



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

BROUGHAM v REGAN

(SC 104/2019) [2020] NZSC 118

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsfnz.govt.nz.

Introduction

The issue in the appeal was whether the appellant, Mr Brougham, was liable as a guarantor of a loan made by the first respondents, the trustees of the Winchester Trust, to a company incorporated by Mr Brougham and the second respondent, Ms Dey.

Background

Mr Brougham and Ms Dey were in relationship. They agreed to purchase a business together and set up the company for that purpose. Ms Dey arranged for the Trust to lend the company the \$50,000 it needed to purchase the business. Ms Dey was a trustee and beneficiary of the Trust at the time. Ms Dey and Mr Brougham were to guarantee \$25,000 each.

Mr Brougham signed the loan agreement as both a director of the company and as a guarantor. Ms Dey signed the agreement only as a director. The loan agreement did not specify the obligations of those who signed the agreement as guarantors. Instead, it provided that before the money was advanced, any person named in the agreement as a guarantor had to sign a separate written guarantee. No written guarantee was ever prepared or signed by Mr Brougham. The \$50,000 was advanced to the company the same day the loan agreement was signed.

Subsequently, the relationship between Mr Brougham and Ms Dey ended and the company was liquidated. The trustees of the Trust attempted to enforce the guarantee against

Mr Brougham. They were unsuccessful in both the District Court and High Court. However, the Court of Appeal allowed their appeal and held that Mr Brougham was liable as a guarantor for \$50,000 together with interest. Mr Brougham was granted leave to appeal to the Supreme Court. The approved question was whether the Court of Appeal was correct to allow the trustees' appeal.

The Supreme Court's decision

The Supreme Court has unanimously allowed Mr Brougham's appeal.

The primary issue was whether the loan agreement met the requirements of s 27(2) of the Property Law Act 2007. Section 27(2) requires a contract of guarantee to be in writing and signed by the guarantor. Although the loan agreement was signed by Mr Brougham as guarantor, it did not include any provision under which he agreed to answer for the debt, default or liability of the company. Accordingly, the Court held that the loan agreement did not satisfy the "in writing" requirement in s 27(2) and Mr Brougham was not liable as a guarantor.

The Court considered that even if the requirements of s 27(2) were satisfied, the guarantee was unlikely to be enforceable. The general rule is that where a guarantee names multiple guarantors, it is ineffective unless it is signed by all guarantors. Here, the loan agreement named both Mr Brougham and Ms Dey as guarantors, yet only Mr Brougham signed as a guarantor.

The Court also rejected the trustees' argument that Mr Brougham was estopped (prevented) from resiling from his obligations as guarantor of the loan. The Court held that to prevent Mr Brougham from denying the validity of the guarantee would defeat the consumer protection purpose of s 27(2) of the Property Law Act.

Finally, the Court held that the trustees were not entitled to an order of specific performance requiring Mr Brougham to sign a written guarantee in accordance with the loan agreement. Although the loan agreement contemplated that a written guarantee would be signed before the \$50,000 was advanced, this requirement was waived by the trustees. There was therefore no commitment made by Mr Brougham to sign a written guarantee in respect of which an order for specific performance could be made.

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