000.00 on Scale 3, or $1,750.00, plus disbursements reasonably incurred.

J.

December 19, 1990

Halifax, N.S.