IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 104/2019
[2020] NZSC 118

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

Hearing:	9 June 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Williams JJ
Counsel:	F E Geiringer and J K Mahuta-Coyle for Appellant F A King and M A Dempster for First Respondents S A McKenna for Second Respondent
Judgment:	30 October 2020

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made in the Court of Appeal are set aside and judgment is entered for the appellant.

C The respondents must pay the appellant costs of $25,000 plus usual disbursements.

D The award of costs and disbursements in the lower Courts in favour of the first respondents is set aside. Such costs and disbursements should be reassessed by the Court of Appeal in light of this judgment. The award of costs in favour of the second respondent stands.

E The first respondents' interlocutory application to adduce further evidence is dismissed.

REASONS
(Given by O'Regan J)

Guarantee "in writing"

[1] The issue in this case is whether the appellant, Mr Brougham, is liable as a guarantor of a loan made by the trustees of the Winchester Trust (the trustees) to B & R Enterprises Ltd (the company).[1] The principal issue is whether the document signed by Mr Brougham complied with the requirement set out in s 27(2) of the Property Law Act 2007 that a contract of guarantee must be "in writing".

[2] The case began in the District Court, which determined that Mr Brougham was not liable as guarantor.[2] That decision was upheld by the High Court.[3] The Court of Appeal allowed the trustees' appeal to that Court and entered judgment against Mr Brougham for the principal of the loan together with interest and awarded indemnity costs.[4]

[3] This Court granted Mr Brougham leave to appeal, the approved question being whether the Court of Appeal was right to allow the appeal to that Court.[5]

Facts

[4] The loan made by the trustees to the company was recorded in a Term Loan Agreement (the loan agreement) which was on the printed Auckland District Law Society form.

---

1 The first respondents are the current trustees of the Winchester Trust. At the relevant time the trustees were Ms Regan and her daughter, the second respondent, Ms Dey.
2 *Regan v Brougham* [2016] NZDC 18553 (Judge Ross) [DC judgment].
3 *Regan v Brougham* [2017] NZHC 1091 (Simon France J) [HC judgment].
4 *Regan v Brougham* [2019] NZCA 401, [2020] 2 NZLR 299 (French, Collins and Wild JJ) [CA judgment] at [38]–[39]. Leave to appeal to the Court of Appeal was granted in *Regan v Brougham* [2018] NZCA 157. Simon France J had earlier dismissed an application for leave to appeal to the Court of Appeal: *Regan v Brougham* [2017] NZHC 2464.
5 *Brougham v Regan* [2019] NZSC 143.

[5] The company was established shortly before the loan agreement was entered into. It was set up by Mr Brougham and the second respondent, Ms Dey, who were, at the time, in a de facto relationship. They had agreed to purchase a business together. The company was set up for that purpose.

[6] Ms Dey arranged for the trustees to lend $50,000 to the company, which it needed to purchase the business. At the time, the trustees of the Winchester Trust were Ms Regan and Ms Dey. Ms Dey was responsible for the arrangements relating to the loan. She instructed a lawyer to document the loan in an email which provided:

> The agreement should reflect the following information:
>
> Lender: Winchester Trust
> Borrower: B & R Enterprises Limited
> Amount: $50,000
> Term: 10 years
> Interest Rate: 3 % above current floating rate - currently 5.850% p/a
> Default: I am assuming there is some sort of standard clause that can go in here, reflecting interest at default payments being at the current unauthorised overdraft rate, or a set interest rate for late payments of e.g.: 19.95%
>
> As we discussed a personal guarantee from both directors of B & R Enterprises Limited – being Bryce Brougham and myself Rachael Dey to accept a personal responsibility for $25,000 each.

[7] The lawyer then prepared the loan agreement. The first page of the loan agreement set out the details of the lender, borrower and guarantors as follows:

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**

[8] The second page of the loan agreement set out the key obligation of the borrower to repay the loan along with interest and other charges, then listed the conditions precedent, as well as the provision for execution of the document by the parties. This part of the loan agreement was 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

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

[9] In accordance with Ms Dey's instructions, provision was made for Ms Dey and Mr Brougham to sign the loan agreement both as directors of the company as borrower, and as guarantors. As can be seen from the image above, Mr Brougham signed on the wrong line, so his signature appears on both of the spaces for execution by guarantors. However, it is common ground that his first signature was, in fact, in his capacity as a director of the company and he therefore signed both as a director of the company and as a guarantor.

[10] As is apparent from the image above, Ms Dey signed the loan agreement in her capacity as a director of the company but did not sign as guarantor. There was some dispute as to the circumstances which led to that omission.[6]

---

6 See below at [15].

[11] All of the details of the loan and the terms on which it is made are contained in a schedule, which comprises a section headed “Loan Details” and a section headed “Loan Conditions”. The latter is seven pages of fine print. With one exception, all of the loan conditions are expressed in terms that make it clear they are provisions binding on the borrower and lender.

[12] The exception is cl 13 of the loan conditions, which is headed “Covenantor”. It provides that a person executing the loan agreement as covenantor agrees to pay and comply with the obligations in the loan agreement. It goes on to provide that, although the covenantor may be, as between the borrower and covenantor, a surety only, he or she will, in relation to the lender, be deemed to be a principal party to the contract and be so treated in all respects by the lender.

[13] The significance of this is that it is clear from the format of the document that, where there is a covenantor, no separate document recording the obligations of the covenantor is required. As can be seen from the image appearing at [8] above, provision is made for parties to sign either as covenantors or guarantors. In this case the reference to covenantors was struck out, so that the basis on which Mr Brougham signed was as a guarantor.

[14] The condition precedent that appears just before the execution provisions (see the image at [8] above) makes it clear that, when someone signs the loan agreement as a guarantor, a separate document setting out the terms of any guarantee is required. It is in a clause headed “Conditions precedent to advance” and says before an advance can be made, any person named as guarantor must have signed a deed of guarantee and indemnity in the required form. No such guarantee document was prepared by the lawyer instructed by Ms Dey and so no separate guarantee was signed by Mr Brougham (or Ms Dey). The reason for this omission was apparently that the trustees did not think a separate guarantee was necessary, because Mr Brougham had signed the loan agreement as guarantor.

[15] As mentioned earlier, Ms Dey did not sign the loan agreement as a guarantor, though that had been contemplated when she gave instructions to the lawyer. Ms Dey said, after the instructions had been given to the lawyer, she and Mr Brougham agreed

that she would not guarantee the company's obligations under the loan agreement. Mr Brougham denied this. The District Court Judge said of this dispute:[7]

> 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 [the company] 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.
>
> …
>
> As I have pointed out above, I have resolved the claim by Ms Dey that she had told [Mr Brougham] prior to his signature of the term loan agreement that she was not going to be, or no longer going to be, a guarantor, in her favour. Her evidence was that he in fact had agreed to be the sole guarantor to the Trust for the loan. I could not go so far as to find that established, even on balance, though I am satisfied that matters were discussed prior to his signature of the term loan agreement.

[16] That finding does not resolve whether Mr Brougham agreed to be the sole guarantor. Nor does it resolve whether, if he did agree to be sole guarantor, that meant he was liable for the whole of the $50,000 advance or only the $25,000 originally contemplated, as disclosed in Ms Dey's email to the lawyer.

[17] The $50,000 was advanced by the trustees to the company the same day the loan agreement was signed. The company met interest payments for a period of time after the loan was advanced, but the relationship between Mr Brougham and Ms Dey came to an end later in 2010. Subsequently, the business foundered and interest payments ceased. The trustees then took steps to enforce the guarantee against Mr Brougham. As well as defending the guarantee claim against him, Mr Brougham unsuccessfully pursued a counterclaim against the trustees and a claim against Ms Dey. Neither of Mr Brougham's counterclaims is in issue now.

Issues

[18] The first and principal issue is whether the loan agreement meets the requirements of s 27(2) of the Property Law Act, namely that a contract of guarantee

---

7 DC judgment, above n 2, at [60] and [71].

must be in writing and signed by the guarantor. There is no doubt in this case that there was a written agreement and that it was signed, so the key question is whether s 27 requires express terms of a contract of guarantee to be in the signed document. Mr Brougham says that the loan agreement contains no terms of guarantee and, indeed, is predicated on the assumption that a separate guarantee and indemnity will be executed, which never happened. The trustees argue that the loan agreement, having been signed by Mr Brougham "as guarantor" meets the requirements of s 27, even though there are no express provisions as to what the guarantor covenants to do in the loan agreement.

[19] Mr Brougham's fall-back argument is that, if the loan agreement does meet the terms of s 27 and constitutes an effective contract of guarantee, then the guarantee is still unenforceable because it provides for two guarantors to sign and only one did so. The second issue is whether that is correct. A related argument is that the contract on which the trustees rely is the loan agreement, which provided for two guarantors and that differs from what the trustees now say is the contract of guarantee binding upon Mr Brougham (one guarantor). We see this argument as adding nothing to the second issue.

[20] The trustees argue that, if the loan agreement is not enforceable as a contract of guarantee, they can nevertheless rely on equitable estoppel. The third issue is whether that is correct.

[21] The trustees also argue, as an alternative to the equitable estoppel argument, that the provision in the loan agreement referring to the guarantor signing a deed of guarantee created an obligation on the part of Mr Brougham to sign a guarantee and indemnity if called upon to do so. The fourth issue is whether there is such an obligation and, if so, whether the trustees are entitled to an order for specific performance of it.

[22] We will deal with the issues in the above order.

Was there a contract of guarantee that complied with s 27 of the Property Law Act?

[23] Section 27 of the Property Law Act provides:

> **27 Contracts of guarantee must be in writing**
>
> (1) This section applies to contracts of guarantee coming into operation on or after 1 January 2008.
>
> (2) A contract of guarantee must be—
>
> (a) in writing; and
>
> (b) signed by the guarantor.
>
> (3) Subsection (2) does not require the consideration for a contract of guarantee to be in writing or to appear by necessary implication from a writing.
>
> (4) In this section, **contract of guarantee** means a contract under which a person agrees to answer to another person for the debt, default, or liability of a third person.

[24] The wording of s 27 can be contrasted with the statutory provision that preceded it, s 2 of the Contracts Enforcement Act 1956 (the 1956 Act). Section 2(1)(d) of the 1956 Act provided that s 2 applied to "[e]very contract by any person to answer to another person for the debt, default, or liability of a third person". Section 2(2) provided:

> No contract to which this section applies shall be enforceable by action 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.

[25] The rationale for the requirement of a written guarantee was explained by Lord Hoffmann in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* as follows:[8]

> [20] The terms of the [Statute of Frauds 1677 (Eng) 29 Cha II c 3] therefore show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious. This means that while normally one would approach the construction of a statute on the

---

8 *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 AC 541.

> basis that Parliament was unlikely to have intended to cause injustice by allowing people to break promises which had been relied upon, no such assumption can be made about the Statute [of Frauds].

[26] The Law Commission report on reform of the Property Law Act made it clear that what is now s 27 was intended to impose more stringent requirements than had been imposed by s 2(2) of the 1956 Act. The Commission's report says:[9]

> 236 This section moves the provisions relating to guarantees in the Contracts Enforcement Act 1956 into the new Property Law Act. Under the Contracts Enforcement Act 1956, the requirement was for a guarantee to be in writing or for a memorandum of it to be in writing signed by the party to be charged or by some other person lawfully authorised by that person. Section [27] imposes a more restrictive requirement. The contract of guarantee must actually be made in writing and be signed by the guarantor. …
>
> 237 The terms of the guarantee must be in the written document, but subs [(3)] brings forward in simplified form the dispensation contained in s 3 of the Contracts Enforcement Act 1956, whereby consideration for the guarantee does not have to be recorded in writing or to appear by necessary implication from a writing.
>
> …
>
> 239 Because the requirements of s [27] are more strict than those of the existing law, the section is to apply only to contracts of guarantee coming into operation after the new Act comes into force: subs (1).

[27] Section 27 was enacted in essentially the same form proposed by the Law Commission. Because it imposes more stringent requirements than s 2(2) of the 1956 Act did, cases decided under the 1956 Act must be considered with some caution.

[28] The argument for the trustees is that the loan agreement satisfied the requirements of s 27. That argument was rejected by both the District Court[10] and High Court. The High Court Judge held:[11]

> 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 it is 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

---

9 Law Commission *A New Property Law Act* (NZLC R29, 1994).
10 DC judgment, above n 2, at [47] and [95].
11 HC judgment, above n 3, at [25].

> 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.

[29] In both this Court and the Court of Appeal, the trustees relied on the decision of Tipping J in *Bradley West Solicitors Nominee Co Ltd v Keeman*.[12] *Bradley West* was not cited to the District Court or the High Court. They say that a guarantee is not required to be in any particular form or use any particular words. Here, they say the terms of the guarantee can be inferred from the loan agreement.

[30] In reliance on *Bradley West*, the Court of Appeal held that the loan agreement satisfied the requirements of s 27. The Court of Appeal adopted the following passage from Tipping J's judgment in *Bradley West*:[13]

> 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.
>
> …
>
> 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 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.

---

12 *Bradley West Solicitors Nominee Co Ltd v Keeman* [1994] 2 NZLR 111 (HC).

13 CA judgment, above n 4, at [20], quoting *Bradley West*, above n 12, at 116–117 (citations omitted).

[31] The Court of Appeal acknowledged that *Bradley West* was decided when s 2(2) of the 1956 Act was in force and that s 27(2) set a more exacting requirement for enforceability.[14] The Court then continued:

> [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.

[32] The Court of Appeal drew some support for this conclusion from the decision of Associate Judge Matthews in *Kung v DVD Advance Ltd*.[15] *Kung* was one of two further High Court decisions cited to us. The other is *Victoria Quarter No 1 Ltd v FBB Holdings Ltd*.[16] It is apparent that there is an inconsistency of approach in these cases.

[33] In *Victoria Quarter*, Hinton J rejected a claim against a person said to be the guarantor of a lease (Mr McGrath). The relevant document was a heads of agreement to lease. The document provided: "Guarantor (being the shareholder and director of the Tenant where the Tenant is a Company): Danny McGrath subject to clause 4 above". Under cl 4, the landlord agreed to release any guarantees on assignment of the lease. This was the only other reference to a guarantee in the document. The document was signed by Mr McGrath on behalf of the tenant company. There was no provision for the signature of a guarantor. Hinton J found there was no enforceable guarantee as there was nothing in the document recording an agreement to answer for the debt or liability of a third person.[17]

[34] *Kung* also dealt with an agreement to lease. The printed form had no reference to a guarantor but the alleged guarantor, Mr Ferguson (the sole director of the tenant), signed the document next to a handwritten notation "Gauranteed [sic] by DANIEL FERGUSON". The agreement to lease included a covenant by the tenant to enter into a formal lease. In addition, there was a clause providing that, if required to do so, "the

---

14 At [22]–[23]. See above at [26]–[27].
15 At [25], referring to *Kung v DVD Advance Ltd* [2018] NZHC 3319.
16 *Victoria Quarter No 1 Ltd v FBB Holdings Ltd* [2015] NZHC 3007.
17 At [80].

Tenant shall arrange for its shareholders to guarantee the obligations of the Tenant".[18] There were no other references to a guarantee. Associate Judge Matthews applied *Bradley West* to the facts of the case. He found the agreement to lease contained the terms of the guarantee and was signed by Mr Ferguson so the requirements of s 27 were met.[19]

Our evaluation

[35] It is notable that there is no reference in *Bradley West* to s 2 of the 1956 Act. In light of that, it was not authority for the proposition that merely signing a document as guarantor necessarily means that document is an effective guarantee in terms of s 2 of the 1956 Act. Even if it had been, that would not necessarily mean it remained good law in respect of s 27(2). Section 27(2) is a more exacting requirement for the enforceability of a guarantee than s 2(2) of the 1956 Act. On its plain wording, it requires that "a contract of guarantee" must be signed by the guarantor. "Contract of guarantee" is defined as a contract under which a person agrees to answer to another for the debt, default or liability of a third person. If the document signed by the person said to be a guarantor does not include an agreement to answer for the debt, default or liability of a third person, it is not a contract of guarantee.

[36] In the present case, the loan agreement does not include any provision under which Mr Brougham agrees to answer to the trustees for the debt, default or liability of the company.[20] On the contrary, the loan agreement makes it clear that a separate document to that effect is required as a condition precedent to the making of the advance. In the absence of that further document, no guarantee liability arises. The decision of the Court of Appeal in this case was predicated on its finding that "[t]he Agreement (and thus the obligations being guaranteed) is in writing".[21] With respect to the Court of Appeal, we do not consider that means the loan agreement meets the

---

18 There were two shareholders, Mr Ferguson being one of them.

19 *Kung*, above n 15, at [51]–[52].

20 The present case can be contrasted with *Xie v Wang* [2016] NZHC 2756. In that case, the alleged guarantor signed the loan agreement (which was not drafted by a lawyer) as guarantor. However, the loan agreement included a provision "The guarantor shall undertake joint and several liabilities therefor." Downs J held this meant the agreement satisfied the requirements of s 27.

21 CA judgment, above n 4, at [24].

requirements of s 27(2) in the absence of any provision in the loan agreement under which Mr Brougham agrees to guarantee the company's obligations.

[37] Even if we accepted that *Bradley West* remained good law after the coming into effect of s 27(2), we would not see it as applicable to the present case. The underlying premise of *Bradley West* is that the document in that case set out the terms of the loan clearly and it could be inferred that the guarantor guaranteed the borrower's obligations under the loan. In the present case, two guarantors were named in the document but only one signed. And even if that is put to one side, there is real doubt as to whether the parties agreed that Mr Brougham would guarantee all of the indebtedness of the company, or only $25,000, given that the initial arrangement was that he and Ms Dey would guarantee $25,000 each. So, even if the approach of *Bradley West* to the inferring of guarantee terms were open to us, we would not draw that inference. The policy behind s 27 is that requiring a signed document setting out the terms of the guarantee avoids doubts such as this arising.

[38] Mr Brougham signed a document but it was not a contract of guarantee. He is therefore not liable as guarantor of the obligations of the company under the loan agreement. As the High Court Judge observed in the present case, the consumer protection purpose of s 27(2) would not be met if a person who signs a document merely describing the signatory as a guarantor but otherwise containing no provisions of the purported guarantee was found to be liable as a guarantor.[22] This is especially so where, as here, the document that was signed represents, first, that there would be two guarantors, but on the trustees' case there is only one guarantor under the contract comprised in the loan agreement and, second, that the execution of a separate document was a condition precedent for the loan being made.

Was the purported guarantee unenforceable because only one of two named guarantors signed it?

[39] Mr Brougham argues that, even if the loan agreement amounted to a contract of guarantee complying with s 27, he could not be liable because the loan agreement

---

22 HC judgment, above n 3, at [25]. See above at [28].

contemplates there will be two guarantors (both he and Ms Dey are named as guarantors on page one) but only he signed the document as guarantor.

[40] Our conclusion that Mr Brougham is not liable as a guarantor because there was no contract of guarantee complying with s 27 makes this point academic. We deal with the arguments only briefly.

[41] Mr Brougham relies on the following passage from *Rowlatt on Principal and Surety*, which was approved by the Court of Appeal of England and Wales in *Harvey v Dunbar Assets plc*:[23]

> … 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.

[42] As is made clear in *Harvey*, the issue is one of construction of the purported guarantee document. If the form of the document, on its face, shows it is intended to be a joint composite guarantee contained in a single document, which assumes all sureties will sign, the guarantee will be regarded as being subject to the condition that the signature of all sureties is necessary for it to be valid.[24]

[43] In *NZHB Holdings Ltd v Bartells*, Baragwanath J found that reference in a guarantee or indemnity to "joint and several" liability by the guarantors or indemnifiers will ordinarily imply that the document is not binding until all parties execute it, but this presumption can be displaced by express words to the contrary.[25] He referred to the finding of the High Court of Australia in *Gattellaro v Westpac Banking Corp* that, where a guarantee is drawn up for two guarantors, and only one

---

23 David GM Marks and Gabriel Moss (eds) *Rowlatt on Principal and Surety* (6th ed, Sweet & Maxwell, London, 2011) at 201 (footnote omitted), approved in *Harvey v Dunbar Assets plc* [2013] EWCA Civ 952, [2013] BPIR 722 at [20] and [22]. See also *James Graham and Co (Timber) Ltd v Southgate-Sands* [1986] QB 80 (CA) at 86 per O'Connor LJ and 93–94 per Browne-Wilkinson LJ; HG Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London, 2018) vol 2 at [45-075]; Geraldine Andrews and Richard Millett *Law of Guarantees* (7th ed, Sweet & Maxwell, London, 2015) at 150–151; and James O'Donovan and John Phillips *Modern Contract of Guarantee* (looseleaf ed, Thomson Reuters) at [3.1150].

24 *Harvey*, above n 23, at [22].

25 *NZHB Holdings Ltd v Bartells* (2004) 5 NZCPR 506 (HC) at [17]–[18]. See also *Kolmar Investments Ltd v R Hannah & Co Ltd* HC Auckland CIV-2002-404-1861, 5 June 2003 at [28]–[32]; and Barry Allan *The Law of Secured Credit* (Thomson Reuters, Wellington, 2016) at 1366–1367.

signs, then the party who signs is not bound because the only promise he or she made was to join with the other to guarantee, and if the other does not join, then he or she is not bound.[26] Kirby J made it clear that this principle applied only "in the absence of a clear term of the contract of guarantee … rendering Mr Gattellaro separately and individually liable".[27]

[44] In *NZHB Holdings*, the document included a clause in this form:

> Any Purchaser or Covenantor who signs this document shall be bound whether or not any other Purchaser or Covenantor signs.

In light of that clause, Baragwanath J found that those who had signed the document were bound, notwithstanding the fact that others had not.[28]

[45] Mr Brougham argues that it was contemplated that both Ms Dey and he would sign the loan agreement as guarantors. Only he signed. There was nothing in the loan agreement providing that he would be liable even if Ms Dey did not sign. So he was not liable as a sole guarantor.

[46] The Court of Appeal dismissed this argument. It said:[29]

> There was provision [in the loan agreement] 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. [Counsel for Mr Brougham] accepted that each guarantor who signed would have joint and several liability.

[47] The difficulty with this analysis is that the words in condition precedent (c) refer to the guarantor having signed a completely different document, the "deed of guarantee and indemnity in the form required by us", so can have no bearing on the significance of one proposed guarantor signing the loan agreement. We do not see

---

[26] *Gattellaro v Westpac Banking Corp* [2004] HCA 6, (2004) 204 ALR 258 at [52] per Gleeson CJ, McHugh, Hayne and Heydon JJ and [95]–[96] per Kirby J. See also *Marston v Charles H Griffith & Co Pty Ltd* (1982) 3 NSWLR 294 (SC) at 300–301; *Taubmans Pty Ltd v Loakes* [1991] 2 Qd R 109 (SCFC); and *Keith Murphy Pty Ltd v Custom Credit Corp Ltd* (1992) 6 WAR 332 (SC) at 342–345.

[27] At [96].

[28] *NZHB Holdings*, above n 25, at [18]–[19].

[29] CA judgment, above n 4, at [17].

how the fact that the reference to "Guarantor(s)" contemplates there may be one or more guarantors can have any significance when the document itself names two guarantors. Accordingly, we do not see anything in the terms of the loan agreement that displaces the default position that, where a purported guarantee document shows on its face that more than one guarantor is required to sign and only one does, the one who signs is not liable.[30]

[48] The trustees say that when construing the loan agreement, the factual matrix includes the last minute change which left Mr Brougham as the sole guarantor. As we mentioned earlier, there is some dispute about the circumstances in which Mr Brougham came to be the sole guarantor. The evidence was by no means clear. There remained real doubt as to whether, if Mr Brougham was to be the sole guarantor, that meant that he was guarantor of the whole loan or only $25,000 as originally intended. There are also questions as to the admissibility of the evidence about the dispute. Given that none of this affects the outcome of the present appeal, we do not address these points further.

Can the trustees rely on equitable estoppel?

[49] The respondents argue that equitable or promissory estoppel can overcome the effects of not complying with s 27(2) of the Property Law Act. They say, if the loan agreement is not an effective contract of guarantee, Mr Brougham is estopped from relying on its invalidity to resile from his guarantee obligations.

[50] This argument faces the difficulty that, if it were accepted that a person giving a guarantee that fails to meet the requirements of s 27(2) is nevertheless estopped from asserting the guarantee is ineffective because he or she indicated in the non-complying document or oral representation an intention to be a guarantor, that would deprive s 27(2) of any practical effect. This point was made in the speeches in *Actionstrength*.[31]

---

30 A similar analysis would apply if the loan agreement were found to be a contract of guarantee under which Mr Brougham and Ms Dey were guarantors. The release of Ms Dey as co-guarantor would have discharged Mr Brougham's obligations as co-guarantor because the District Court Judge found that it was not proven that Mr Brougham agreed to Ms Dey's withdrawal as a guarantor: DC judgment, above n 2, at [71]. See above at [15].

31 *Actionstrength*, above n 8, at [9] per Lord Bingham, [26] per Lord Hoffmann and [52] per Lord Walker. The same point was made by the District Court Judge: DC judgment, above n 2, at [32].

[51] Actionstrength, a subcontractor to International Glass (Inglen), was concerned at the failures of Inglen to pay for its services in connection with a construction project being undertaken for St-Gobain. Actionstrength threatened to withdraw its services. It did not do so on the faith of a representation from St-Gobain that St-Gobain would ensure Actionstrength received any amount due to it from Inglen, if necessary by redirecting to Actionstrength payments due from St-Gobain to Inglen.

[52] St-Gobain did not pay and Actionstrength sued. St-Gobain applied for summary judgment on the ground that an oral guarantee was unenforceable under s 4 of the Statute of Frauds, so Actionstrength's case could not succeed. Actionstrength argued that St-Gobain was estopped from relying on s 4 of the Statute of Frauds. The House of Lords unanimously dismissed Actionstrength's appeal.[32] Lord Bingham summarised the position as follows:[33]

> On the facts of this case [the approach to estoppel] involves asking three questions. (1) What is the assumption which Actionstrength made? (2) Did St-Gobain induce or encourage the making of that assumption? (3) Is it in all the circumstances unconscionable for St-Gobain to place reliance on section 4 [of the Statute of Frauds]? …
>
> It is implicit in the assumed facts that Actionstrength believed itself to be the beneficiary of an effective guarantee. Its difficulty, in my view insuperable, arises with the second question. For in seeking to show inducement or encouragement Actionstrength can rely on nothing beyond the oral agreement of St-Gobain which, in the absence of writing, is rendered unenforceable by section 4. There was no representation by St-Gobain that it would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that it would confirm the agreement in writing. Nor did St-Gobain make any payment direct to Actionstrength which could arguably be relied on as affirming the oral agreement or inducing Actionstrength to go on supplying labour. If St-Gobain were held to be estopped in this case it is hard to see why any oral guarantor, where credit was extended to a debtor on the strength of a guarantee, would not be similarly estopped. The result would be to render nugatory a provision which, despite its age, Parliament has deliberately chosen to retain.

[53] Lord Walker accepted that if a party who gave an oral guarantee represented that it would not plead the Statute of Frauds, that could found an estoppel. As there

---

32 At [10] per Lord Bingham, [12] per Lord Woolf, [29] per Lord Hoffmann, [36] per Lord Clyde and [54]–[55] per Lord Walker.

33 At [8]–[9].

was no such representation in *Actionstrength*, St-Gobain was entitled to summary judgment.[34]

[54] Lord Clyde summarised the law as follows:[35]

> In order to be estopped from invoking the Statute [of Frauds] there must be something more, such as some additional encouragement, inducement or assurance. In addition to the promise there must be some influence exerted by St-Gobain on Actionstrength to lead it to assume that the promise would be honoured.

[55] The respondents pointed to the decision of the High Court in *Tait-Jamieson v Cardrona Ski Resort Ltd* as a case where an estoppel argument was successful despite the guarantee document not complying with s 2 of the 1956 Act.[36] In that case, a letter was sent to Cardrona stating that Mr Tait-Jamieson and two other parents of children undertaking ski training at Cardrona guaranteed payment of Cardrona's ski training fees for a season. Cardrona had indicated it was considering discontinuing the programme because of lack of funding. On the faith of a letter, Cardrona allowed the ski training to continue despite it being unfunded. However, only one of the parents had signed the letter (not Mr Tait-Jamieson). When the attempt to fund the programme failed and Mr Tait-Jamieson was called upon to pay the amount he had undertaken to pay, he attempted to resile from the obligation on the basis that there was no enforceable signed guarantee.

[56] French J held that, despite the letter being ineffective as a contract of guarantee under s 2 of the 1956 Act because Mr Tait-Jamieson had not signed it, he was nevertheless estopped from relying on this deficiency. She said:

> [64] To apply estoppel in the circumstances of this case does not in any way undermine the policy of the Contracts Enforcement Act. Certainty is not being sacrificed at the altar of fairness. The agreement being enforced was in writing, so there is certainty as to its terms. Nor is this a case of a powerful creditor and an inexperienced person being led into a one-sided and ill-considered obligation he did not fully understand, and from which he did not gain any benefit. This was not a document drawn up by the creditor, or even at the suggestion of the creditor. The document was the result of a

---

34 At [52] and [54].

35 At [35].

36 *Tait-Jamieson v Cardrona Ski Resort Ltd* [2012] 1 NZLR 105 (HC). Leave to appeal to the Court of Appeal was granted (*Tait-Jamieson v Cardrona Ski Resort Ltd* HC Invercargill CIV-2010-425-181, 14 December 2011) but it appears the appeal did not proceed.

> meeting which Mr Tait-Jamieson attended and it was a document which was circulated to him for approval. It was addressed to Cardrona and so as I have said, Mr Tait-Jamieson knew it was to be delivered for the purpose of inducing Cardrona not to terminate the training programme. It did in fact have that effect. As for the requirement of a signature, the purpose of a signature is to evidence an intention to be contractually bound. Mr Tait-Jamieson personally and expressly affirmed his intention to be bound both orally over the telephone and also, importantly, in writing via email. Further, he personally obtained a significant benefit as a result of the guarantee.
>
> [65] In all the circumstances, it would clearly be unconscionable for him to rely on the absence of a signature, and subject to the issue of leave, I am satisfied he should be estopped from doing so.
>
> (footnote omitted)

[57] The respondents say it is unconscionable for Mr Brougham to resile from his guarantee obligation. So he should be estopped from denying the effectiveness of the purported guarantee.

[58] Although neither counsel relied on Australian authority, we have considered whether Australian cases assist. There is some inconsistency, illustrated by comparing the view of McLure and Newnes JJA in *Tipperary Developments Pty Ltd v Western Australia* on the one hand with that of Wheeler JA in the same case and Edelman J in *Netglory Pty Ltd v Caratti* on the other.[37] The former suggests that Statute of Frauds-like provisions do not stand in the way of a claim based on estoppel in relation to an oral guarantee; the latter adheres to the approach in *Actionstrength*. Some Australian commentators are also critical of the approach in *Actionstrength*.[38] Given that the New Zealand legislature has recently chosen not only to retain the requirement for a guarantee to be in writing, but to strengthen it,[39] we do not consider there is a case for departing from the *Actionstrength* approach in New Zealand.

[59] As was said in *Actionstrength*, something more than the unenforceable guarantee is required to found an estoppel. Affirmation other than the deficient

---

37 *Tipperary Developments Pty Ltd v Western Australia* [2009] WASCA 126, (2009) 38 WAR 488 at [128]–[147] per McLure JA (with whom Newnes JA agreed: at [305]) and [21]–[24] per Wheeler JA; and *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [198].

38 Andrew Robertson "The Statute of Frauds, Equitable Estoppel and the Need for 'Something More'" (2003) 19 JCL 173; and NC Seddon and RA Bigwood *Cheshire and Fifoot: Law of Contract* (11th ed, LexisNexis, Chatswood (NSW), 2017) at 928.

39 As explained above at [26]–[27].

guarantee document is required. An estoppel based on reliance on only the deficient guarantee effectively undermines s 27(2) of the Property Law Act.

[60] The trustees relied on three factors as evidencing this additional encouragement, inducement or assurance. Those factors and our evaluation of them are as follows:

(a) The trustees say Mr Brougham affirmed his obligation by signing the loan agreement as guarantor. We do not accept that is additional encouragement, inducement or assurance. The loan agreement is the defective guarantee document. It is not "something more".

(b) The trustees say payments of interest made under the loan agreement evidenced Mr Brougham's acceptance of his obligation as guarantor. We disagree. The payments of interest were made by the company, not by Mr Brougham. He did not, in fact, make any payments.

(c) Mr Brougham acknowledged in his evidence at the trial that he intended to be bound as a guarantor. However, the acknowledgement by Mr Brougham at trial was made well after the money was advanced to the company. An acknowledgment made some years after the advance cannot have induced the trustees to make the advance. Rather, they relied on their view that he was bound as a guarantor because he had signed the loan agreement, and no deed of guarantee was required to be signed.

[61] It is true that in *Tait-Jamieson*, the High Court Judge relied upon affirmations made by Mr Tait-Jamieson after Cardrona had acted in reliance on the deficient guarantee document and the ski training programme had concluded as a basis for finding he was estopped from denying he was liable under the guarantee. Such affirmations do not appear to meet the requirements outlined in *Actionstrength*, which contemplated that an affirmation could found an estoppel if it induced Actionstrength to continue working. Implicitly, an affirmation made after the work had been

completed and the debt had accrued could not suffice.[40] In the present case, the affirmations would need to have been made before the loan was advanced to found an estoppel under the approach in *Actionstrength*.

[62] In *Tait-Jamieson*, the High Court placed some weight on the fact that there was clarity as to the terms of the guarantee because it was a written document, not an oral communication as was the case in *Actionstrength*. We do not see that as supporting an estoppel. In any event, it can be contrasted with the present case, where the only document signed by Mr Brougham was the loan agreement, which, as we have already found, does not contain anything at all that defines the terms of the guarantee.[41]

[63] We do not consider there is any basis to distinguish this case from *Actionstrength*. Mr Brougham did not make a representation or give an assurance of the kind that Lord Walker and Lord Clyde considered necessary to found an estoppel. No estoppel arises in this case.

Can the respondents get specific performance of Mr Brougham's obligation to sign a deed of guarantee and indemnity?

[64] The respondents argue that, if their other arguments fail, they should be entitled to require Mr Brougham to sign a deed of guarantee and indemnity in accordance with the terms of the loan agreement.

[65] The difficulty for the respondents is that there is no covenant in the loan agreement that could be enforced by way of specific performance. The only reference to the deed of guarantee and indemnity is in the conditions precedent, and the wording of the provision is not a covenant to sign a deed of guarantee, but rather the specification of a condition which must be fulfilled before the advance is made. As already mentioned, the respondents decided to waive this requirement. There is, therefore, no commitment made by Mr Brougham in respect of which an order for specific performance could be made.

---

[40] See Allan, above n 25, at 1352; and *Northcott v Davidson* HC Whangarei CIV-2012-488-97, 7 June 2012 at [67]–[70].

[41] The same distinction was made in *Victoria Quarter*, above n 16, at [95]–[96].

[66] The respondents argued that this case was similar to *Chambers v Chatfield*, in which Edwards J upheld a District Court decision ordering specific performance of a covenant in an agreement to lease requiring Mr Chambers to execute a written guarantee.[42]

[67] Counsel for Mr Brougham, Mr Geiringer, argued *Chambers* was wrongly decided. We did not have full argument on the point and it was not dealt with by the Court of Appeal.[43] It does not require resolution in this case, given our conclusion above at [65]. We prefer to leave the point for a case where it has been fully argued and affects the outcome.

Result

[68] The appeal is allowed. The orders made in the Court of Appeal are set aside and judgment is entered for the appellant.

Costs

[69] The Court of Appeal found that the respondents were entitled to indemnity costs on the basis that cl 12 of the loan agreement required the borrower (referred to in the agreement as "you") to pay "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".[44] However, cl 12 applied only to the company (as borrower) which was "you" in terms of cl 12. As the loan agreement contains no terms relating to the guarantee (and is not a contract of guarantee), cl 12 cannot apply to Mr Brougham.

[70] The Court of Appeal delivered a later judgment quantifying costs not only for the appeal and application for leave to appeal to that Court but also for the proceedings

---

42 *Chambers v Chatfield* [2016] NZHC 1871, (2016) 18 NZCPR 1.

43 *Chambers* was mentioned briefly by the Court of Appeal, but it did not consider whether Edwards J was correct to order specific performance: CA judgment, above n 4, at [29].

44 CA judgment, above n 4, at [33] and [39]. See also Court of Appeal (Civil) Rules 2005, r 53E(3)(e).

in the District Court and High Court.[45] The respondents claimed a total of $249,706.93 relating to the enforcement of the guarantee and Mr Brougham's counterclaim, of which $184,517.67 was claimed as indemnity costs under cl 12 of the loan agreement. The Court awarded the trustees costs and disbursements totalling $107,192.76 (for all courts) in relation to the enforcement of the guarantee and $30,811 in relation to Mr Brougham's counterclaim.[46] It also awarded Ms Dey costs of $9,787.52 in relation to Mr Brougham's unsuccessful claim against her.[47] Costs as between the trustees and Mr Brougham will need to be reassessed in light of this judgment. We therefore set aside the award of costs and disbursements for all the Courts below in favour of the trustees and direct that such costs and disbursements be reassessed by the Court of Appeal in light of this judgment. The award of costs in favour of Ms Dey stands.

[71] In this Court, costs should follow the event. We award costs to Mr Brougham of $25,000 plus usual disbursements. The respondents are jointly and severally liable for that award.

Addendum

[72] After the Registry contacted counsel to inform them of the date for delivery of this judgment, counsel for the trustees filed an interlocutory application to adduce further evidence. The proposed evidence is said to support the contention that Mr Brougham gave oral affirmations of his liability as guarantor on two occasions, which, the respondents argue, strengthens their case in relation to equitable estoppel. The first such occasion was on or about 7 October 2010 and the second on or about 29 January 2011. The proposed evidence comprises new affidavit evidence from four deponents, including Ms Regan and Ms Dey, and two documents that were discovered but not produced in evidence in the District Court.

[73] It hardly needs to be said that a date only days before the intended delivery of the reserved judgment of the third appellate court is not the most auspicious time for

---

45 *Regan v Brougham* [2020] NZCA 173 (French, Collins and Wild JJ). The Court took this course because Judge Ross had died since deciding the case in the District Court, and almost three years had elapsed since the High Court hearing and the High Court Judge had not had to deal with an indemnity costs claim: at [15]–[18].

46 At [97].

47 At [98].

the making of such an application. The timing of the application is an obvious impediment to the admission of the evidence, but it is far from the only one. The proposed evidence is not fresh. Its credibility cannot be assured because it has not been tested as it would have been if it had been adduced in the District Court. And it lacks cogency. We are satisfied that, on our approach to the case, the admission of the proposed evidence would not affect the outcome. Even if the evidence were accepted as true, the affirmations said to have been made by Mr Brougham would add nothing to the affirmations referred to above at [60], as they were made after the trustees had acted to their detriment by making the advance to the company. The proposed evidence does not, therefore, meet the test for admissibility and we do not admit it.

Solicitors:
Macalister Mazengarb, Wellington for Appellant
McKenna King, Hamilton for Respondents