DE SOUSA v COOPER

In the Supreme Court of the Northern Territory of Australia

Martin J.

16 January and 19 February 1992

APPEAL - Appeal against decision of Master - Court to give due weight to Master's decision, but unfettered by it

GUARANTEE & INDEMNITY - Indebtedness of company - insolvency of co-guarantors - extra burden to be shared among remaining guarantors

JUDGMENT & ORDERS - Summary judgment for plaintiff - application by plaintiff for summary judgment as to part of claim on grounds of no defence to that part - liability of guarantor to service debt where co-guarantors insolvent - Supreme Court Rules (NT) R. 22.02

PRACTICE & PROCEDURE - Appeal - appeal against decision of Master - Court to give due weight to Master's decision, but unfettered by it

PRACTICE & PROCEDURE - Summary judgment for plaintiff - application by plaintiff for summary judgment as to part of claim on grounds of no defence to that part - liability of guarantor to service debt where co-guarantors insolvent - Supreme Court Rules (NT) R. 22.02

Cases applied:

Burns Philip Trustee Co Ltd v Saret (unreported, 5 May 1988)
Mahoney v McManus (1981) 55 ALJR 73
Southwell v Specialised Engineering Services Pty Ltd (1990) 70 NTR 6

Statutes:

Supreme Court Rules (NT) 1987

Counsel for the plaintiff : Mr T F Coulehan
Solicitors for the plaintiff : Barr Moore & Co

Counsel for the defendant : Mr D de L Winter
Solicitors for the defendant : David de L Winter

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 701 of 1990

BETWEEN:

MANUEL DE JESUS DE SOUSA
Plaintiff

AND:

JEANETTE CAROL COOPER
Defendant

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 19 February 1992)

This is an appeal to the Court from a decision of the Master made on 12 December 1991 dismissing the appellant's application for summary judgment for part of his claim with costs. On such an appeal the Judge is in the same position as the Master and is unfettered by the Master's decision although he would give it due weight (Southwell v Specialised Engineering Services Pty Ltd (1990) 70 NTR 6, and see my unreported decision in Burns Philip Trustee Co Ltd v Saret, 5 May 1988).

By the endorsed Statement of Claim on his writ the plaintiff alleged an agreement in writing dated 11 July 1986

whereby he and the defendant, Cooper, and two other persons, namely Messrs Williams and Aresti, guaranteed to the ANZ Bank due payment to the bank of all monies owed to the bank by a company, Key Real Estate Pty Ltd. Those facts are admitted by the defendant by her defence. The Statement of Claim goes on to assert that the judgment was obtained by the bank against the plaintiff on 20 June 1990 in the sum of $205,000 plus interest, and that of that sum the plaintiff had paid approximately $150,000 to the bank and come to arrangements as to the balance. It is further alleged that the company, Key Real Estate Pty Ltd, was insolvent and that both Messrs Williams and Aresti were declared bankrupt. By his claim the plaintiff sought contribution from the defendant in the sum of one half of the amount which he had paid to the bank and towards his ongoing contributions to the balance of the judgment.

By her defence the defendant says, inter alia, that the bank had obtained judgment in September of 1987 in default of appearance against the company, Key Real Estate Pty Ltd and Messrs Williams and Aresti for the sum of $108,959.19 plus costs and says that if she is liable to make any contribution to the plaintiff (which was denied) then her contribution was limited to 25% of that judgment. She also alleges that it was by virtue of the plaintiff's own mismanagement and unreasonable defence to the claim by the bank against him that he became liable to pay to the bank the amount for which it had obtained judgment against him and that she is in no way reasponsible for any excess

over the amount for which judgment might have been obtained against him as at the date upon which judgment was obtained against the others.

I am satisfied on the affidavit evidence of the plaintiff as to the terms of the guarantee, as to the judgment obtained by the bank on 18 September 1987 against the company and the other two guarantors, as to the judgment obtained against him, as to the agreement he reached with the bank and his payment to it, as to the insolvency of the company and the bankruptcy of Messrs Williams and Aresti. The plaintiff deposes that he believes that the defendant, Cooper, has no defence to his claim in so far as the sum of $54,479.60 is concerned, that is, one half of the judgment obtained by the bank against the company and the other two guarantors back in September 1987. The plaintiff's application before the Master and thus before the Court is for judgment in that sum being part of the claim included in his Statement of Claim upon the grounds that the defendant has no defence to it (r. 22.02(1)). Apart from the defendant's claim that the plaintiff's own actions brought about the judgment against him for a greater amount than that obtained against the others she does not raise any positive defence to the amount claimed, but simply denies that the plaintiff is entitled to any contributions from her. In other words, she admits having entered into the guarantee in the terms alleged by the plaintiff and simply denies any liability to the plaintiff in respect of the contribution claimed by him, but in addition raises a

specific defence going to the additional amount for which the bank obtained judgment against the plaintiff as opposed to the amount for which it had obtained judgment against the other guarantors.

The Master dismissed the application, but neither party put before me evidence of any reasons which the Master may have given and thus I am in no position to give any weight to them.

I have examined the guarantee, a copy of which has been exhibited to the plaintiff's affidavit and I am satisfied that the plaintiff is entitled to a contribution from the defendant. The plaintiff has paid or provided more than his proper share of the principal debt and I am also satisfied that he is entitled to contribution from the defendant of at least one half of the judgment obtained by the bank against the other guarantors in September 1987 upon the basis that the company and the other guarantors are now insolvent (see Mahoney v McManus (1981) 55 ALJR 73 per Gibbs CJ. at p. 675). The same amount was included in the judgment obtained against the plaintiff.

Counsel appeared on behalf of the defendant upon the hearing of the appeal, but indicated that he had no coherent instructions from his client. He did not seek an adjournment and did not raise any argument as to why the plaintiff's application should not be granted, but did not consent to such

an order being made.

I see no good reason why the application should not have been granted by the Master and the appeal will therefore be allowed. There will be judgment for the plaintiff for part of the claim endorsed upon its Statement of Claim in the sum of $54,479.60.

The Master's order that the plaintiff pay the defendant's costs of the application before him is set aside and the defendant is ordered to pay the plaintiff's costs both before the Master and the Court on appeal.