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IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA.

CORAM : MANN C.J.

Tuesday,
9th July, 1968.

BETWEEN F. W. BRECKWOLDT
Plaintiff

AND DELTA INDUSTRIES (N.G.)
PTY.LTD.
Defendant.

JUDGMENT

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Moresby.

n C. J.

In this action the plaintiff is a merchant of Hamburg, Germany, and has extensive business interests throughout the Territory. He claimed nearly $12,000 from the defendant company under the provisions of a document, Exhibit "O", in these proceedings, which purported to be a guarantee.

The defendant company is one of a substantial group of companies formed in the Territory and carrying on a variety of business undertakings. An associated company, Delta Constructions Pty. Ltd. engages in structural engineering and building contracts. Large consignments of cement and other structural materials were ordered from time to time from the plaintiff and received by Delta Constructions Pty. Ltd. at different ports in the Territory, each conveniently selected to facilitate delivery to whatever site of construction was concerned. The business transactions between the plaintiff and Delta Constructions Pty. Ltd. were described as amounting to some hundreds of thousands of dollars per annum.

It would appear from the evidence presented to the Court that the plaintiff might have had considerable difficulty if he had sought to prove his claim as a balance of a trading account between the parties concerned because there were many details of expenses and incidental matters which might have caused formidable difficulties in proof over the long series of very substantial transactions. But

this is not the way that the plaintiff's claim is put.

It was the practice for Delta Constructions Pty. Ltd. to place separate orders for separate delivery at chosen ports, so that each order and each delivery would normally be referable solely to some particular contract being undertaken by the construction company. This aspect of the case appears to be of importance.

The defendant denies liability under the terms of the guarantee and, in addition, relies on a general denial that the goods were delivered to the construction company. Paragraphs 2 - 6 of the Defence were apparently abandoned at trial.

The main case of the defendant at the trial was based upon the argument that a guarantee of the kind relied on by the plaintiff is by its very nature a document which must be read strictly and not extended as a matter of interpretation to obligations which are not clearly specified as intended to be covered by the express terms of the guarantee.

This mode of construction and approach to the question of liability is reinforced, according to the defendant's argument, by the circumstance that the agreement itself was drawn up by the plaintiff and proffered to the defendant as an embodiment of the terms, and presumably the only terms, upon which the plaintiff was prepared to do business. Thus, according to the defendant's case, the doctrine of "contra proferentem ...." applies with full force, and further restricts the interpretation of the document.

Ample authority was cited to support these arguments for the defence, but I find that they are not supported, on the first argument by the terms of the document itself, nor, as to the second argument, by the facts of the case.

Taking the contra proferentem rule first. It is clear from the evidence that a draft of the proposed form of guarantee was prepared by the

solicitors for the plaintiff and handed to Mr. Clamp, the Governing Director of the defendant company, who submitted it to the Company's solicitor and later returned an amended draft, which led to the agreement as finally executed. It seems, in fact, that the document was the joint production of the two solicitors acting for the parties and was in no sense exclusively the expression of the will of the plaintiff alone. Thus, the Court must approach the interpretation of the guarantee not so as to extend its meaning or terms beyond the apparent intention of the parties, but as a business agreement expressing, so far as it expresses anything, the intentions equally of both parties.

As a matter of construction the defendant contended that in the opening parts of the guarantee there is a recital which limits the goods to those which are ordered "in the way of that company's trade or business now carried on by it at Four-mile, Hubert Murray Highway, Port Moresby", that is to the strict exclusion of any goods ordered in relation to the company's business carried on in any other part of the Territory. The argument for the defence goes on to contend that the construction company's business is carried on from time to time at many different parts of the Territory. It may have a contract to build a bridge in one district, a highway in another, buildings in yet another, and so on. Therefore, it is contended that the business contemplated by the guarantee is the business which is actually done and transacted and carried on at the company's address in Port Moresby, and not its activities at Milne Bay, Wewak or elsewhere.

To support the reasonableness of this approach to the construction of the recital, the defendant company pointed out that Mr. Donald Clamp, who exercised sole authority and control over the companies in question, would naturally require the liability of the company, situated for all purposes at Port Moresby, to be limited to transactions which were carried on at Port Moresby so that he could exercise personal supervision at Port Moresby and not be compelled to scrutinise transactions taking place all over the Territory.

The first point is that the recital at the top of the form of guarantee does not in terms express or define or limit the obligations of the plaintiff to supply goods. It is a recital of the consideration given for the obligations of the defendant to pay certain things. If the consideration were an agreement to supply goods only in Port Moresby, that consideration would still be fully satisfied if the plaintiff, in addition and without any obligation, were to supply further goods elsewhere. Thus, the question of interpretation is not likely to find its answer solely in the recital.

I think that in the context the words "trade or business now carried on by it at Four--mile etc." are words of identification of the company's general business. They are descriptive words and, so far as the evidence shows, the address at Port Moresby is the only fixed place of business of the company. It engages in temporary activities elsewhere from time to time and place to place, but these individual contracts are hardly to be described as the "company's business" in the ordinary sense. The words "trade or business" are apt to refer to things that continue, and take place and are transacted at the company's permanent address. These include statutory transactions of many kinds, the keeping of books and accounts and the making of decisions by the company's governing director.

The part of the guarantee that gives specific expression to the obligation of the defendant company to pay is paragraph 1. It provides that the defendant is to be answerable and responsible to the plaintiff for the due payment ...."for all such goods as aforesaid". One must, therefore, look at the earlier express terms to identify the goods. The corresponding words in the recital are "goods in the way of that company's trade or business"............. I, therefore, construe the operative words as meaning that the defendant Company is liable for all goods supplied to Delta Constructions Pty. Ltd. in the course, or "way" of the defendant's business which is in fact carried on at Port Moresby, regardless of where some particular construction job might be in progress.

Paragraph 1 contains further specifications for the defendant's liability. The words "as you may from time to time on that company's request supply" are satisfied in this case because Mr. Clamp himself controlled the entire transaction and personally ordered the goods, or at least had direct personal knowledge of every detail. Accounts were rendered covering each separate transaction.

Paragraph 1 further provides for the time of payment. It provides that payment is to be made in sixty days after arrival of the goods from time to time in Port Moresby. The defendant contended that any goods which arrived at any other port than Port Moresby would not come within the terms of the guarantee. But the agreement does not actually say this. This is only a provision dealing with time for payment.

Applying the standard test for implied terms one has only to imagine the kind of situation which actually occurred in this case. For example, if goods had been ordered by Delta Constructions Pty. Ltd. and Mr. Clamp had said "it would suit us much better to have these goods delivered at another seaport, have you any objection to that?" As between businessmen it would be unthinkable that either party would suggest that if the goods were delivered at some other port the guarantor would not be called upon to pay. In my view, in a business transaction of this kind and in the circumstances prevailing, one is compelled to imply a term to the effect that where it suited the parties to adopt some alternative mode of performance by delivery at any other place, the obligation to pay for the goods would only be subject to whatever reasonable modification as to time might be appropriate. There is no express prohibition against delivery of goods at any other place.

Paragraph 1 of the guarantee also provides that the terms of payment are to be those agreed upon by the plaintiff and Delta Constructions Pty. Ltd., subject to a limit of £10,000. The practice was that goods were brought to the Territory under a C. and F. contract providing for payment to be made "against sixty days sight D/A through the Commonwealth

Trading Bank of Australia, Port Moresby". Insurance was arranged separately. This mode of obtaining and delivering the documentary title to the goods was mutually adopted by all parties to the transactions with full understanding of what was going on, and in each case Mr. Clamp had undoubted authority to act as he did on behalf of both Delta Constructions Pty. Ltd. and Delta Industries Pty. Ltd., regardless of which company paid for any of the large numbers of shipments made on Mr. Clamp's authority. It is clear that these transactions were completed according to the terms agreed upon by the plaintiff's agents and Delta Constructions Pty. Ltd. In the case of C. and F. contracts it is the shipping documents of title, not the goods themselves that are delivered. See Joske, Sale of Goods in Australia, p. 92 et seq.

There appear to be no remaining legal difficulties. The case of Evans v. Beattie (1) which was relied upon by both sides in argument as to the admissibility of accounts and records, draws a clear distinction between the production of accounts and records to prove indebtedness of a principal debtor by reference to a regular system or course of business, and the non-allowable use of an admission made by the principal debtor as against a guarantor who was not a party to the admission. Thus, the books of the principal debtor were admitted in evidence as part of a systematic record which to the degree of reliability inherent in the system, established as a fact what the liability of the principal debtor was. They were not admitted in evidence upon the footing that they constituted an admission by the principal debtor so as to be used on that footing against the defendant.

With the exception of a few items which cannot be proved, I find that the plaintiff's claim comes within the terms of the guarantee. The plaintiff at the hearing abandoned these minor claims, leaving an amount of $9,149.07 outstanding. Each of the amounts in question arises under a specific contract for the supply of particular goods and in each case the price, including the freight and shipping charges paid at the port of shipment, are

(1) 170 E.R. 725.

specified. Therefore, the total price agreed to be paid by Delta Constructions Pty. Ltd. is the amount endorsed on the Bills of Exchange (Exhibit "N") and the amounts shown on copy invoices, Exhibits "P" and "Q", and shipping documents. I find, therefore, that the plaintiff is entitled to succeed in this action for the amount stated above.

There will be judgment for the plaintiff for $9,149.07, with costs to be taxed.

Stay seven (7) days.

Solicitor for the plaintiff : Norman White and Reitano.
Solicitor for the defendant: C. Bayliss.