IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 104/2019
[2020] NZSC Trans 16

BETWEEN **BRYCE BROUGHAM**
Appellant

AND **CHRISTINE ANNE ELIZABETH REGAN AND MARK JEFFEREY TUFFIN (as trustees of the Winchester Trust)**
First Respondent

RACHAEL CHRISTINA DEY
Second Respondent

Hearing: 9 June 2020

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Williams J

Appearances: F E Geiringer (via video link) and J K Mahuta-Coyle for the Appellant
F A King and M A Dempster for the First Respondent
S A McKenna for the Second Respondent

CIVIL APPEAL

MR GEIRINGER:
May it please, Your Honours, counsel's name is Felix Geiringer and I appear with my learned co-counsel, James Mahuta-Coyle, for the appellant.

WINKELMANN CJ:
Tēnā kōrua.

MR KING:
May it please the Court, counsel's name is King and I appear with Ms Dempster for the first respondent.

WINKELMANN CJ:
Tēnā kōrua.

MR McKENNA:
May it please Your Honour, counsel's name is McKenna and I appear for the second respondent.

WINKELMANN CJ:
Tēnā koe, Mr McKenna. Right, Mr Geiringer, the floor is yours.

MR GEIRINGER:
Yes, good morning, Your Honours. I trust that Your Honours have received this morning my oral outline under the new rule 36A. I understand it's been provided in both electronic and in physical form. If Your Honours do have access to the electronic version I've done my best to hyperlink a lot of the text to take you immediately to the main material that I'm relying on for each of the statements in it. So if you have access to that that might assist.

As the oral outline says, I'm presenting today with my learned co-counsel. I will be presenting the bulk of the case and in reference to the oral outline I will

deal with matters set out in numbers 2 through 9 and then after I have finished Mr Mahuta-Coyle will address you on item 10, which is the *Harvey v Dunbar Assets PLC* [2013] BPIR 722 line of authority.

Obviously, Your Honours, this is my attempt at streamlining my oral submissions today in the way I wish to present the material that was previously in the synopsis and to reply to my learned friends for the respondents. But if Your Honours have different ideas and if there are particular matters that Your Honours wish to take me to of course feel free to do that as I move through.

WINKELMANN CJ:
You go ahead…

MR GEIRINGER:
Sorry, Your Honour. And I do expect that there is an ever so slight lag between us, so I do apologise if I'm speaking over but I'll attempt not to do so.

So starting therefore, as my oral outline does, with section 27, and the proposition that section 27 when it came into force in the 2007 Act changed the law of New Zealand to impose a more restrictive requirement for enforceable guarantees, and in the case of *Chambers v Chatfield* [2016] NZHC 1871 that my learned friends rely on and which I will discuss later Justice Edwards describes the proposition that this Act changed the law of New Zealand as beyond argument, and I set out here the full propositions which I say make this clear. And the change is this: whereas before the Act a guarantee there had to be some writing but the guarantee could be distributed over notes, memoranda or contracts, something had to be signed, but all you needed is that in combination all of the documents together would make the guarantee sufficiently clear.

What we say is that now the requirement is much clearer than that, there has to be a written contract of guarantee, it has to contain terms of guarantee that are written and signed. And Your Honours can be confident in my submission

that this is right because, firstly, as Your Honours know, the statutory history of this is we start we the 17th century Act, 1677 Statute of Frauds, which made its way round the whole of the Commonwealth, including New Zealand, and this Act found its way into section 2, a relevant portion of that found its way into section 2 of the Contracts Enforcement Act 1956. Now that dispensed with the archaic language that had appeared in the 17th century Act and the archaic spelling, but in my submission if you go through it – and it's written out in my synopsis – it's quite clear that it mirrors pretty precisely the requirements that existed way back in 1677.

And then what happened in the 2007 – sorry, pausing for a moment – then we have a Law Commission Report in 1994, and if Your Honours click on my 2.1 it will take you to the relevant part of that report, which is explaining why the new Act in its new terms should come into force, and the Law Commission says quite clearly that it is a change to impose a more restrictive requirement, the contract of guarantee must actually be in writing and be signed by the guarantor. So there's no ambiguity there and, going back to my outline, that change came into effect because – and my learned friend for the first respondent suggested there is no change because there was a requirement for writing before, there was a requirement for writing now – but the difference in the wording of the Act is that whereas before there was a list of possible documents that you could point to to find sources for the guarantee you're trying to enforce, now there has to be a expressly a contract of guarantee, that's the key change, and that's what Law Commission believed was creating the new requirement that there would have to be written terms and it would be those terms that would have to be signed.

Next, you can be confident that this is in fact what happened in the new Act because if you compare the wording that was proposed by the Law Commission, if you see my 2.3, if you click on the first part of that it will take you to the Law Commission's wording from the report which was at that point in what was called clause 41, and then if you compare that, you can click on the second part of that sentence, it will take you to the Act itself, which is now in the supplementary bundle, and the Act itself mirrors the words, the

only variation is that what was a subsection (2) from the Law Commission has been broken apart into subsections (2) and (3) and there's now bullet pointing for "in writing" and "signed by the guarantor" just to make it clearer to read, but materially it is identical to the wording that was being proposed by the Law Commission.

And just lastly to complete this, you have of course the sources from the debates. I won't necessarily take you to those unless Your Honours wish to, but if you click on "parliamentary debates" or you click on "explanatory note" it will take you to those documents and it will show you the responsible Minister saying expressly that the purpose was to implement the recommendations of the Law Society with some –

WINKELMANN CJ:
Mr Geiringer, if you just slow down a tiny bit…

MR GEIRINGER:
Sorry.

WINKELMANN CJ:
That's all right. We're just trying to keep up with you. So can we just go back? You're at 2.4, are you? Can you just give us moment? So you asked us to click on what at 2.4?

MR GEIRINGER:
Well, let's do that. If you click on the parliamentary debates in 2.4 it takes you to the introduction…

WILLIAMS J:
So if you right click there, right click down on the pdf doc down the bottom.

WINKELMANN CJ:
Right. So that document, we're in it, it opens on Clayton Cosgrove I think.

MR GEIRINGER:

Yes. Clayton Cosgrove is the Associate Minister of Finance at the time and he was the responsible Minister for this Act and introducing it, and if you look at the third and fourth paragraphs it explains that there was a report, that the introduction of the Act is for the purposes of implementing the recommendations from that report…

WINKELMANN CJ:

Is that all you're taking us to?

MR GEIRINGER:

That's all. As I said in my synopsis, it's of limited assistance, but it does make it clear expressly that Parliament was intending to implement those changes. And if you go back to my oral outline and click instead on the word "explanatory note" it takes you to the first page of the explanatory note for the Bill and the second substantive sentence there under "Law Commission Report" is more clear –

WINKELMANN CJ:

Just pause for a moment. I don't know that that clicking, the split clicking, works. I don't know if anybody else is having any…

WILLIAMS J:

Yes, it does.

O'REGAN J:

It takes you away from the document instead of…

GLAZEBROOK J:

Yes, I can't get back to the document.

WILLIAMS J:

Mr Geiringer, can I suggest that when you suggest to us that we follow you down one of these hyperlinks that you just give us time to catch up so that

we've gone to it, opened it and looked at it before you tell us what it says, otherwise we'll fall hopelessly behind you.

MR GEIRINGER:
Yes, I apologise, yes.

WINKELMANN CJ:
This forum seems to making you go at high speed. You can relax, because it seems to be working okay, so you can just relax a bit and go at a more leisurely pace.

MR GEIRINGER:
It is.

WILLIAMS J:
We're in the South Pacific here, Mr Geiringer.

WINKELMANN CJ:
Yes.

MR GEIRINGER:
It is. Plus it's after midnight here, so I'll admit I'm partially on caffeinated beverages. Not that this is one. Okay, I'll that on board, I'm sorry, Your Honours.

So have Your Honours found the second link in that sentence, which is the Property Law Bill?

WINKELMANN CJ:
I haven't but…

MR GEIRINGER:
What I'll also do, in case there is any trouble with the authorities, is just to let you know where it is in the bundles as well.

This is in the supplementary bundle as one of the 002 documents, Property Law Bill explanatory note, and the only additional thing that this give you that I wanted to point out is that this, the second paragraph there under “Law Commission’s report”, is expressed as to which parts of the report are not being carried forward into the Bill, they’re not relevant to this case, they’re not relevant to this case, they’re not relevant to the issue of guarantees that was in the report. So just to the extent that the introduction of the Bill says that for the most part the Bill is implementing the report, the explanatory note explains that and explains which parts are not.

So you have the Law Commission saying that this requirement should be strengthened and it should be strengthened by making the terms of guarantee be required to be put into a contract of guarantee and for that document to be the one signed. You have the recommendation of the words that the Law Commission puts together being implemented into the Act and passed, and you have Parliament saying that it is intending in doing that to be implementing the recommendations, the relevant recommendations of the Law Commission, and my submission is very simple therefore, that Parliament quite clearly intended this to be a change and a strengthening of the requirement, and the law that preceded this, which enabled one to look at a myriad of documents and to try and extract sufficient clarity about the guarantee, those days are gone and, since 2008 when this Act came into force, the requirement is quite simple: there must be a contract of guarantee setting out the terms of the guarantee and that document must be signed by the guarantor.

WILLIAMS J:
Is that really very different from the prior law which, if you made that statement, would reflect that law? The difference you're suggesting is that there must be a separate single contract of guarantee, isn’t it?

MR GEIRINGER:
Yes, but slightly more through some subtle mechanisms. If, Your Honour, you go back to the Act which is, bizarrely, in the supplementary bundle at tab 3,

and have a look at the new section 27 as it is enforced – this was taken at the relevant time, I don't believe it's changed – you'll see that the definition of a guarantee has now been put expressly into the section in subsection (4). Now the words are reconstructed from the archaic words that came from the Statute of Frauds describing what kind of a contract this rule applied to, and so those words have been reconstructed into a modern definition of a contract of guarantee. But by defining it in the section it makes even more clear that we have a new requirement, because if you go up to subsection (2) it is a contract of guarantee that must be in writing and signed by the guarantor, and in the section a contract of guarantee as per subsection (4) means a contract under which a person agrees to answer to another person for the debt, default or liability of a third person. Now this will seem subtle at this point, but this case does in a way turn on this subtlety. There is, we submit, quite clearly now a requirement from the Act – and this is the intention of Parliament – that there must be document in which a person agrees to answer for the debt of another and that document must be signed. Now if one looks at the cases that were decided under the old rule, and particularly Your Honours will be taken to some of the Statute of Frauds cases from the United Kingdom, which have some very senior authorities on the interpretation of the rule, this is something more than those case would have required.

I'll take Your Honours through some of the relevant cases and you'll see that there are at least two New Zealand authorities in the High Court, one from Associate Judge Bell and one from Justice Hinton, where the High Court has recognised that this is a material change and have sought to implement, and you'll see the authority obviously in this case from the Court of Appeal which disagreed with that, and the case of *Kung v DVD Advance Limited & Anor* [2018] NZHC 3319 and another, Associate Judge Smith's decision in the High Court, which essentially goes the other way.

So that's the starting point, as you can see what has happened in the Act, it seems clear on the face of it what it is now requiring, it's very clear in the parliamentary materials and the Law Commission's materials that it's intended to be a change and a strengthening. There's another thing to note about the

Act and about the strengthening. The Law Communication's Report – sorry, Your Honours, for flipping between the authorities – but the Law Commission's Report, which is authority one in the bundle, I took Your Honours to page 287 of that in my hyperlink before, you can get to it from my 2.1 through the hyperlink. Page 287. Now this is the description I took Your Honours too before of the Law Commission's explanation of why this change has been made and how it will work, and I note a couple of points there. At 239 you will see because the requirement is 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, that's subsection (1), and that was nowhere in the Act, in subsection (1) of the Act. So the Law Commission is saying –

WINKELMANN CJ:
Can I just ask you to pause. Did you say it was 287 of the Law Commission report because I can't find it.

MR GEIRINGER:
It's 280 of the report, which is page 287 of the document. It's because the Law Commission's numbering doesn't start on the cover page of the document.

WINKELMANN CJ:
Right.

MR GEIRINGER:
So the Law Commission is saying there, again 239 makes it clear, envisages this being a strengthening of the law, and therefore it would be unjust to imply it, all guarantees rule them, unenforceable because they didn't know about this law, it didn't exist, so they're only making it prospective. Again it's an obvious mechanism that's needed because you're changing the law and you're making the requirement more strict, and it is mirrored in there.

WINKELMANN CJ:

So to answer Justice Williams' question about what was the difference. The difference used to be that you could cobble together different documents which did not purport to be a contract but could be evidence of an agreement to guarantee.

MR GEIRINGER:

Yes.

WINKELMANN CJ:

Which the Court was satisfied – this now says, no, that's not enough, you need a formal written contract, is that what you're saying?

MR GEIRINGER:

It has to – I'll discuss in detail as we go through the cases what is required, and I'll make the submission that not actually very much is required, but it has to be a document that contains the terms of guarantee, and we say in particular it has to contain a promise from the guarantor to answer for the default of another. Justice Hinton makes that point. We say that's a point well made. If it doesn't contain a promise to answer for the debt of another, it is not appointed a guarantee and it falls at the very first hurdle.

WINKELMANN CJ:

And what's said against you is that the very word "guarantee" carries with that the promise to answer for the debt of another.

MR GEIRINGER:

Depending on how it's used, possibly. There are – well we'll get into the detail of certainty.

WINKELMANN CJ:

Okay.

MR GEIRINGER:

But there's another difference in the law. The old law did not require the memos or notes that constituted the guarantee to come before the contract formation. So you could point to documents that were after the contract formation. Memorandums in writing. So you could have an oral agreement and then it could be recorded later in a memo and that would be the written requirement for a contract of guarantee satisfied. That clearly can't happen, in my submission, under this Act. This Act now requires, we're requiring the written contract, under normal rules of contract, the contract doesn't come into force until it is that document that is executed. So that's a significant change.

I also want to note the detail in 237 of the Law Commission's report, not page 237, but just above on that same page. The terms of guarantee must be in the written document. So it's not me making up this idea that a contract of guarantee requires there to be terms of guarantee, it's the Law Commission saying that is the intent. That there now must be a contract that contains terms of guarantee. The point of 237 is that it was the case under the old law, and it continues to be under the new Act that a consideration need not be there, the contract will not fail for lack of consideration, and so the fact that you omit consideration from your terms will not invalidate the document, the contract guarantee. But in my submission the fact that Parliament, the Law Commission and Parliament, expressly, in requiring terms of guarantee, expressly states that the requirement to set out in writing, consideration is not there, doesn't not have to be there, that in a way reinforces the fact that the other items that one would expect to see in a contract do still need to be there and do need to be there in writing. You need to specify the parties, you need to specify the quantum, you need to specify the condition under which the guarantee can be enforced. In other words, when is it that the guarantor has to pay the money?

If I could out of my order, intended order, take Your –

WILLIAMS J:

Mr Geiringer, can I just butt in for a second? Isn't it the case that the Court of Appeal basically said all those requirements are met here?

MR GEIRINGER:

Yes…

WILLIAMS J:

Well, let me back up. You wouldn't have any problem with a single document that contained the loan and the guarantee if the guarantee terms are expressed and signed by a guarantor as well as a director of the company?

MR GEIRINGER:

No.

WILLIAMS J:

It doesn't have to be a separate document, it just has to be in a single document, correct?

MR GEIRINGER:

Yes. It just has to have terms of guarantee, it can be signed by a guarantor.

WILLIAMS J:

Right. So the difference between you and the Court of Appeal is the Court of Appeal said all that's necessary is in this document and you say it's not?

MR GEIRINGER:

Yes, though you can dig into that, and they say it by, in my submission, relying on principles of the old law, which was, "Do we feel that we can be sufficiently certain about what has been guaranteed?" I would not accept the Court of Appeal's conclusion on that submitted –

WINKELMANN CJ:

Are you coming onto this in your submissions?

MR GEIRINGER:

Yes. But I was just, sorry, to answer His Honour's question, but I would submit that there wasn't sufficient certainty. But in any case you can put that all to one side and say it doesn't matter, because what the Court of Appeal got wrong in any case is that the new law doesn't allow one to do that. The new law says quite expressly and clearly it's parliamentary's intent that there must be written terms of guarantee. So if you must have written terms of guarantee you cannot do what the Court of Appeal did, which is simply infer all of the terms of the guarantee. If you're simply inferring all of the terms of the guarantee from the fact that somebody is signing a document as guarantor, then there is no document with written terms of guarantee and therefore the statute is not satisfied.

I wanted to assist in where the discussion was going, I wanted to take Your Honours to a case I was going to deal with later, but it's in the bundle for a different purpose. I'd like to take you to it, it's the case of *Paulger v Butland Industries Limited* [1989] 3 NZLR 549, 551 (CA), it's authority number three in the authorities bundle, joint authorities bundle. If you wish to get there through hyperlinks, if you just scroll down in my oral outline to the word "*Paulger*" – and I have some summary points about cases – and click on that, that will take you to the electronic version of the case. Now *Paulger* is a 1989 case, long before the new Act came into force, it's not an interpretation of the new Act, and in fact it doesn't – we were relying on it for a very different purpose in our submissions. But it is a case where you have somebody writing a guarantee and then seeking to say that it wasn't intended to be a guarantee. And if you go to page 551 you have the guarantee document in full there, after the first paragraph, and you'll see the background is that this man was selling his business, he had debts that he was struggling to meet, he thought he could meet them all from the proceeds of the sale, so he was asking all the creditors to forebear while he went ahead with the sale so that he could do the sale, pay them all off, and everyone would be happy, that was the plan. Obviously it didn't go as he intended. So you have Mr Paulger writing to all of the creditors, it expressly says, "To all of the creditors," the letter says it serves as intention to make payments to all creditors.

Next portion, he tells them that – sorry, the second-to-last substantive sentence, “The writer personally guarantees that all due payments will be,” and just above that he makes it clear that he’s going to, “Make good all outstanding matters within 90 days.” So you have there in this very brief letter a document in which somebody is stating to whom they are making the promise, to all the creditors, what the quantum is, it’s all of the payments that are due, when they can be enforced, it’s within 90 days, and he has signed it. So it’s a very simple letter and it was decided well before, this case was decided well before the new Act, but I just take Your Honours to this because it is an example of just how easily and simply one could satisfy all of the requirements of the new Act. You have all of the terms of guarantee there, you have clarity over everything. So my submission is that if *Paulger* were decided today it would not necessarily be decided any differently because of the new Act. But not so necessarily other cases.

Is it of any assistance – the next intention in my oral outline was to take Your Honours to the document itself. Would that be of assistance?

WINKELMANN CJ:
Yes, thanks.

MR GEIRINGER:
So that is in the bundle at 301.0017. I won’t go through the full factual narrative with Your Honours today, but Your Honours will be familiar with the fact that this is essentially the only document, there’s no other executed document in existence, there’s no other draft document with terms in existence. This is, to the extent that there’s any ability to point any document and say, “This is a guarantee, this is it,” and what we have is the salient features. We have on the cover this is a term loan agreement, we have lenders named, we have borrowers named, and then in the third box we have guarantors – and as always these documents get harder and harder to read – this is Rachael Dey and Bryce Brougham listed as guarantors on the cover, and then the very next page you have place for four signatories. Two have the words scribbled out below – two of the spaces are for directors and two of

the spaces are for guarantors. Now Mr Brougham has signed twice in both of the guarantor slots. It is common ground that that was an error and that he meant to sign once as a director and once as a guarantor. Ms Dey has signed once in a director slot and she says that's intentional that she has not signed as a guarantor because she did not intend to be bound as a guarantor.

Now there is one more reference to "guarantee" and that is in the last clause above the signatures. This is conditions precedent to the advance (a), (b) and (c), and condition precedent (c), before we, this is the lenders, can make the first advance to you under this contract, "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." Now that's it in terms of references to guarantees or guarantors. There's no other clause anywhere in this document that there are specific clauses that continue for the pages that follow to do with the payment or repayment of the loan. None of it refers to the guarantor. None of it creates any obligations on the guarantors.

There is one disagreement in that it seems in submissions from my learned friend for the second respondent. He points to clause 12. If Your Honours scroll down to the second to last page in that document. Clause 12 talks about the legal costs that are payable, and it talks about the costs being payable to you. There are a number of places in the contract that refer to "you" and this was a matter of debate in the District Court and High Court, and my understanding is that this issue was not followed up again in the Court of Appeal, although the Court of Appeal does comment on it, and this is because in clause 2 above there is a reference to who is "you" and "you" in the contract is anybody regardless, this is in 2(b)(ii), "The word "you" includes all persons executing this contract regardless of how they may be described in this contract, and the covenants contained and implied in this contract will bind each of you jointly and severally as the principal party in this contract." And the argument was, in the District Court and the High Court, no longer pursued, that that meant that the guarantors be named as guarantors, would

also be named as principal and therefore that they would have to pay the loan. The problem is, of course, and the contract makes clear, it depends on context and "you" clearly wasn't intended to mean everybody in relation to every clause. If it were, then you'd have very absurd results including that the lenders would have to repay the money as if they were borrowers.

WINKELMANN CJ:
And the Court of Appeal rejected the notion that "you" could be read in that way, didn't they?

MR GEIRINGER:
The District Court and the High Court both rejected it. The Court of Appeal noted that it was no longer pursued but said they would have rejected it had it been argued.

WINKELMANN CJ:
Yes, because they said that if it was argued it would mean that this wasn't a proper record of what was being undertaken because it would mean that somehow by saying you'd be guaranteeing he'd be undertaking an obligation as a principal debtor. I think that's –

MR GEIRINGER:
I think Your Honour is remembering Justice France's decision in the High Court, where he goes into this and, because it was argued before him, and he says, yes, you wouldn't expect by some sidewind, without it being expressly stated for the guarantors to suddenly become principal debtors. The Court of Appeal has a very passing reference to it.

So my learned friend for the second respondent suggests that the "you" in the costs provision also applies to the guarantors, but in fact there's no reference to the guarantors there.

So the divide between the parties on the main issue, it's not the only issue, but on the main issue is that the appellant says that section 27 requires him to

sign a document with terms of guarantee, and there isn't one, and the respondents', based on the conclusions in the Court of Appeal, say that it is enough that Mr Brougham has signed as guarantor and you can infer everything else. The argument is that you can infer what it is he's guaranteeing, who he can guarantee it to, when those guarantees can be called up, and all of the other terms that you would otherwise expect to be set out in a contract of guarantee, based simply on what is usual. So it is more usual than not for people to guarantee the whole of a loan amount if they're guarantors, "So we can just assume that that's what he was doing." It's usual that as soon as the borrower defaults the principal the lender can call on the guarantee, "So we're just going to assume that that's what was going to be agreed in this document even though there are no terms."

Now there are a few features of this case that highlight how wrong it is, in the submission of the appellant, to make such assumptions, and one of them is the fact that the parties initially instructed the lawyer, although the second respondent initially instructed the lawyer preparing this document that the intention of the parties was to guarantee half of the principal each, $25,000, and Your Honours can see that in a rather confusing document in the bundle so I want to take a second to explain it to Your Honours. There are two documents that will be disclosed separately which actually should be one document. If Your Honours can go to 301.0014? So Ms Dey meets with the solicitor who's instructed to draw up this document on, I believe, the 3rd of February. Then there's an exchange of emails on the 10th of February, this is 2010. And if Your Honour look at the bottom of that document 301.0014 you'll see the beginning of a chain email from Ms Dey to the solicitor, Mr Simpson, "When I met with you on Wednesday 3 February to quickly go over the distribution for," and then the document ends. Your Honours need now to go, confusingly, to 301.0011, three pages earlier, and the document starts at 301.0011 but that's because it's been erroneously put together. And if Your Honours look at 301.0012 where it says, "Flashman I requested that a loan be drafted," it is common ground that this is intended to be the second page of the document you were previously looking at at 0014. Apologise for

the confusing nature of this, this is the way it put together from discovery is the understanding.

WINKELMANN CJ:

Who's Flashman?

WILLIAM YOUNG J:

It's a joinery company, it's a flashings company.

MR GEIRINGER:

This is a reference to – Ms Dey and Mr Brougham started a new business, B & R –

WINKELMANN CJ:

Yes, no, I was being facetious, Mr Geiringer.

MR GEIRINGER:

Oh, sorry.

WINKELMANN CJ:

It just sounds very romantic, like 19th century literature.

MR GEIRINGER:

Yes. Yes, sorry, taking you too literally. So if you read down that document you'll see Ms Dey's evidence was that she was writing, by the way, in her capacity as the director of B & R. She does go and suggest that B & R be charged default interest of 19.95 percent, which I thought was an interesting request to make of the solicitor as a director of B & R, but just below that you'll see, "As we discussed, a personal guarantee from both directors of B & R Limited, being Bryce Brougham and myself, Rachael Dey, to accept a personal responsibility for $25,000 each. Now this is not reflected in the final agreement, and you will see that Ms Dey gives evidence that this was an agreed difference, and Mr Brougham gives rather confused evidence that he actually thought that this was how it was going to work, and that he was going

to be responsible for half of the amount. Which leads on to the other issue which the Court of Appeal resolved by ruling that the evidence was inadmissible, which is the last minute, oral discussions between these two parties about varying this from having two guarantors to having one, and in my submission the Court of Appeal got it right when it determined that that was inadmissible. It's plainly evidence of oral discussions to go to subjective intention saying you should interpret this written document differently because we subjectively intended it to be different, and that is plainly inadmissible evidence. It's for the Court to give an objective interpretation of this document on its face, and thus there are –

WINKELMANN CJ:
It wouldn't be inadmissible though, would it, if there was evidence of a collateral contract between Winchester Trust and Mr Brougham that they agreed there should only be one guarantor.

MR GEIRINGER:
If there is a collateral oral contract of that kind it would, it could constitute under contract law a different contract. But there's a fatal problem there under guarantee law, because you can't have oral contract to guarantee. You haven't been able to have oral contracts of guarantee since the 17th century. So if there was such a collateral agreement, there's simply no question, it is not an enforceable guarantee.

I'm going to take you to the cases which discuss, and maybe I'll do that now, discuss the mischief that this Act, starting with the Statute of Frauds, was there to protect against, and what the English Courts, and particularly in the House of Lords decision I'm going to take Your Honours to, say is the whole intention was to protect against a mischief of people, of there being ambiguity as to what the terms are, or that people are being held to oral contracts that they deny, or are being held to contracts that were ill-considered because they didn't have the opportunity to see the express terms and consider them. And really that, in a nutshell shows you why, even under the Statute of Frauds, an oral variation of a document that's then signed as a written

contract can never be an enforceable contract of guarantee. It's exactly what Parliament way back in 1677 wanted to rule out, and the New Zealand Parliament, rather than reversing that position has gone the other way and has strengthened it.

It's probably useful to go to *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541. It's in the bundle of authorities at authority 5. This is one of those cases where at least four different law Lords all had something slightly different to say, and you've got to flick between them if you want to get rules of law, but they're all in concert as to the result and to the general tenor of how the analysis works. If I could take Your Honours to the speech of Lord Hoffmann, which starts at paragraph 13 of this report, but for my purposes I want to take Your Honours to paragraph 19 starting at the third sentence Lord Hoffmann says, " It is, however, important to bear in mind that the purpose of the Statute of Frauds was precisely to avoid the need to decide which side was telling the truth about whether or not an oral promise had been made and exactly what had been promised. Parliament decided that there had been too many cases in which the wrong side had been believed. Hence the title, 'An Act for prevention of frauds and perjuries'."

The next little bit of that paragraph is directed at the submissions of Mr McGhee in that case, but if I could take you now to paragraph 20, "The terms of the Statute of Frauds 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 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." And given what we've learnt about section 27, in my submission, everything that Lord Hoffmann says there must be true with even greater force, avoiding the Latin phrase, of New Zealand law under

section 27. You can't assume that Parliament intended there to be no injustice as a result of section 27 by people getting out of promises that they had been made, and that had been relied upon. You might make that assumption in other cases but it's quite clear here that Parliament has done a balancing act between causing injustice by allowing people to get out of such promises, and allowing other injustice by not having a black letter clear requirement about what's needed for a contract of guarantee. Parliament unambiguously has come down on the side of a black letter clear requirement, and if that requirement is not met, the guarantee is not enforceable, irrespective of what somebody's subjective intentions were, or irrespective of what they have said to have orally promised.

In that context, the reason I took Your Honours to this after Your Honour Chief Justice's question, I think this colours what we can do with negotiations between the parties to vary a contract before it's signed, and I terms of the contract of guarantee. Unless they're recorded in writing they simply cannot form the basis of a contract that you can seek to enforce, a contract of guarantee that you're going to seek to enforce. In my submission that has been the way it was since the 17th century. That's not new.

WILLIAM YOUNG J:

Mr Geiringer, let us assume a slightly simpler case than this. A form which contains a loan agreement and an explicit guarantee, which contemplates two people are going to sign it, only one person signs and the loan is advanced. Now how does the Court deal with that? Does it hear evidence as to whether the agreement, which in a sense is complete on its face, can be enforced as an agreement? That is as between the people who've executed it.

MR GEIRINGER:

Your Honour, this is point 10 in my oral outline and it's the one and only one that I'm leaving for my co-counsel Mr Mahuta-Coyle, so I'm loathe to take away all of his opportunities and launch into a reply, but the position as per our synopsis is that such a contract is unenforceable. It hasn't, in fact, been executed.

WILLIAM YOUNG J:

Why, because you can't tell from what's in writing whether the signature of the second guarantee, the presence of the second person as a guarantors was fundamental?

MR GEIRINGER:

Well whether or not a co-guarantor is there, I'm feeling bad now for Mr Mahuta-Coyle. We will say it is fundamental. I think I should leave this for Mr Mahuta-Coyle to go into in detail, but if you've got a contract that has multiple signatories set out on the face of it, given that you're supposed to be interpreting it objectively on the face, unless there's something that changes that rule – and I submit this doesn't – it's not complete if it hasn't be executed by all of the signatories. If you imagine the –

WILLIAM YOUNG J:

Well, I won't argue with you about it, I'll leave it for Mr Mahuta-Coyle.

MR GEIRINGER:

There's one surprising aspect of the Court of Appeal, which I'll go into before Mr Mahuta-Coyle has a chance, and that is this. If you imagine two people – the Court of Appeal's conclusion on this was that the evidence of the amendment was inadmissible, so we must just assume, we must just interpret this contract on its face, but the contract in the Court of Appeal's view contemplated the people who signed it would be bound and the people who hadn't signed it simply wouldn't be bound, and this is a very surprising conclusion in my submission. It suggests that if you in New Zealand sit down with a counter-party, with a two-person contract, and you pass it over to them and say, "Well, we both need to sign it but you go first," and the other person signs it, the person who hasn't signed it yet can snatch up this contract and gleefully dance out of the room having in their hands a contract which they can enforce against the signatory or which can't be enforced against them because they didn't sign it, and in my submission that's an absurd conclusion, but it is the only logical conclusion from the position that the Court of Appeal reaches.

WINKELMANN CJ:

Okay, so to take you away from the area of Mr Mahuta-Coyle's submissions, what is the law in relation to joint and several and guarantees, is there any presumption that operates to presume that if it's not stipulated it'll be joint and several as between guarantors?

MR GEIRINGER:

Again, it's common. Now Mr Mahuta-Coyle was asked this in the Court of Appeal, "Would you accept that the liability would have been joint and several between them?" and Mr Mahuta-Coyle's answer, as he recounts me and I'll repeat this to Your Honours – this is not his area, this is mine, even though it's what he came up with – is this: look, the position of Mr Brougham is that there are no terms of guarantee on this document and so this document you simply can't interpret it as creating a guarantee on anyone. But the question was asked, well, if we're going to create a guarantee, if we say that merely because somebody has signed as guarantor it creates a guarantee, and it creates a guarantee that applies to the whole amount, well, if it did that and both of them had signed it, if you're able to infer a guarantee from the document, you're able to infer it applies to the whole amount and you've got two people to whom it applies in its whole, then logically the conclusion must be joint and several liability between them. But in direct answer to Your Honour's question, no, there's no rule of law that says it has to be one way. And what Mr Brougham and Ms Dey said to their lawyer, that they wanted –

WINKELMANN CJ:

Well, just can I ask you to pause there for a moment? Because the law generally is that if you don't stipulate and it's an obligation which both held is they're joint and several, isn't it? That's what the law is generally. Am I right about that?

MR GEIRINGER:

If you are liable for the whole of an amount, together with other people who are also liable for the whole of the amount, and obviously the person can't

double-dip and get the whole of the amount from both of you, then the way the law works is to make it joint and several.

WINKELMANN CJ:
So to perfect the instructions that were given the lawyer would have had to draw up other guarantee documentation that made clear that the obligation was several.

MR GEIRINGER:
Yes, or it was something else. To answer Your Honour's question in another way, there is in the documentation a copy of the ADLS standard deed for a guarantee. I'm just trying to remember the number for it in the bundle. The ADLS document is at 05.0094, attached to a joint memorandum. Both the parties thought it would be useful for it to be the Court of Appeal, and the joint memorandum they filed is there at 05.0094. So there are essentially a series of default terms that one would apply. It's a very simple document. It assumes that the most likely think you want is a contract of exactly the type here, but it's clear that it is intended to be able to be amended, and in particular in answer to Her Honour's question just now, it says what happens when there is more than one guarantor, and, sorry I'm just trying to find the section. But so, "Unless limited by the terms of the guarantee, the respective obligations of each guarantor pursuant to clause 1.1 and 1.2 are joint and several..." So the default position is joint and several, but it's expressly stated to be joint and several, it's not, it just is, and it's quite clear that there is scope for people to change that by agreement if they wish.

So on this issue, I mean in relation to this case, in relation to the questions of certainty, we would say that in the absence of a clause that either sets this out or sets out what the intentions were, you can't assume, you can't simply say we're going to assume that this was always going to be both parties responsible for all of the debt. Mr Brougham, who is found to be an honest witness, if not necessarily always a, one who is onto it, in my words, he obviously didn't pay as much attention as perhaps he should have at some parts of this transaction, and that's the way the District Court married the

evidence of the two, but he was nevertheless found to be an honest witness and he clearly had an understanding that he was only going to be every liable for half this debt. And the contract is silent on it and in those circumstances it's particularly unsafe for a Court to say, well, it's usual for ap arty to be responsible for the whole amount, so we're just going to assume that that's what was going to be inherent, inferred. Can't be inferred.

WILLIAMS J:
Can I ask you why Mr Simpson, I think it was Mr Simpson, whoever it was that said the separate deed of guarantee was not felt to be necessary, why they said, what the reason was for them saying that?

MR GEIRINGER:
So I haven't said it expressly but our case is that a separate deed was contemplated on the face of the agreement. The submissions even of my learned friend for the respondents say that it was the Trust's position that they had a guarantee merely because of the term loan agreement. So they say they relied on the term loan agreement as giving them the guarantee that they wanted, and therefore they didn't need a separate deed.

WILLIAMS J:
Right.

GLAZEBROOK J:
Was that by submission or did that came out in evidence?

WILLIAMS J:
Did a witness say it, yes.

MR GEIRINGER:
It's also in pleadings in that in the respondents' reply document. I'll just bring that up.

WINKELMANN CJ:

Are you saying it didn’t come out in evidence?

MR GEIRINGER:

To be honest I can't remember but it didn’t need to come out in evidence because it was their pleading. It was an undisputed pleading –

WILLIAMS J:

I'm not really interested in the pleading or the positions of the parties, I just want to know whoever it was that was the witness that said we didn’t feel we needed one, and so we didn’t bother, why they said that.

MR GEIRINGER:

I can't remember offhand. I could see if I could find that at a break for Your Honour. I can't remember it in the evidence. That, of course, doesn’t necessarily mean it’s not there. I'll go searching again but I can't remember it being in there.

GLAZEBROOK J:

Well your friend might be able to point us to it if it is there, in the evidence.

WILLIAMS J:

One simple way of interpreting all of this, I would have thought, was that paragraph (c) of that second page of the term loan agreement was to the effect that we require a guarantee and this double criminality isn't one, we want a deed, and if that’s the case then the reasoning in the Court of Appeal must have been there was an oral agreement to guarantee it and this is evidence of what was in the oral agreement. Now if that’s the case of course it’s in breach of section 27 and so can’t be right. But that depends really on whether the deed was only ever intended to be the document to be relied on per section 27, or whether it was felt that the term loan agreement itself contained the guarantee, not that you could infer the terms of a separate guarantee from the terms of the term loan, but that it was itself the guarantee.

MR GEIRINGER:

I think for the purposes of resolving this case between these parties, you do need to rely on what was said in pleadings. So perhaps if I can just take you to that so you can se exactly what was said.

WILLIAMS J:

Okay.

MR GEIRINGER:

Actually no. So the, the position in pleadings is that that clause (c) was waived. You can find that in 101.0046 in the document of a reply to paragraph 12.2.

GLAZEBROOK J:

Sorry? 101.046?

WILLIAMS J:

0056 is that what you said?

MR GEIRINGER:

0046.

GLAZEBROOK J:

I've got a 45 and a 48.

MR GEIRINGER:

Sorry, 45 is the start of the document, and 46 is the page which it's on. Under 12.2 it's made clear that the plaintiff waived the condition precedent by advancing the loan. So that's the case in relation to the requirement for a separate deed.

WINKELMANN CJ:

Well waiving the condition precedent is not necessarily waiving the requirement for a separate document though, is it?

MR GEIRINGER:

It is in that that was the only requirement for a separate document. It is, read properly, in my submission –

WINKELMANN CJ:

Yes, I understand.

MR GEIRINGER:

The respondents are now trying to say that (c) can be taken to be an agreement to agree, but quite apart from the fact that they waived it, in any case it's not an agreement to agree, it's a condition precedent. It says we don't have to give you the loan until you've satisfied as to an executed deed of guarantee. They have chosen to simply advance the loan without waiting and requiring that document.

WINKELMANN CJ:

Yes and I suppose, because it is quite an unusual one because it says, normally such clauses say on the standard Auckland District Law Society terms and conditions or something, or the terms and conditions annexed to this document, but this says "on the terms we stipulate" so notionally it was open to the guarantors to look at those terms and say, no we don't want to go ahead with the loan on that basis.

MR GEIRINGER:

Yes, exactly. It doesn't create a mechanism for resolving it. It doesn't specify what the terms are and Your Honour, in my submission, is absolutely correct. The way that this loan agreement was clearly intended to operate is this. Is the lenders want the assurance of a guarantee. They say you've got to complete a deed. They send the deed so then the lenders can say, yes, we're satisfied with that and provide the loan, or they can say, no, it's not good enough, we want more, and the guarantors can always say, well we're not wiling to give more. The condition precedent isn't met and the loan doesn't have to be advanced, and that might be the end of the contract. But it doesn't create an obligation on the guarantor to give any particular worded guarantee

in all the circumstances. It just gives the lender a get out if they're not happy with the guarantee.

GLAZEBROOK J:

There's an issue, too, of whether the condition precedent was for the benefit of both parties, and the argument might be it is for the benefit of both parties because in fact, living aside the in writing issue, there wasn't actually the terms of the guarantee in the document that had been signed. And so having that separate document would then have given the actual terms of guarantee.

MR GEIRINGER:

Yes, and it's our case that in the absence of that separate document that there aren't any terms of guarantee.

GLAZEBROOK J:

No, I understand that, and of course they have to be, you say, because they have to be in writing. So the absence of that separate document in this case, you say, is fatal?

MR GEIRINGER:

Yes, and I'd go further to say that the drafters of this document, because it is based on a standard document, the drafters of this document intended that the details of the guarantee would be worked out and recorded in a separate document. In my submission that was plain intention of those who created this, and if you're going to give it objective interpretation you've got to say that the parties intended there to be, to the extent that there was going to be a guarantee, they intended that to be recorded in a separate document.

WINKELMANN CJ:

Right.

MR GEIRINGER:

On the issue of an oral variation, I just want to cover off one thing before I leave it. We've got the issue of whether or not it is admissible evidence,

we've got the issue of whether or not, even if it is admissible, an oral variation can be enforced, given that it's a guarantee, but we have a third issue, and that is my learned friends for the respondents are making an error in their factual summary in my submission in that the District Court Judge actually found expressly that there was no agreement. The District Court Judge's judgment on this is slightly confusing because of the way he legally analyses the facts that he did find. But if Your Honours go to paragraph 71 of the judgment – I'll just bring up the judgment myself – this is at 101.0001, that's the judgment, and paragraph 71 I wish to take Your Honours to is at page 101.0020. So the situation is this: you had Mr Brougham turning up and saying there was never any such discussion and you have Ms Dey turning up and saying there was such a discussion, "I told him I was not going to sign as guarantor and he signed anyway so he should be taken to be the sole guarantor," and the Judge tries to marry this evidence, and you'll see discussion above paragraph 71 where he says that the reality is the Mr Brougham, there's several signs that show that he didn't really pay a lot of attention to some of the details, he just trusted Ms Dey – in fact in cross-examination Mr Brougham says that he would have signed anything that was put in front of him by his girlfriend, Ms Dey.

AVL CONNECTION LOST

MR GEIRINGER:
Hello everyone, sorry about that.

WINKELMANN CJ:
That's all right. It's not your fault, we think.

MR GEIRINGER:
Reconnected. Sorry, I was discussing the learned Judge, His Honour's judgment of first instance. So he's trying to marry two pieces of inconsistent evidence, and he doesn't find either of them to be dishonest witnesses, rather he says that Mr Brougham really wasn't paying much attention. He got the evidence wrong about where they signed and then he accepted he got that

wrong. He signed the contract in the wrong place. So various signs that the Judge points to that show that Mr Brougham wasn't paying as full attention as he might, and he concludes by saying that on the balance of probabilities, Ms Dey probably did raise the issue, but he falls short of saying that Mr Brougham then agreed to the variation and in fact at paragraph 71 he says the opposite. "As I have pointed out above, I resolved the claim by Ms Dey that she had told the defendant 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, but I am satisfied that the matters were discussed prior to his signature of the term loan agreement."

So the way in which the Judge resolved these two conflicting evidence doesn't permit agreement. You don't get agreement when somebody tells you that there's going to be a change and you don't really pay attention. Agreement requires a meeting of minds, as is trite.

WINKELMANN CJ:
Between the Trust and Mr Brougham wouldn't it be? It would have to be between the Trust and Mr Brougham?

MR GEIRINGER:
Yes, confused by the fact that in this case Ms Dey was both the trustee for the Trust, and the director for the company, and somebody listed as a guarantor.

WINKELMANN CJ:
Yes.

MR GEIRINGER:
But there has to beautiful meeting of minds and whoever else needs to be there, Mr Brougham clearly does need to be there, and if the reason that he signed it, despite this discussion, and thought he was signing something different, is that he didn't pay attention, then there's no meeting of minds.

There's no agreement by him to a variation. And in any case that is the way in which the first instance Judge decided it and in my submission there's no reason to seek to overturn that. It could only be –

WINKELMANN CJ:
It's quite striking in where he does make the finding on the balance of probabilities she probably did tell him, that finding seems to go against all the comment he's been making immediately preceding to that.

MR GEIRINGER:
Yes, that was confusing. His Honour called her –

WINKELMANN CJ:
Do you think evidence lame, yes.

MR GEIRINGER:
Yes.

WINKELMANN CJ:
We thought that might be typographical but…

MR GEIRINGER:
Well you might think so but then what was that evidence that he's calling lame? It's the idea that because she was giving a different guarantee she shouldn't have to give this guarantee, which logically makes no sense. Her guaranteeing down the line though, when she's also trustee of a trust that she knows has plenty of money to pay it in any case and that she won't be called on to pay it. The fact that she's going to have that guarantee backed up by a guarantee that comes only from him means ultimately that the financial arrangement was going to have him as the one who has to pay all of the money.

GLAZEBROOK J:

That's, of course – sorry, I was just going to say that's of course assuming that the discussion was that he would become liable for the whole $50,000 rather than merely the agreed $25,000 that was contemplated when she gave her instructions to the lawyer.

MR GEIRINGER:

Yes, and ultimately we can probably shortcut that by saying in relation to a guarantee there's simply no question that you can enforce an oral discussion of this kind.

WINKELMANN CJ:

But there's no evidence of any, I didn't read that she'd given evidence that they agreed that he'd be liable for the whole amount?

MR GEIRINGER:

Well yes it was her position in evidence, that he had agreed that he would be the sole guarantor.

WINKELMANN CJ:

Yes, but that's a different thing to agreeing that he'd be liable for $50,000 rather than 25.

MR GEIRINGER:

It doesn't expressly say that, no. You'd have to imply the next bit. You can of course have a guarantor for half an amount. There's nothing wrong with saying in a contract, "Look, you want a guarantor, you don't want to end up being out of pocket, but I'm scared of ending up with the whole amount, I can't really afford that risk. So I'll tell you what, I will guarantee but I will cap my limit at half the amount. That way you know that you can't lose the whole the amount, you're going to have me to pay for half of it, and I know that I won't be made liability for the whole amount because I've capped my liability as guarantor." Nothing wrong with that, it's perfectly able to be agreed as a guarantor.

There's all sorts of other things you can agree if you want to vary a guarantee. You can say, "Look, I will guarantee this but I'm not happy with the idea that you write once to the borrower and then the borrower says I can't pay, you come after me. I want you to go through some more hoops to make sure that you've exhausted your possibility of getting the money from the borrower before you pursue me as a guarantor," you could do that. And of course, as Justice Simon France explained in the High Court, predominantly in New Zealand contracts have gone the other way. In fact it's quite usual now in New Zealand for contracts in name to really create liability as if you were a principal borrower to give the lender more rights against you than they would have if you were just a guarantor. And, as Justice France explains, this is not extraordinary, this is common, and in fact if you carefully read the standard ADLS deed that I took Your Honours to before I think in fact that is the effect of that document, the standard deed given out by the ADLS is not really creating a guarantee at all, it's creating another person who's liable as if they were a principal party.

So the point is that there are a lot of things that you can vary if you want to, and in the absence of terms that explain what is intended by these particular parties it is in our submission not safe to make assumptions.

Trying to press on with matters, taking a look at the time, if I could take Your Honours quickly through the cases. Your Honours don't have to go to the cases if you don't want to now open them. I'll just run through where we say we get to in analysing the New Zealand cases on this issue. I have them in a certain order in my oral synopsis at 7. I've already talked about *Paulger. Northcott v Davidson* High Court Auckland, CIV 2012-488-9, 7 June 2012, Bell AJ is an Associate Judge Bell decision in the High Court,. It's post-section 27, it's a 2012 decision, and in our submission it's a good analysis of Judge Bell, Associate Judge Bell, of the new requirements, and he points out that the law has been made more restrictive, that there are no requirements for a written guarantee. In that case you had mortgage investments being made by Northcotts through a broker, Mr Davidson, being

the director of a brokerage company and an associate nominee company, and Mr Davidson gave oral promises that there would be a guarantee protection and he also set up a mechanism where the investors would give instructions to invest and so he wrote up documents and sent them to the investors and the investors signed them and those documents, at least some of them, contained an express guarantee from him. But while they were signed by the investors they were not signed by him as guarantor, they came under a cover page that he had signed, and the question was can you extract from the fact that he's signed a cover page and attached it to an instruction to invest that the investor signed, a signed contract with terms of guarantee. And His Honour somewhat reluctantly, I interpret from the text, says that under section 27 you simply cannot. The cover letter doesn't contain any terms. It's simply attaching the other document. You could try and argue that the other document contains terms, but they are not signed, and section 27 cannot be met.

WILLIAMS J:
So the cover document signature, was that simply a signature at the end of the cover document saying, "Signed Bob Davidson," or whatever his name was.

MR GEIRINGER:
Yes, I don't have the text in front of me but something along the lines of, "Please find enclosed the instructions that you need to sign and send back to me. Yours truly."

WILLIAMS J:
Right, I see.

MR GEIRINGER:
So there's on, and then there's an attachment and the attachment says that Mr Davidson is giving you a guarantee, but there's no document with a term that is signed by him.

GLAZEBROOK J:

Do you maintain the submission, which I think you were making, that you can't have more than one document in this, because if the letter had said, here's a document containing the terms of guarantee which I agreed to, signed in this case Mr Davidson, and then you have an attached document, normally you'd say you can read those two documents together, wouldn't you? Because –

MR GEIRINGER:

Yes, I don't, sorry Your Honour?

GLAZEBROOK J:

No you go.

MR GEIRINGER:

I don't seek to vary the usual rules of contract and of course under the usual rules of contract you can make a contract up of multiple documents.

GLAZEBROOK J:

Okay.

MR GEIRINGER:

It's just the real change is the way that the old law allowed you to look at multiple different documents over time, even after the fact, and put them all together.

WINKELMANN CJ:

And cobble together an agreement.

MR GEIRINGER:

Yes. And in fact because only one document had to be signed you could have an unsigned document that seemed to have terms in it, and then a memo which didn't have terms in it but was signed, and you could put the two together and say well there's a signed guarantee, and that you really can't do anymore.

So that's *Northcott*. The next case in my list is *Victoria Quarter No 1. Ltd v FBB Holdings Ltd* [2015] NZHC 3007, another one we impress upon Your Honours with support. This is a decision of Justice Hinton. Again it is a case that is subsequent to the new Act, and it's 2015, and Justice Hinton we say correctly identifies the minimum requirement. If Your Honours do want to go to it, I'm talking about Her Honour's discussion at, 78 is the application, her discussion of the relevant passage starts at 68, the Act, section 27 is there at 70, and it's the parts that follow, but Justice Hinton essentially says the Act requires a written contract of guarantee. It defines a written contract of guarantee as being one where a person agrees to answer for the debt of another, debt, default or liability of a third person. If you're going to point to a document here and say, "This is the document that complies with the Act," at a bare minimum it must contain a promise, so in our case it would have to say, the guarantor Mr Brougham promises to answer for the debt, default of the borrowers, if they default. That's a bare minimum. And Her Honour applies that to the case she has before her at 78 to 80 and there we have a lease with heads of agreement, and there's a schedule in the lease that defines a Mr McGrath as being a guarantor, and there's another clause that discusses the fact that if there is an assignment of the lease, the landlord will release any personal guarantees or covenants of the tenant. But otherwise the contract is silent as to any terms of guarantee. So you have somebody signing the document and it's defined in the document that they are the guarantor, but nowhere in the document is there a promise from that person the guarantor to answer for anyone else's default, and Justice Hinton says well that is fatal in terms of section 27. That's all I wanted to say on that.

The next case in my list is the *Golden Ocean Group Limited v Salgaocar Mining Industries Pvt Limited* [2012] 3 All ER 842, 858. This is a UK decision under the Statute of Frauds, and I relied on it because it has some nice passages to help explain the purpose of the Statute of Frauds from Lord Justice Tomlinson. But my learned friends have come back and tried to say that this is a case that should be relied on and applied to the facts of *Brougham v Dey*, though I just wanted to address Your Honours briefly on the

facts. And my position is this is not a section 27 case, it couldn't be decided the same way on section 27, but even under the Statute of Frauds one has to understand this case as being very particular to its facts. It's a maritime case, it's a 2012 decision in the England and Wales Court of Appeal. Lord Justice Tomlinson begins by explaining that in the maritime world this arrangement of chartering a boat through a charter company and guaranteeing it from the trader that is going to use the charter boat is the normal practice, this is how they operate. He supposes it's probably to do with taxes but he doesn't go into it. But he says this is how the maritime world operates.

So what we have is Salgaocar, who are the traders, they want to use a boat, and so they have a company that they own, Trustworth, and Trustworth charters the boat from the boat owners, Golden Ocean Group, but they do so through a broker, which is a broker called, I think, Howe Robinson. And Howe Robinson exchanges emails in which they say that the charter will be fully guaranteed by Salgaocar, and then they draft a document in which they expressly set out the obligations of the charterer, the chartering company, and again repeat that there will be a full guarantee from Salgaocar, and there's an exchange of emails where the broker on behalf of their principal agree to be bound by that contract. Now it is not the agent who turns around and says, "We know we never agreed, it is only Salgaocar." And the evidence from the agent, from the broker, was, "Yes, yes, we were intending to be agreed, that exchange of emails was an agreement, and we did it on instructions from our principal," and, what's more, they say, "We have done this for our principal on 250 previous occasions." So this is the way that this contract operates in this industry and it has happened on 250 previous occasions. So this is probably as thin as you can get under the Statute of Frauds to create a guarantee and maybe even –

WINKELMANN CJ:

And it's based – because contracts guarantee is still subject to the usual rules of contractual interpretation, aren't they?

MR GEIRINGER:

Yes. And the matrix of facts can very much include the standard practice of the industry and the relationship between the parties, as can be objectively determined. Your Honour, I'm looking at the time.

WILLIAM YOUNG J:

Your bedtime, Mr Geiringer, is it?

MR GEIRINGER:

I wish. No, I'm just wondering whether Your Honours wished to take an adjournment at this point?

WINKELMANN CJ:

It's past it. Yes, we take an adjournment. Thank you for pointing it out.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.49 AM

WINKELMANN CJ:

Mr Geiringer, go ahead.

MR GEIRINGER:

Just to indicate my learned friend, Mr Mahuta-Coyle, has said that he expects to be at most 15 minutes and I expect to have him on –

WINKELMANN CJ:

And you're nearly finished?

MR GEIRINGER:

I'm most likely – yes. So we do expect to be able to allow the respondent, first respondent, to start in time to make some headway before lunch.

WINKELMANN CJ:

All right, and we'll take just an hour for lunch.

MR GEIRINGER:

Your Honours, the other thing I received from my learned friend, Mr Mahuta-Coyle, in the break is that as well as speaking too fast I am a little bit too loud in Court, so I will try and talk a little bit softer for this next bit.

WINKELMANN CJ:

That's not really your fault. It's to do with our settings.

MR GEIRINGER:

Nevertheless, you tell me if I'm taking it too far.

WINKELMANN CJ:

Okay.

MR GEIRINGER:

So I was in the discussion of the relevant cases that are referred to. I've just done *Golden Ocean Group*, and I was going to talk next is the thorniest case for us. This is the case that was relied on by the Court of Appeal chiefly as the basis for overturning the Courts below. *Bradley West Solicitors Nominee Ltd v Keeman* [1994] 2 NZLR 111. Now this is a 1993 case of Justice Tipping and always daunting to try and suggest that a Judge of his eminence has got something wrong, but one safe submission I can make is simply this is well before 2007. So this is not a case under the new Act, and what's more Justice Tipping doesn't in fact have a discussion in this judgment at all about the Statute of Fraud requirement, the Contractual Enforcements Act. So there's no consideration either of the, obviously of the new Act because it pre-dates the new Act, but there's no consideration of the requirements under the old Act. The circumstances here is it's a purchase of a business with the underlying premises that are being used. There's an increase in a mortgage for the purposes of completing this transaction, and the document has on the front cover, just like in our case, the people in their personal capacity listed as guarantors and again at the end they sign, executed by those people as guarantors in the presence of, et cetera, Tipping explains.

So it's a signed document. It states that they are to be guarantors but like in our case there are no terms of guarantee. There's no expressed promise by anyone to guarantee anything.

One salient fact which obviously colours the judgment, Justice Tipping notes with obvious disapproval that one solicitor acted for both sides of this transaction and that this case illustrates the danger of that happening.

So I do think that colours what happened here where you've got clear intention that wasn't carried through. Nevertheless, I don't suggest to Your Honours that Justice Tipping is getting it right. He is saying that one can sufficiently determine with certainty the terms of the guarantee with no terms of guarantee set out, and in particular in a case where you have four co-guarantors, and co-guarantors is a particular issue. You might assume that without further detail people are intending to guarantee the whole of a liability. Maybe they are, maybe they're not. But to make assumptions about how four co-guarantors assume that they're going to be guarantors with respect to one another in my respectful submission is going too far. It's essentially inputting what the Court thinks the parties might have wanted, or probably would have wanted, and it's something that the Court can't do. With nothing more, with no detail in the contract as to how the guarantee is going to work or how the guarantors are going to work with respect to one another, you can't conclude a certain guarantee.

So even on the Statute of Fraud requirements as they existed in 1993, obviously the Contractual Enforcement Act requirement, I say that I submit there's a question as to whether this was correctly decided. But in any case it's not good authority because there's no discussion of it. There's no explanation of why it does or doesn't meet that requirement. But this nevertheless is the document, is the judgment that the Court of Appeal look at and say we can, as Tipping did, with certainty say what the contract said in terms of guarantee.

Now this case has been applied once post-2007 and that is in the decision of *Kung*. This is in the bundle at 15. But *Kung* is a decision of Associate Judge Matthews and again it's a case where you have a document with the words, "guaranteed" in this case, so not just signed by a guarantor, it's ever so slightly stronger than our case or the *Bradley West* case, it says it's guaranteed by Mr Daniel Ferguson. But it doesn't take you much further, and again there are no terms of guarantee, there's no promise –

WINKELMANN CJ:

Well, the difference I suppose is that it suggests that this is the thing, this is the act of guaranteeing, the use of the guarantee suggests that this is the thing that is guaranteeing it.

MR GEIRINGER:

Yes. So in terms of then, there is obviously an objective intention that this document be that document, we say, is even lacking in our case. So you could say there's an objective intention by the parties that this was the document by which Daniel Ferguson was doing the act of guaranteeing, and you might even extract the fact that that amounts to a promise by him to answer for a sum, but you don't have any detail of exactly what that sum is or the circumstances in which it can be enforced against him and so I would again say it can't meet the requirements of section 27.

Now this case came after the case of *Chambers*, which I'll talk about in relation to equity in a moment. And in *Chambers* Justice Edwards does consider section 27 for the purposes of deciding whether specific performance can be ordered, and Her Honour in that case says that you need to look at the purposes of the law. The purposes are to avoid enforcing uncertain contracts as long as you are certain you do not have an issue under section 27. And His Honour Associate Judge Matthews then looks at the case of *Bradley West* and says, "Well, Tipping says I can be certain when somebody signs as guarantor, here even more strongly because it's signed as a guaranteed buy," and from these two logical propositions he concludes that, notwithstanding section 27, he can find that this is an enforceable guarantee. And I would

submit, though it's not necessarily required for a successful conclusion of the appeal, that both of those propositions are in doubt.

I've already addressed Your Honours on *Paulger*, which is to say that there's an old case with a very simple guarantee which could meet the requirements of section 27.

Now that's the cases that Your Honours have before you from both sides that talk directly to the interpretation of the requirement under section 27, and principally our conclusion on that is you can do it from first principles and from the Act itself, there have to be terms of guarantee, the terms of guarantee have to make it clear exactly what the arrangement is and, in particular, it has to include a promise from the guarantors to answer the debt of another, and simply in our case that that's all missing.

That's the end of the main thrust of the appeal. But then I do need to spend a moment addressing the arguments that have been raised in reply, which turn on the question of estoppel. So these are in my oral summary at – I've already addressed you at point 8, this is point 9.

So the estoppel is actually a difficult question. The question of equity in relation to both the Statute of Frauds and section 27 is a slightly thorny issue. Equity of course cannot be used to undermine the purpose of a statute, you can't, if Parliament is saying, "You must have a signed contract with terms of guarantee," you can't simply say, "Yes, but luckily even though there wasn't a signed contract with terms of guarantee equity will save you," if in doing so what it is doing is enforcing a do that falls foul of the statute. I'll take Your Honours to *Actionstrength* in a moment, which goes into that in detail, but first there is a question of part performance. There is doubt as to whether part performance, the doctrine of part performance, was ever applicable to guarantees. If I could take Your Honours back to the Law Commission report at number one in the authorities, and to that same section at page 280 of that report, 287 of the document, there is a section there from the Law Commission. The Law Commission's view, recorded at paragraph 240,

is that the doctrine of part performance has never applied to guarantees and the Law Commission for that proposition is relying on a 19th century case, *Maddison v Alderson* (1883) 8 App Cas 467, 490. But in any case, what the Law Commission recommends is that the new statute preserve the doctrine of part performance with respect to land contracts but exclude preservation of the doctrine with respect to guarantees, their reasoning is because it never has applied to guarantees but, whatever their reasoning, that is what has been enacted by Parliament. And so if Your Honours look at the Property Law Act back in number 3 of the supplementary bundle and back near section 27, the previous section, section 26, is in relation to contracts in relation to the disposition of land, which is section 24, and certain interests in land, which is section 25, in respect of those two sections section 26 says those sections do not affect the operation of the law relating to part performance but intentionally that preservation does not apply to section 27.

So we have Parliament intending in my submission to extinguish the doctrine of part performance in relation to guarantees to the extent that it did exist, but in any case there's good reason to belief it didn't exist. And if I can take Your Honours back to *Actionstrength,* because *Actionstrength* has a very robust, extensive discussion of the relationship between equity and the Statute of Frauds, and it's of a great deal of assistance in my submission in relation to even section 27. So *Actionstrength* is again at 05 in the authorities bundle, and I took Your Honours to the discussion of, the speech of Lord Hoffmann discussing the purpose of the statute and the effect of the statute, but what this case turns on is a question of to what extent can equity save the situation?

So just to recap the facts very briefly, Actionstrength is a provider of labour for construction. It is providing labour as a subcontractor for the construction of Saint-Gobain factory. The contractor obviously gets into trouble and stops paying the subcontractor labourers, and under their contract they have a right to walk off the job after 30 days of default and they threatened to do so, which is of obvious concern to the principal, Saint-Gobain, because they're not going to bet their factory built. There is an allegation of an oral promise by Saint-

Gobain to Actionstrength that if they stay on the job and they can't get paid by the contractor Saint-Gobain as principal will pay them directly, and this is held to be a guarantee, it's a promise to answer for the debt of another, and it's an oral guarantee. So in the face even of the Statute of Frauds it is not enforceable. And on strikeout the question is is there any viable case in equity that go ahead to trial to say notwithstanding the fact that an oral contract of guarantee is unenforceable can equity save the situation?

And what Their Lordships say, starting with Lord Bingham, is, firstly, if you're going to consider equity there are identified to be – this is where you get into difficulty depending on which Lord you look at – three or four elements. But there has to be an assumption that is made by the person, by the plaintiff, the plaintiff needs to assume something. The assumption needs to be made with the encouragement, inducement, of the defendant, Bingham goes into these at paragraph 8 of his speech, and then he jumps to the next element, which has to be unconscionable in the circumstances, other Lords point out that there has to be reliance. So not just an assumption and an inducement, but there has to be reliance on the inducement to make the assumption, there has to be a connection between them, and then it has to be unconscionable. And Lord Bingham makes the point – this is still at paragraph 8 – that it is wrong in principle to jump to the last part, is it unconscionable, you have to go through the steps, you have to identify an assumption, you have to identify an inducement. And in relation to a situation where you've got an unenforceable contract by statute you have a real problem, and Lord Bingham jumps quickly to a conclusion because he says in the following paragraph, paragraph 9, "Its difficulty, in my view insuperable, arises with the second question," the second question being was there encouragement? Because the encouragement can't be the unenforceable contract, because that would be to make the unenforceable contract enforceable and that, says Lord Bingham, is fatal. So he's looking at the inducement, he's asking the question, "What is the inducement here? Actionstrength can't point to anything other than saying the inducement was the promise that they made and that cannot be, for the purpose of equity, the inducement."

WINKELMANN CJ:

Are you saying it's somehow controversial that the doctrine of part performance doesn't apply to cap guarantees, because I thought it was not beneficial?

MR GEIRINGER:

If I could take you to Lord Hoffman's speech? Lord Hoffmann concentrates on the question of, in terms of equity, on a question of part performance. Because there's an overlap here of course. Part performance, as Your Honours are very familiar, is a species of a broader estoppel, and the question is how does estoppel of any kind work in relation to an unenforceable contract? And what Hoffmann says at length – I'm not going to repeat all of it – is that there is dicta out there that says that there are ways around, in more general terms, the incompatibility between part performance and estoppel. But in terms of a guarantee he says – and this is at paragraph 27 – so this is really concentrating on the first element assumption or reliance, what is it they do? He talks about Mr McGhee, this is the counsel for Actionstrength, as trying to argue that estoppel wouldn't apply in every case but what would be different about this case? He says that, "Actionstrength continued to supply Inglen only because of Saint-Gobain's encouragement" – I'm not going to go through it all – but what Lord Hoffmann says is essentially what they're saying is that only the basis of the promise they kept doing what they were doing for the benefit of Saint-Gobain and to the detriment of themselves. But Lord Hoffmann says, "Well, that is a guarantee, all of these are the features which would follow from somebody giving you a guarantee. So as well as saying you can't rely on the guarantee, the unenforceable guarantee, that promise, as being the inducement, you also can't point to the things you did on the basis of the guarantee that's unenforceable as being your reliance, because again that would have the effect of rendering, in this case the Statute of Frauds, nugatory," is Hoffman's point. So they've got a fatal problem and, Your Honour, I'm getting convoluted here between estoppel and part performance, but the point is that there's actually very little left by way of estoppel outside of part performance. If you accept that part performance is extinguished what is the thing that you have done? As Hoffmann explains, it

is just always the case with a guarantee that you are performing prior to calling up on the guarantee, that's the nature of guarantees, you promise that if there's later default after you've done your performance there will be this guarantee waiting for you. So if the guarantee is unenforceable you can never have part performance, you can never point to reliance, never point to anything that you have done, other than the thing that you have done on the basis of the unenforceable contract, and if that can mount a claim in equity then the statute is defeated.

Now the sliver of light for somebody wanting to rely on equity comes in with the other two speeches with Lord Clyde and Lord Walker, and Lord Clyde – this is in 35 – says okay, there is a possibility here, "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 Saint-Gobain on Actionstrength to lead it to assume that the promise would be honoured." Before I delve into that just turn to Lord Walker, which the passage is at 52. Lord Walker says, at 52, "An explicit assurance that Saint-Gobain would not plead the Statute of Frauds (like an explicit assurance not to take a limitation point) could found an estoppel." So there's the sliver that's left. You can't rely on the promise itself of a guarantee because that would be to enforce an unenforceable guarantee. You can't rely on the fact that you have done the thing that you thought you were given a guarantee for at the end because that is just performance in light of a guarantee. Again, either of things is to enforce an unenforceable contract in reliance on estoppel and to defeat the statute. It is possible, according to Their Lordships, some of Their Lordships, for there nevertheless to still be promissory estoppel that can apply, notwithstanding the Act, but is in this very narrow sliver where you do something like you say, "Okay, yes, it's oral contract and, yes, that's not enforceable at law, but I promise you that we will not take that point if it comes to Court." Why you would do that and not write the contract's unclear, but it's a very, very narrow sliver and, in my submission, that is all that is left.

Turning back to more general questions of equity, the respondents also rely on specific performance. Specific performance, as I understand the argument, is in the basis of that condition precedent (c) and, as I've already addressed the Court, it's not an agreement to agree and that's the end of the specific performance argument. But in any case they rely on the case of *Chambers*, which in turn is drawing from the case of *Inglis v Clarence Holdings Limited* [1997] 1 NZLR 268 (CA). *Inglis* is pre-section 27 and it's an agreement to lease where the lease included a guarantee and it detailed the terms of the guarantee. And the question was asked, "Can we on the basis of an agreement to enter into that lease with that guarantee, can we order specific performance of it?" this is the 1996 decision, and it was found that you can on principles of specific performance.

Now we turn to *Chambers*, which is now in light of section 27 and Justice Edwards says well *Inglis* says that you can do this, this is another case of agreements of lease with a document that says there's going to be an obligation to procure a guarantee. It sets out in detail the terms of the guarantee. Her Honour's challenge to say that *Inglis* is no longer good law because of section 27 and what you're ordering a specific performance of is an agreement that does not comply with section 27, and respectfully there's some force in that. So I don't want to take it too much further because I don't need to for this appeal, given that there is no agreement to agree here, and to the extent that there is a passage that you can point to in the agreement that my learned friends are relying on as formerly an agreement to agree, it doesn't contain any terms. So it's very distinguishable from both *Chambers* and *Inglis* in that both of those, all of the terms were set out in full in draft.

So but in any case I think there's real doubt, as explored in *Chambers*, even though Her Honour Justice Edwards goes the other way, there's real doubt whether that can survive section 27 because ultimately it means you're enforcing a contract that was not signed as a guarantee, and section 27 says you cannot do that.

So I say that, though I don't need to for the appeal, there is no role for specific performance. There is a very, very narrow role for estoppel. There is no role for part performance. And that brings me to the case of *Tait-Jamieson v Cardrona Ski Resort Limited* [2012] 1 NZLR 105 (HC), (2011) 12 NZCPR 687 (HC), which is the application in New Zealand of the principles from *Actionstrength* in relation to a guarantee case. This is a decision from 2011 of Justice French in the High Court in Invercargill. Now the circumstances here, just to quickly recap, it's to do with the Cardrona ski field that had a high performance facility for training young athletes, and there was a charity that was sponsoring, they had a scholarship of young ski athletes to go and participate in this high performance training, but the charity was in trouble. There are a number of people whose children have won places to do this high performance training, and Mr Tait-Jamieson in particular had four members of his family who had positions in this training, but the whole thing was going to collapse through lack of funds. So there's a discussion of an arrangement where three of the parents, as I understand it, will agree to stump up some money if the charity at the end of the day cannot secure the funds that it's hoping to secure to continue its operation, and there's an arrangement that they think they're going to have the money by September, and there's a document put together which says, well if by the end of September you don't have the money, we will pay the money in October and the vast majority of that money is going to come from Mr Tait-Jamieson. In the event – that document is signed by one parent, but not by Mr Tait-Jamieson. It's then given to the ski field who say they rely on it. They continue to provide services to allow these athletes to train until the end of the year when it becomes clear that the money is not going to come through, it's been defaulted upon, but not until December do they approach Mr Tait-Jamieson and he responds by saying, "Yes, yes, I will pay this money but I need more time." And then later when the matter comes to court says that this is not an enforceable guarantee.

Justice French does a section 27 analysis, accepts that it is not an enforceable guarantee, but turns to the question of equity. Cites the principles that come out of *Actionstrength*, which I cited before and Her Honour recounts

them at paragraph 55, and then tries to see whether there is something in this case that can amount to a promise that would meet the requirements of *Actionstrength,* and I'm with Her Honour in my submission up until this point and I'm with Her Honour in my submission in the result, but in my submission Her Honour accepts too many things as amounting to an inducement. Her Honour says that the very act of delivering the document that contained the promise could be seen as an inducement, and in my submission that's an error because that's merely conveying the promise that is unenforceable. If you say that conveying the promise, an unenforceable promise, is an inducement then you are in effect enforcing an unenforceable promise. So Her Honour, I say, errs in that regard – that's at paragraph 60 – but we have something more in this case, which is the exchange that happens in December, remember, where Mr Tait-Jamieson says, "Yes, yes, I accept that I'm going to pay this, I just need more time. And there is agreement after the default, after the default has happened, where services have been provided to Mr Tait-Jamieson's children, where Mr Tait-Jamieson says, "I accept that I will now meet this burden and I will pay it.

WINKELMANN CJ:

That's not as high as the proposition that Lord Walker had put, which was that, Lord Walker's proposition was that if the person said, "Well, even though this is not in writing and doesn't comply I'm happy to, I'm going to stand by it." So this might be, Mr Tait-Jamieson might say, "Well, look, I thought I was just agreeing that I was going to fulfil a binding obligation but that was a mistake."

MR GEIRINGER:

Yes, and I'm not in fact saying, certainly in submission, that it's necessarily correct to say it's an *Actionstrength* estoppel. But I would interpret that as creating a new binding agreement from Mr Tait. Mr Tait says, "I want you to keep training my kids for another season, my kids, and I will foot the bill, and I am not accepting that I will foot the bill and there's no question of the default of another because they've already defaulted." And so I submit that there is a binding agreement there on Mr Tait but I accept, Your Honour, I'm not

submitting that it necessarily should be analysed as an *Actionstrength* estoppel.

WINKELMANN CJ:

So that's not a guarantee, that's just saying, "I will actually pay the debt as a primary obligor".

MR GEIRINGER:

Yes. So that's the application that we're aware of in New Zealand of *Actionstrength.* My learned friends for the respondents in my submission fail at every element. They can't point to anything by way of an inducement other than the agreement itself. If I could pause on that point that Your Honour just raised, yes it would be an error too if you were to say, "Well, he didn't just once ring me up and guarantee this, you rang me seven times and on all seven calls he guaranteed that he would pay this debt. And I'm not suing on all seven, I'm suing on the first one, and I point to the other six as being something more," I think that would be an error, that's just seven unenforceable promises. There's something more, as Your Honour notes from Lord Walker, has to be something akin to a promise not to rely on this defence, has to be something that goes beyond an unenforceable promise. And my learned friends simply can't point to anything, there is no assurance from Mr Brougham that he's going to pay this debt, that he's not going to rely on this defence, there's nothing at all. Theirs is the contract that Your Honours have seen at 301.0017, that's it, and there's the signing of it.

There's also no reliance. There's no performance. There's nothing done in reliance on an inducement other than to advance the loan and as Their Lordships explained that simply can't be – there has got to be something else, can't simply say, "Well, I did my part in the contract that's unenforceable." You've got to have done, for the estoppel, something in reliance on something outside of the unenforceable contract. So, for example, they've relied on a promise that they weren't going to rely on section 27 to not ask them to sign a written contract. "He told me he wouldn't rely on section 27 so I was going to ask him to sign a written contract that complied with it but he told he wouldn't

rely on it so I didn't," and there you've got an action that is outside of the action over the unenforceable contract and reliance on a promise that's outside of the reliance on an unenforceable contract. But I very much accept and, in fact, submit that this is a very slender role left for promissory estoppel, and there's nothing in this case that can meet it, and there's another part of this that's fatal for the respondents and that is their case is, and has always been, that they didn't require the deed under that clause (c) because they said that the term loan agreement was enough. Well, that means that they are, what they're relying on in their own case is the unenforceable agreement and if what they're relying on – they fail at element 3. There's no reliance on something outside of the contract. They're quite firm in their case. They relied on the contract. But for promissory estoppel they've got to have relied on something other than the contract.

So in my submission the case in equity that my learned friends are responding with is hopeless. It can't work in specific performance. They waived that requirement. There was no such requirement and specific performance probably can't survive section 27 anyway. They can't rely on part performance. They can't point to anything that can meet the sliver of promissory estoppel that still exists, and that is it. There is no case in equity here.

And those, Your Honour, are my submissions for my part of this presentation unless Your Honours have any questions, and if not I will –

WINKELMANN CJ:
No, thank you. Hand over?

MR GEIRINGER:
I will hand over to my learned friend, Mr Mahuta-Coyle.

WINKELMANN CJ:
Thank you, Mr Geiringer.

MR MAHUTA-COYLE:

Your Honours, during my brief address I'm going to be principally referring to *Harvey v Dunbar Assets* and Your Honours will find that is the eighth authority in the bundle of authorities, or tab 8 if you're working from a physical version.

The proposition, and of course this is set out in further detail at or rather from paragraph 63 of the appellant's submissions, is principally of course the appellant says that the lending agreement relied upon by the respondent isn't an enforceable guarantee at all but if it is we say it is one that objectively interpreted contemplated two guarantors, and in the event only one executed it and as a consequence we say it is subject to recognised principles concerning the enforceability of contingent guarantees where only one signs and another doesn't. In doing so, Justice Young, I will endeavour to answer your question as directly as possible. I'm going to make two short points before I get to that.

The first one I make because it seems that perhaps the Court of Appeal had some doubt about this, and that is I say the principle cited in *Harvey v Dunbar Assets* is, in my submission, the law in New Zealand. In particular if one goes to paragraph, or rather page 733 of that judgment, and in particular at the very bottom of page 733, paragraph 20, is one in which Lord Justice Gloster cites *Rowlatt on Principal and Surety* and the statement of principle is contained immediately over the page where he says, "On similar principles a surety is not bound if the instrument when signed by him is drawn in a form as showing himself and another or others as intended joint and several guarantors and any intended surety does not sign." There's a further sentence there, and it would be misleading of me, of course, to omit the final sentence in that quote which is, "In such cases the creditor must show that the surety consented to dispense with the execution of the document by the other or others."

The Court of Appeal, just to deal with their position on this, were content to say that that case is of no particular assistance in the present because Harvey Dunbar entailed a forged signature whereas in this case we've got an allegation at least that there was some sort of separate oral agreement that

one wouldn't sign. I say that is not relevant to the underlying principle and the reason is that once you have the withdrawal of one of the executors of the document, the remaining person no longer has what they bargained for, assuming of course that the absence of a signature means that the named but non-signing person is no longer bound, and so that, in my submission, is the underlying principle which is one that is recognised in New Zealand in another authority that's in the bundle called *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506 (HC). Now *Bartells* doesn't deal with the question of consent, but it does accept that that is the law and *Bartells*, if I recall rightly, wasn't concerned with forged signatures or anything of that kind.

WINKELMANN CJ:
I don't think anyone would dispute this far broader principle than the forged signature one.

MR MAHUTA-COYLE:
Thank you Ma'am. I didn't mean to –

WINKELMANN CJ:
I don't know if it is disputed by the respondents, but it seems to me that it'd be settled more. It's referred to in many cases beyond the one you've referred us to.

MR MAHUTA-COYLE:
Right, moving on then.

WINKELMANN CJ:
No, no, you take your time.

MR MAHUTA-COYLE:
Well the final point I think to make would be that *Harvey v Dunbar* and a whole line of authorities seems to trace itself back to an authority called *Hansard v Lethbridge* (1892) 8 TLR, which is found and at least discussed in the *James Graham & Co (Timber) Ltd v Southgate Sands* [1985] 2 All ER 344 authority

that Your Honours have, and that wasn't a case about forgeries at all, but I'll leave the point of that.

GLAZEBROOK J:
Sorry, what was the other?

WINKELMANN CJ:
Hansard v Lethbridge.

MR MAHUTA-COYLE:
Yes, sorry Justice Glazebrook, it's at authority number 9, and there's a fairly.

GLAZEBROOK J:
9 is *James Graham* on mine.

MR MAHUTA-COYLE:
That's correct, Your Honour, but what you find in that decision at page 350 of *James Graham* is a discussion of the judgment in *Hansard v Lethbridge*. I acknowledge that *Hansard* itself isn't, or *Lethbridge* itself isn't before Your Honours, it's an 1892 decision.

So assuming that the principle applies, or could apply in this case, first of all the appellant says that there's nothing about applying the principle that offends equity in the sense that it's not unlike other cases where you had a creditor who didn't know that one of the signatories was either forged or missing. In this case, of course, the Trust was well aware of whatever, of the absence of Ms Dey's signature because, of course, she acted for the Trust. So in my submission that type of concern isn't at play. The real question then comes to Your Honours –

WILLIAM YOUNG J:
Can I just sort of formulate it again? So we've got a form that is a loan agreement and a guarantee, it's typed out so that it contemplates two guarantors, guarantor 1 and guarantor 2. Guarantor 1 signs, the form is

handed over to the lender, which advances the money. Now, say guarantor 1 is the person who hands over the form, says, “Here’s the form, I’m the only one who’s signed it, kindly advance the money.” Wouldn't that be an offer by guarantor 1 to the lender to say, “Advance the money and I guarantee you’ll be repaid?

MR MAHUTA-COYLE:
Yes, and it would be consistent –

WILLIAM YOUNG J:
And it wouldn't matter that the form as originally drafter up had someone else’s name on it?

MR MAHUTA-COYLE:
I say it would matter. Sorry to give a conflicting answer.

WILLIAM YOUNG J:
Well, but if – okay, well, why would it matter? I mean, if I and my wife have signed, and it envisages signing as guarantors, my wife’s away, I go to the financier and say, “Look, sorry, she’s away, I’ve signed, will you advance the money to our company on the basis of my guarantee?” they say, “Yes, here’s the money.” Does it matter that my wife’s name is on the document?

MR MAHUTA-COYLE:
I say it does, Your Honour.

WILLIAM YOUNG J:
Why?

MR MAHUTA-COYLE:
For the same reason that applies in this case, is that what Your Honour’s contemplating is effectively an oral variation.

WILLIAM YOUNG J:
No, it’s not. There’s only thing in writing and that's handed over –

MR MAHUTA-COYLE:

I beg your pardon?

WILLIAM YOUNG J:

There's one thing in writing that is completely in itself…

MR MAHUTA-COYLE:

Yes.

WILLIAM YOUNG J:

Why wouldn't that contract, why wouldn't I be liable on that contract?

MR MAHUTA-COYLE:

Because Your Honour's asking to give a meaning that's different from the written terms.

WILLIAM YOUNG J:

No, it's not. It's just as completed, it's complete, as it were.

GLAZEBROOK J:

Well, doesn't it just come with the – if you looked at paragraph 20, it says you can't be bound if other surety didn't sign, unless the creditor showed that you consented to dispense with the execution.

WILLIAM YOUNG J:

But how do you…

WINKELMANN CJ:

Well, it's not part of the guarantee.

GLAZEBROOK J:

So in your example don't you dispense with the…

WILLIAM YOUNG J:

Well, this is what I wanted to get to. Saying the alternative is, "I hand the guarantee to my wife," G2, I say, "Take it to the bank, see if they'll take it with my guarantee alone," she does that, they lend it. That's really the same as 1 isn't it? Must be the same as 1.

MR MAHUTA-COYLE:

Well, I think the problem remains under either approach whether that amounts to consent of 1.

WILLIAM YOUNG J:

But it's not so much a variation of the contract. Wouldn't the contract be the tendering of the document and the advancing of the money? It's not the superfluous language in the document that no one's filled in.

WINKELMANN CJ:

If you look at Donovan on guarantees they put the issue rather different to *Rowlatt* and they say the issue is whether the arrangements were conditional upon multiple guarantors. So if you look at it that way then that's a question of fact as to whether the arrangements were conditional on multiple guarantors and then you can say that that might be admissible as evidence that they were not conditional.

WILLIAM YOUNG J:

The problem might be how do you decide whether the arrangements are conditional on multiple guarantors without going into the detail of the agreement, which is itself meant to all be captured in, according to the Property Law Act meant to be captured in the document?

MR MAHUTA-COYLE:

Well, in this case, drawing on the limited words that are relied upon –

WILLIAM YOUNG J:

Sorry?

MR MAHUTA-COYLE:

In this case, drawing on the limited words that are contained in the loan agreement we say because of – well, because that is the document the Court has to interpret, I submit –

WILLIAM YOUNG J:

Well, I've given you a simplified version and you've got the advantage here that simplify, the version that actually was handed envisaged a contract, a separate deed of guarantee.

MR MAHUTA-COYLE:

Well, yes, I mean that's another reason we say that this, I mean, the agreement isn't enforceable with the guarantee at all. But if, as the respondent's say, this is the guarantee and we're forced therefore to reckon with, well, what do the words on the page mean, how do we objectively interpret them? First of all I note that what is in writing are the words within the box "Guarantors", Rachel Christina Dey and Bryce Brougham, that's the first thing, so if the Courts – because if the Court is going to draw reading in, as the Court of Appeal said, or construing from the principle of any agreement a written guarantee, that's one of the most meaningful terms.

WILLIAM YOUNG J:

But just say, going back to my examples, we have Ms Dey's guarantor 2, so your client, Mr Brougham, is guarantor 1, he signs the document, says to Ms Dey, "That's good. I'm the guarantor. This can be now finalised with the trust. I could get the money," which is sort of her case, might that not be a contract of guarantee that is accepted when the trust, that he's proffering an offer to guarantee the loan if the money's advanced and she's – and the trust accepts it when they pay the money?

MR MAHUTA-COYLE:

Your Honour, I'm sorry I don't have a better answer other than to say that that still sounds like an oral guarantee.

WINKELMANN CJ:

Did you have a look at the authorities gathered together in *Rowlatt* on this point?

MR MAHUTA-COYLE:

Well, of course, the authorities cited by *Rowlatt*, Your Honour, date back to the 1800s.

WINKELMANN CJ:

Yes. There's nothing wrong with old cases though.

MR MAHUTA-COYLE:

Nothing at all, Ma'am, other than to say no, I don't, and so I can't tell the Court what the –

WINKELMANN CJ:

Because this area of law is actually very tied down. It's pretty settled and if you looked through the authorities you'd find the kind of agreements the Courts are contemplating.

MR MAHUTA-COYLE:

I beg your pardon?

WINKELMANN CJ:

If you look through the authorities there, and in *Donovan* I think we'd find the answer to the question that Justice Young is postulating.

MR MAHUTA-COYLE:

Right. Well, the one that I'm aware of, namely *Hansard v Lethbridge*, in that case that concerned the absence of a director's signature and what the Court said there was, well, no, we're not going to hold the guarantee enforceable against the one who did sign because there was, in the Court's words, no evidence that the other intended surety, or, sorry, that the person who did sign had consented to the absence of a signature by another intended surety who

was written on the document, and that is found, in fairly brief terms, discussed at, as I said, page 350 of *James Graham*.

And the result, in my submission, Justice Young, is well, what do you then do with all of this evidence we had about the discussion on the night before or the night that it's signed, and certainly the appellant's position, we say, is it's not admissible for the same reasons that the Court of Appeal –

GLAZEBROOK J:
It's not what, sorry?

MR MAHUTA-COYLE:
Not admissible as evidence.

GLAZEBROOK J:
Well, is that right if – because it could be evidence of consent, couldn't it? It mightn't be evidence to interpret the contract but at this stage we're assuming there is a contract of guarantee and we're saying because the surety hadn't, the co-surety hadn't signed, it wasn't enforceable. So if consent could just be the prior one then surely the evidence is admissible to show consent, but, of course, what Mr Geiringer has pointed to is that there was a finding there wasn't agreement so there wasn't consent.

MR MAHUTA-COYLE:
Yes, well, on the facts we would say that you never got that far.

WILLIAM YOUNG J:
Can I just put it, I thought the argument was that there wasn't a contract of guarantee in reality, that the offer, that whatever could be construed from your client signing the form wasn't an offer capable of acceptance unless and until Ms Dey had signed and possibly unless and until there was a deed of guarantee.

MR MAHUTA-COYLE:

That's certainly our position.

WINKELMANN CJ:

But that's a fall-back argument on all the earlier ones.

WILLIAM YOUNG J:

No, isn't it the first argument.

WINKELMANN CJ:

Well you could say it's the first argument but it's –

MR MAHUTA-COYLE:

The first argument is that the written document fails section 27.

WINKELMANN CJ:

I mean I can take Justice Young's point in the sense it's a prior point but, yes, but…

WILLIAM YOUNG J:

First point, no contract. Second point, if there is, it's not in writing.

WINKELMANN CJ:

Yes.

WILLIAM YOUNG J:

It's a logical order I would have thought.

WINKELMANN CJ:

Not enforceable. First point, no contract. Second, anyway, we could argue about that, but your argument is you're –

GLAZEBROOK J:

Nothing wrong with having two points that get to the same point.

WINKELMANN CJ:

You're not quite sure what is needed because you didn't review the authorities, what's needed to show that agreement or the consent, but in any case, yes, you're saying the Judge's factual finding was that there was no consent?

MR MAHUTA-COYLE:

That's correct.

WINKELMANN CJ:

And in terms of *Rowlatt* on guarantees, it's on the obligation where you've got something like these documents is on the creditor to show that there was a consent dispensed with or requirement.

MR MAHUTA-COYLE:

That's right. I mean them having brought their case, it's generally their burden.

WILLIAMS J:

Isn't it, it just seems relatively simply to start with anyway, and that is can you read this document as if on its face, and without any other context, Mr Brougham agreed to be the only guarantor, and the answer to that is found in context first by reference to the point you make about what's on the front cover, but then also by reference to the amendments that are made on the execution page.

MR MAHUTA-COYLE:

Well the execution page, Sir, had obviously places for both Ms Dey and Mr Brougham to sign. We say that simply reinforces –

WILLIAMS J:

Well whatever they say, that's what you have to draw it from.

MR MAHUTA-COYLE:

Yes.

WILLIAMS J:

If there is an agreement at all that Brougham would be the only guarantor, you've got to find it in the document.

MR MAHUTA-COYLE:

Yes. That's exactly right.

WILLIAMS J:

I just don't know how hard that is.

MR MAHUTA-COYLE:

Well, I've managed to vex a number of Courts about it now.

WILLIAMS J:

Yes.

MR MAHUTA-COYLE:

Ultimately we say it's not more or less complicated than that, particularly given that the obvious intention of the contract was, between the borrower and the creditor, was that a separate deed would be executed to create guarantee obligations by Ms Dey and Mr Brougham. It's hard to read, I think it's clause (c) on the second page, any other way, but I don't want to cover ground Mr Geiringer has already mapped out.

Just finishing off on this discrete area, did Mr Brougham give a contingent guarantee, and to respond to one or two other arguments raised by the respondent. These are slightly more minor points but the rule of course is subject to the principle that a contingent guarantee can be, or presumption in favour of a contingent guarantee where there was joint and several liability, can be displaced by a clear wording to the contrary. The respondents argue that the use of the word "guarantor" and then with an "(s)", and also again the

contemplation of a separate deed, amounts to that type of, or amounts to necessary wording that does displace the presumption. The appellant says no it doesn't. If anything it reinforces the appellant's position. It recognises that there are multiple guarantors, but it certainly doesn't go as far as to say the relationship between them is going to be X or Y, or limited in some way or independent of the others.

That's the next thing. Well I think actually that's probably the extent of it because I've dealt with the rest of those other points in my earlier submissions. So those are my submissions unless Your Honours have any questions?

WINKELMANN CJ:
Thank you.

MR MAHUTA-COYLE:
I wonder if I might consult with Mr Geiringer just over the video. Felix, did you want to raise or discuss the fourth issue at all, from our written submissions?

MR GEIRINGER:
I have, I did.

MR MAHUTA-COYLE:
All right. I just wanted to be careful before I say that concludes our case, that's all.

MR GEIRINGER:
Yes, thank you. This is the question of whether we dealt with the fact that it would be an oral variation, but we have dealt with that.

WINKELMANN CJ:
Yes, you have.

MR MAHUTA-COYLE:

Thank you, Ma'am. I think those conclude the appellant's submissions then.

WINKELMANN CJ:

Right. Mr King?

MR KING:

May it please the Court, before I begin I'll just outline a couple of housekeeping matters. I will make my way through my submissions and refer Your Honours to specific points that are relevant today. However I will deal with the first four issues that the appellant has raised on appeal and then my junior counsel, Ms Dempster, will address you in regard to equitable estoppel.

WINKELMANN CJ:

So, just looking ahead, you have got two people from your firm representing the first and second respondents. The second respondent's submissions seem largely repetitive of yours. Is there any proposal, have you made arrangements between yourselves, first and second respondents, about how you handle the argument?

MR KING:

I will deal with all of the arguments for the first respondent and then the second respondent will deal separately with just highlighting a couple of key matters for his client.

WINKELMANN CJ:

All right, thank you.

MR KING:

So, I don't expect the will take too long. Just before I start, I'm aware that the lunchtime adjournment is upon us –

WINKELMANN CJ:

You may as well get underway.

MR KING:

Get underway, okay.

WINKELMANN CJ:

We've got eight minutes.

MR KING:

Right. So referring to my submissions, and if Your Honours can have that in front of you, that's 000 first respondent submissions in the electronic casebook.

As introductory matters there is the $50,000 loan has been advanced and at paragraph 2, the second sentence, the appellant's signed as a guarantor on the loan agreement, whereas the second respondent, Ms Dey, was listed but did not sign due to an agreed variation before signing that the appellant was to be the sole guarantor. So that was discussed in evidence, or proffered in evidence –

GLAZEBROOK J:

So what do you do about the finding that it wasn't an agreed variation?

MR KING:

Sorry, Ma'am, can you repeat that?

GLAZEBROOK J:

Well, the finding of the District Court Judge was that it wasn't an agreed variation that Ms Dey didn't sign as guarantor. So how are you dealing with that?

MR KING:

Well, I think the first point is to go the District Court judgment itself…

GLAZEBROOK J:

I don't need you to deal with it if you're dealing with it later. I don't want you to necessarily deal with it out of order. But it is something you are going to have address, the finding of the District Court.

MR KING:

Well, let's get straight into it then, Ma'am. If we go to paragraph 60 of the judgment, of the District Court judgment, so that's 101.00, I've got 17, because that's paragraph 60 of the judgment. So the late Judge Ross finds – there's a highlighted section towards to the bottom there that says, "I think it more likely than not the issue of whether she was continuing to be a guarantor of the Trust loan – "

GLAZEBROOK J:

Sorry, I think – in paragraph 60?

MR KING:

Yes, Ma'am.

GLAZEBROOK J:

Thank you.

MR KING:

So there's a highlighted point about halfway down –

GLAZEBROOK J:

It's not highlighted though –

MR KING:

Oh, okay. It starts, "I think it more likely."

GLAZEBROOK J:

Yes, I've got that.

MR KING:

The issue whether or not she, Ms Dey, was continuing to be a guarantor of the trust loan to the borrower was raised by her before the document was placed before Mr Brougham for his signature, and Mr Brougham has acknowledged he paid little real attention at the time he signed them and they were signed in a hurry, and then there's another couple of sentences that aren't highlighted so I submit are important.

WINKELMANN CJ:

We're not highlighting. We've got no highlighting so put to one side any notions you have about highlighting.

MR KING:

Apologies. Ms Dey's reasons for standing aside as a guarantor were plausible and understandable. Ms Regan's evidence was that she believed the only guarantee was from Mr Brougham would be required by the borrower for the trust loan. So the District Court Judge has found that the oral variation was plausible and understandable.

WINKELMANN CJ:

No, no.

MR KING:

No?

WINKELMANN CJ:

He's made a finding about her state of mind. He's dealing with her liability as a guarantor there. The question you have to answer is is the Judge's findings around 68, at 68.

WILLIAMS J:

71.

WINKELMANN CJ:

71. Yes, sorry, 71.

WILLIAMS J:

That's what he thought, not what they thought, or didn't think.

MR KING:

Yes, well, the Judge says he could not go so far as to find the change was established, even on balance, even "though I am satisfied that matters were discussed," so the Judge just goes as far as to say it was discussed. However, I would go further down to paragraph 72, after the Judge cites the notes of evidence, and he says, "The significance of this evidence to me is that it was in respect of the time of the signing of the guarantee, and the term loan agreement, and the consequences of the mistake would have made no difference to the defendant." So he's only addressing that finding in respect of the mistake, that he's signed a contract with only one guarantor when he thought he was signing two.

WILLIAMS J:

Yes, well, he said it would have made no difference to him, but he doesn't say, "I agreed." Interestingly, the Judge doesn't take that "it wouldn't have made any difference" and draw from that that there must have been agreement.

MR KING:

Yes, that is essentially our submission, Sir, yes.

WILLIAMS J:

Well, that's not necessarily in your favour. The fact that he's indifferent doesn't get you to consent.

MR KING:

There's certainly discussion, that's been established, before signing, and so –

WINKELMANN CJ:

Did you argue this? I mean it wasn't even an issue in the District Court, was it?

MR KING:

No, Ma'am. This has not been an issue previously. Just I did write a few notes on this point earlier.

GLAZEBROOK J:

What do you say 71 is doing, saying that he didn't make a mistake or what, because it does say that he's not accepting her evidence that he'd agreed to be the sole guarantor, and it seems very difficult to say that there was a finding in your favour that he was or that we should ignore that finding.

MR KING:

Well, he has gone – I would say that the appellant has gone on to sign the loan agreement and the Judge finds that there was discussion before signing. So if the appellant had serious objections or did not provide consent then he would not have signed in my submission.

WINKELMANN CJ:

So the Judge is saying, the issue here for me in this case, the Judge is saying, is whether or not his signing the document was caused, causally connected to a mistake he was making that Ms Dey was a co-guarantee, and he's saying, "Well, I don't accept he's shown there is a causal connection," but that's a different finding to finding that – you see, it's a contractual mistakes cause of action that the Judge is addressing there.

MR KING:

Yes, yes.

WINKELMANN CJ:

So it's a different issue he's addressing than whether or not Mr Brougham had consented to the documentation being amended so that he's the only

guarantor, now liable for $50,000 rather than $25,000, and the only factual material we have where the Judge has addressed it is he's saying, "I don't think on the evidence it's proved that he consented to it," and that is part of the chain of reasoning because – it's part of the chain of reasoning on that cause of action. So it's said against Mr Brougham when he raises this, "Oh, well, look you consented to it. You're agreeing," and Mr Brougham says, "No, I wasn't agreeing." The Judge says, "No, he wasn't agreeing, but when I look at the next step, which is whether or not it was an activating factor in him signing the document, I'm not satisfied that Mr Brougham's shown that." So you do have a finding against you on this point although it is in the context of contractual mistakes. Perhaps we'll take the lunch adjournment. We'll come back at two.

MR KING:

I'm not quite sure I understand you, Ma'am, but I'll consider the matter over lunchtime.

WINKELMANN CJ:

Well, if you have a think about the law of contractual mistake and read through the judgment I think you'll get the point.

WILLIAMS J:

Can I just ask before you go because there's a small question of fact, are there any findings, was there anything in the evidence as to the order in which Ms Dey and Mr Brougham signed the document? Was she last?

MR KING:

I can't recall –

WINKELMANN CJ:

There's a dispute and the Judge makes a finding, I think.

MR KING:

I can't recall off the top of my head so I'll have to come back to you on that one, Sir.

WILLIAMS J:

There's a dispute about when they discussed it but is…

MR KING:

No, they discussed it, the evidence, back at their place, once they uplifted the documents and took them back to their place.

WILLIAMS J:

There was a dispute, shall we say, or – okay, no, keep talking.

MR KING:

Well, my recollection of the evidence is that no, there wasn't a dispute on that point. They signed it back at their place, because Mr Brougham's earlier evidence was mistaken about where it was signed, so…

WILLIAMS J:

Yes, although interestingly the lawyer says he witnesses the signatures, which seems unlikely at their place, because he billed them for doing so.

MR KING:

I think that might have been in regards to the Flashman franchise agreements.

WILLIAMS J:

Okay, right.

MR KING:

Yes. So that was signed a couple of days earlier.

WILLIAMS J:

All right, I get it, yes. So there's no evidence about what order they signed in? In other words, the amendments to the execution page which struck out

Ms Dey as guarantor, was that in front of Mr Brougham when he attached his signature?

MR KING:
I recall the exact point but I would say that Mr Brougham signed twice as guarantor.

WILLIAMS J:
Yes, he did.

MR KING:
So that would tend to suggest that he signed –

WILLIAMS J:
Not looking closely?

MR KING:
Yes, and he just cracked on and signed it.

WINKELMANN CJ:
I think it's actually dealt with by the Judge but I just can't find where it is.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.04 PM

WINKELMANN CJ:
Mr King.

MR KING:
May it please the Court, I'll pick up some of those question that we finished off before the luncheon break and, in particular, there were sort of two immediate queries to make submissions on. The first of those was the signing order and the second was any evidence of consent of Mr Brougham that Ms Dey not sign.

I'll deal with the signing order first. At 202.0234 on the casebook, that is the brief of evidence of Rachael Dey at –

GLAZEBROOK J:
202, so is that a reply one?

MR KING:
Yes, correct. Evidence of Ms Dey.

GLAZEBROOK J:
And that's the reply evidence, is that right?

MR KING:
That's correct, Ma'am.

WINKELMANN CJ:
202…

MR KING:
0234. It starts at 231 but I'm referring you to 0234, and there's paragraph 18 you'll see about half way down. So Ms Dey states, "We were not at the offices of Simpson & Co, we were at home when we signed the documents. Bryce," that's Mr Brougham, "was given ample opportunity to peruse them. Simpson & Co were our lawyers, he had access to advice from them if he wished to receive it. He always tended to believe he knew better and would very rarely ask for any advice on matters of this nature. I attempted to go over the document with Bryce," Mr Brougham, "but he wasn't particularly interest in the details. I was able to explain that he needed to sign it twice, once as director," and then a key, second to last sentence, "He signed it twice as instructed and then I signed it." So her, Mrs Dey's evidence is that he signed it first, and that's to be – well, it's not consistent with but it's to be compared with Mr Brougham's evidence in the notes of evidence, so that's 201.0165, that's in the notes of evidence, line 12. Just once more, 201.0165,

notes of evidence. And simply Mr Brougham under cross-examination says he doesn't recall the signing order.

So, to summarise, we have Ms Dey saying that Mr Brougham signed first and Mr Brougham says he doesn't recall.

WILLIAMS J:
I see her signature's the first on the…

MR KING:
The highest, yes, that's correct, Sir, and then two…

WILLIAMS J:
Underneath.

WILLIAMS J:
Why would she have signed it up there if she wasn't the first?

MR KING:
There's no evidence of that, Sir, I'd be speculating.

WINKELMANN CJ:
Well, isn't that because she's leaving space, because that's the space he's left for her, if he's signed it first? He's signed down the bottom.

WILLIAMS J:
Yes, so he must have signed at the bottom, but just, why would he sign at the bottom?

MR KING:
I'll be speculating, Sir, if I made the – there's no evidence of that.

WINKELMANN CJ:
All right.

MR KING:

Moving on to the evidence of consent, I've sort of had the opportunity to sort of regroup, I guess, over the lunch adjournment and I can understand the point now, and this is mentioned at paragraph 95 of the *Gattellaro v Westpac Banking Corporation* [2004] 204 ALR 258 case, and there are other authorities such as paragraph 18 in *Bartells* and 348(d) in *James Graham* which all find that where there is consent of a signing guarantee for a co-surety not to sign then the guarantee, then there is still a valid guarantee against the signing guarantor.

WILLIAMS J:

Consent of the signing guarantor to the non-signature of the co-signing guarantor?

MR KING:

That's correct, Sir.

The evidence of consent for the first respondent is as follows. The start point is, as I mentioned earlier, at paragraph 60 of the District Court judgment where there was a finding by the Judge of discussions as to the change in Mr Brougham being sole guarantor. The second point is that Mr Brougham then clearly signs. The third point is on the same page that we are with on the notes of evidence, that's 201.0165, two lines above at line 10, so same reference. The question is put to Mr Brougham, "So you accept that you meant to sign the first signature one line higher? So you accept that you were binding yourself personally and you were binding B & R Enterprises?" Mr Brougham's response at line 10 is, "Correct."

WINKELMANN CJ:

What page is that?

MR KING:

The same page, 201.065, it's noted at 166 on the notes of evidence itself, and it's line 10. Moving down to the next page, that's 201 –

GLAZEBROOK J:

Can we just remain where we are because he says he didn't stand over Ms Dey when she signed the document and said it was highly likely because he went back to whatever else he was doing and didn't pay attention. So how do you turn that into consent?

MR KING:

Well, that is, he has signed it. He has gone along with it. He has said that he is to be bound, and that was my next point in the next evidence was that he acknowledges he was to have some form of liability and his –

GLAZEBROOK J:

So you say his consent is just in signing it. The fact he didn't know whether she had signed as guarantor or not is irrelevant? Sorry that's probably putting, I didn't – well answer anyway. I thought I might have been putting your point a bit too high so I was giving the opportunity to correct what I said.

MR KING:

Perhaps if I can just take Your Honour's indulgence and finish these two bits of evidence I'm referring to, and then that might give you some better indication –

GLAZEBROOK J:

As long as you come back and comment specifically on that bit of evidence I've just read to you.

MR KING:

Will do Ma'am.

GLAZEBROOK J:

Which is, 'I didn't stand over her and it was highly likely I didn't pay attention to her signing."

MR KING:

Okay, I'll go back to that point Ma'am, if you just have my indulgence just to finish off these two bits of evidence. I think that may help to answer that query. So 201.0166, so the next page on the notes of evidence at line 18.

GLAZEBROOK J:

Would you like to look at the first question and answer first or are you going to come back to that?

MR KING:

I was going to come back to that.

WILLIAMS J:

So we're on page 167 of the notes now?

MR KING:

That's correct. I will come back to you Ma'am, if I can just finish these two bits of evidence and I think I might be able to answer that.

WINKELMANN CJ:

I mean this is all, him saying you're bound by it is all rather academic because the question for us is whether he was bound by it, so his legal opinion is not very helpful.

MR KING:

Well the first respondent's position is that, yes, in signing being not particularly interested in signing anything that would have been put in front of him that was referred to in the District Court judgment at 71. That he has provided consent.

WINKELMANN CJ:

Is there any other evidence because I was going to ask you where's the evidence that she said to him, and if I pull out and you sign you'll be liable for the whole amount rather than the $25,000 we'd agreed.

MR KING:

The evidence from Ms Dey, well there's certainly, there's evidence of –

WINKELMANN CJ:

You can just, it's okay to say there's none if there is none.

MR KING:

I'll have to, I don't recall off the top of my head any evidence where Ms Dey says Mr Brougham agreed to be the sole guarantor.

GLAZEBROOK J:

I interrupted you and you wanted to finish off your, where he agreed to be bound, and I don't think we let you do that, so…

WINKELMANN CJ:

I think that was line 18 which you'd taken us to.

MR KING:

Yes, and also at 201, so this is earlier in the notes of evidence, 0089 at line 27 Mr Brougham acknowledges he is to be bound. Excuse me Your Honours.

GLAZEBROOK J:

And the earlier reference was?

MR KING:

201.0166, line 18.

GLAZEBROOK J:

Sorry that's the…

WINKELMANN CJ:

201.0089.

GLAZEBROOK J:

Thank you.

WILLIAMS J:
So is that 90 in the notes is it? What page in the notes of evidence itself? Page 90.

MR KING:
One moment Sir, I'll just doublecheck.

WILLIAMS J:
It's all right, they've lined up there.

MR KING:
Yes, they've lined up there, that's correct. So the question was put to Mr Brougham in pretty clear terms. "You knew that you were to provide a personal guarantee for the trust loan, is that correct? A. Ah, yes."

Going back to the point my colleague's just referred me to, back to Ms Dey's reply evidence, so that is 202.0234, and at paragraph 20. So 202.0234. So it starts at .0231. At paragraph 20 Ms Dey deposes, "Bryce was well aware that I was not going to be a guarantor. We had discussed this at length prior to purchasing the franchise. He was present when signed the loan agreement and saw that I only signed once. Immediately prior to both of us signing it I explained that he needed to sign twice, once as a director and once as a guarantor, so he was aware of the significance of the second signature."

WILLIAMS J:
So this is where she and the Judge differ?

MR KING:
He didn't go as far as to say that there was agreement, just said there were discussions, so yes there is a difference in the factual finding of the Judge there and Ms Dey's evidence, however, he did accept that her explanation for the sole, Mr Brougham being the sole guarantor was plausible.

WILLIAMS J:

Yes.

MR KING:

Yes.

GLAZEBROOK J:

But there is never an explicit evidence from her that she said it's not just 25 it's 50?

MR KING:

Yes, I'm going to have to find the reference to it exactly.

WINKELMANN CJ:

Do you say that she did say that?

MR KING:

Yes.

WINKELMANN CJ:

That she told him it's not just 25 you're on the hook for now, it's 50, because you'd have –

MR KING:

That's correct, as sole guarantor he was to be liable for the whole loan.

WILLIAM YOUNG J:

Just tell me, was there any reason why he should take the risk for all the money that went in?

WINKELMANN CJ:

When they were buying an asset for the both of them.

WILLIAM YOUNG J:

When they were buying it effectively jointly.

MR KING:

So the reasons that the trial Judge found were plausible was that the bank required –

WILLIAM YOUNG J:

Yes, but she's got to put in, she's got to guarantee $50,000 effectively to the bank.

MR KING:

That's right, yes.

WILLIAM YOUNG J:

Yes, but if he's got to guarantee $50,000 he, providing he can pay, is carrying the entire risk, isn't he?

MR KING:

Well, that's correct. If there's a default from the borrower then yes, as a sole guarantor he –

WILLIAM YOUNG J:

So why was it so rationale that only he should provide a guarantee? Wasn't it more rational that they should both provide guarantees of $25,000?

MR KING:

Well the first respondent's submission is that it was clear that because of the bank loan that if there was an immediate default that Ms Dey would have to repay the whole lot, and so –

WILLIAM YOUNG J:

But she could then recover the whole lot from him.

MR KING:

That's correct. Well via the Trust.

WILLIAM YOUNG J:

If it was a team effort one would have expected them to be on risk each for half the money that went in.

MR KING:

Well, that's not what transpired. There was a change.

WILLIAMS J:

Isn't it likely to be because she perceived it as her money that was being put in and that he needed to come to the party?

WILLIAM YOUNG J:

On her theory it's all his money in the end because he's the one who's ultimately responsible.

WINKELMANN CJ:

Even though they've bought a joint asset with it.

MR KING:

Well, that's the Trust position is that Mr Brougham is liable for the whole lot. That's the Trust position.

WINKELMANN CJ:

So you're asking us to make a factual finding the District Court Judge didn't make?

MR KING:

No.

WINKELMANN CJ:

Yes, you are because you can't point to him saying that Mr Brougham consented to this agreed, to it. The Judge found that he didn't, that there wasn't adequate evidence to convince him that he did.

MR KING:

My submission is that consent can be easily inferred.

WINKELMANN CJ:

No, just answer my question. Are you asking us to make a finding the District Court Judge – are you asking us effectively to overturn the District Court Judge's factual finding which wasn't addressed in other Courts?

MR KING:

Well, I think the answer has to be – if I go back to – I'll say yes just to get the answer out of the way but if you bear with me for a moment, Ma'am. There's two issues I think at play that are running simultaneously here and I think it would be helpful if I address those and then perhaps it can give some insight into the answer. The first point is that Mr Brougham, the consent of Mr Brougham was to be the sole guarantor. So the evidence that is in the District Court finding that he had discussions and then he signed it is, on the face of it, in my view, a factual finding in of itself. So if this Court is not persuaded by that submission then yes, I am asking you to make a factual finding, but my submission to you is that that is not a factual finding that you need to make, that based on the evidence that there's a finding of discussions and there's a signing, that that in itself is consent.

WILLIAMS J:

Your problem is what's he signing? Is he signing a document that says there's two guarantors with a condition precedent, none of which have been struck out, and the Judge says, "I'm not convinced he agreed because he just left all that paperwork stuff to her." Where are you going to be able to infer from all of that that he was in on a sole guarantee when the document itself doesn't even say that?

MR KING:

Well, I would submit to you that it does say that, Sir, if you look at the Court of Appeal's finding at paragraph 17.

WILLIAMS J:

Well, just look at the document.

MR KING:

That's right. Okay, well, the documents –

WILLIAMS J:

There's reference to two guarantors and a condition precedent which you say was waived but it doesn't look like Mr Brougham consented to that either.

MR KING:

The condition precedent specifically says, and I quote, "If any person named in this agreement as guarantor," that's the start of the pre, condition precedent, so the Court of Appeal found that persuasive and that when there's listed anybody as guarantor(s), so as soon as anybody signs the contract as a guarantor then the contract comes into effect at that point. So irrespective there could have been 50 people labelled on the contract in the Court of Appeal's reasoning but –

O'REGAN J:

Yes, but you've got to confront the reality that this is a document that's drafted on the basis that there are two guarantors. You can't ignore that.

MR KING:

No.

O'REGAN J:

Clearly that was what everyone expected to happen and there's a condition precedent that they would sign some sort of separate deed. You're trying to infer, well, you're arguing that you can infer that that wasn't intended simply from the existence of the signature of one but not two. Now in order for that to work the other guy has got to say, "Yep, that was the deal," and the Judge doesn't find that, and you say the signature's enough, but you see the circularity of that logic? It can't possibly be just his signature. It's got to be his

signature to a deal of being the only guy, and the problem you've got is the contract is drafted on the basis that there are two.

MR KING:
But the contract says, I just reiterate the point, that if any person is named. So –

WINKELMANN CJ:
Yes but –

WILLIAMS J:
Yes, but you look at the front of the document.

O'REGAN J:
Two of them are named.

WINKELMANN CJ:
Yes, two of them are named. So, Mr King, it just occurs to me that if you're asking us to undo this factual finding then we'd have to look at all the factual findings which might include the earlier one which, as you may have noted I observed to Mr Geiringer, seemed to me to be out of touch with, out of step. The factual findings seem to be out of the step with the factual matters the Judge has said beforehand, where he's described her evidence as being, I'll use another word, unsatisfactory really, or implausible.

WILLIAMS J:
Lame.

WINKELMANN CJ:
Yes, lame, and noted all the contradictory material in the lawyers' files, but then said, effectively seemed to be persuaded by the evidence of the other trustee and thought that it must be plausible on a commercial rationale basis, but actually there is no commercial rationale for it, for Mr Brougham to take all of the liability. So if we do start down of overturning factual findings in the

District Court, we might continue down that path. Sorry, I just thought I should give you a warning about that.

MR KING:

Well, yes, my submission is you do not need to go that far, that Mr Brougham's evidence that he has some form of liability. He's…

WILLIAMS J:

Yes, I don't think anyone's fighting you about that.

MR KING:

No, and that is –

WILLIAMS J:

Just what form is the question.

MR KING:

– evidence of, I say that can be interpreted by this Court as consent.

WINKELMANN CJ:

And he says, his evidence consistently throughout was, yes, I thought I had liability with my partner 50/50, and she didn't say those things to me beforehand.

MR KING:

Well, he wasn't particularly interested and would have signed anything that was put in front of him.

WINKELMANN CJ:

So her evidence was he wasn't particularly interested, so a simple reconciliation of both of them was that Ms Dey attempted to explain it to him and he just signed in a rough way, as he obviously has, and didn't turn his mind to it, so there's no consent or agreement.

MR KING:

Well in my submission that is consent. I mean put it the other way –

WINKELMANN CJ:

Not in law I don't think.

MR KING:

Well if Mr Brougham did not consent then his actions are inconsistent with that, yes, non-consent.

WINKELMANN CJ:

As are everybody's when they sign a guarantee which is not binding.

MR KING:

Sorry Ma'am, can you say again?

WINKELMANN CJ:

As is anybody who signs a guarantee which is not binding. Their actions will be inconsistent with the argument they later make that they're not bound.

MR KING:

Well with respect I disagree. I think that, I submit that if he is not bound then he would go about, he wouldn't continue the business enterprise.

WILLIAM YOUNG J:

Can you just answer me. Though I take it that the loan agreement remained within the company, it wasn't given to anyone.

WINKELMANN CJ:

The evidence was it wasn't given to the District Court, it wasn't given back to the lawyer, was it?

MR KING:

It was retained by Ms Dey and the company, yes.

WILLIAM YOUNG J:

So it didn't go, a copy didn't go to the Trust?

MR KING:

Oh, well Ms Dey had a copy of it so commencement of proceedings so I presume that she, yes, as trustee she would have had access to it.

WILLIAM YOUNG J:

So she had a – sorry, so there was no formality of here is the loan agreement back to the Trust, and the Trust saying, okay, now we've got the loan agreement we'll give you the money.

MR KING:

It was discussed in evidence by Ms Regan and Ms Dey as the trustees and then once the loan agreement was executed the money was forwarded. So it was only once the loan agreement was signed that it was forwarded.

WILLIAM YOUNG J:

Okay.

WILLIAMS J:

For myself I can see the point you make where, you know, if he's only got half his mind on it, and he signs it, tough, you know, people get stuck with those sorts of things all the time because they don't concentrate and that's their bad luck. The problem you've got here is the document refers to two guarantors. What he signs says there are two guarantors. That's the point that Mr Mahuta-Coyle makes. You really have to address that somewhere in the writing in order to, for me to feel somewhat sympathetic to the argument, I would have thought. The signature itself doesn't nix the front of the document, which says there are two guarantors.

MR KING:

Yes. So I'll just refer Your Honour to the Court of Appeal that say that any person named as a guarantor, and perhaps if I – I know Your Honours will

know this judgment well, but at paragraph 17 the Court of Appeal dispensed with this argument by the appellant, and halfway down, “There was provision for one or more guarantors: that’s the “Guarantor(s)”. Two were named. The words in the 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.”

WINKELMANN CJ:

Yes, but the Court of Appeal didn’t address the obvious point, which is that when two guarantors sign it’s a joint and several liability, and so each guarantor has a particular interest in knowing that the other guarantor is also there so they can see a contribution from them at a later point should the guarantee be called upon.

MR KING:

But once the, I would say, Ma'am in reply, once the signing has occurred that meets then section 27.

WINKELMANN CJ:

All right. So perhaps we should go to your section 27 argument.

O’REGAN J:

But can I just be clear though, you're saying that there was at some point a change whereby Mr Brougham’s agreement to guarantee $25,000 was changed into an agreement to guarantee $50,000, and you rely on that, the inference you referred to before, that that was enough for him to basically double his liability?

MR KING:

Well, the first thing I would say, Sir, is you don’t need to go into the previous intention of the parties or the factual matrix because you can just read the parol evidence wrong, you can read the contract as it is, and get the guarantee terms from that.

O'REGAN J:

Well, let's say I don't accept that.

MR KING:

Yes, but if that's the case, yes, certainly the law says that Mr Brougham has to consent to that. And I'm not sure if this answers your question, but the evidence that I've just referred to I say meets that.

O'REGAN J:

But the Court of Appeal was assuming it was a joint and several guarantee, and it wasn't.

MR KING:

That's correct.

O'REGAN J:

It was a guarantee of $25,000 each, that was the deal that was being changed. So they'd proceeded from a proposition that it was a joint a several guarantee where both were liable for $50,000, but that's actually not what the evidence showed. What the lawyer was told was the agree was that it was $25,000 each.

MR KING:

Well, I simply say in submissions that it was $50,000 that was jointly and severally guaranteed.

O'REGAN J:

Well, why was the lawyer to draft a guarantee with $25,000 each liability?

MR KING:

That was the initial bargain that was struck between Mr Brougham and Ms Dey. However once it became clear that Ms Dey had to guarantee the bank loan herself and was essentially in charge of those payments –

O'REGAN J:

So you're saying the evidence you've taken us to is evidence that he agreed that whereas before he was going to guarantee $25,000 now he was guaranteeing 50?

MR KING:

That's correct, Sir.

O'REGAN J:

Thank you.

WINKELMANN CJ:

Whereas there's another plausible, even if we accepted every bit of your narrative to date, there's another plausible account, even on the basis of this document, that the deed when it was finally signed would only have him liable for $25,000.

MR KING:

Well, you're referring to the separate deed that was not executed, Ma'am?

WINKELMANN CJ:

Yes.

MR KING:

Yes.

WINKELMANN CJ:

Because remember, he's not binding himself at this point in time, he can decline to sign a subsequent deed and just not get the loan.

MR KING:

Well, my submission is that that is not the case. When the condition precedent specifically says a guarantee deed executed in a form – I'll quote it so I don't get it wrong.

WINKELMANN CJ:

Yes, we know what it is.

MR KING:

"Signed a deed and indemnity in the form required by us and the condition precedent by us," that's the Trust, "and the condition precedent to the acceptance of that guarantee, if any, must have been completed to our," that's the Trust, "satisfaction." So there's no equal bargaining there, my submission. The contract for guarantee has come into effect on signing and this condition precedent is something that can and was impliedly waived by the Trust.

WINKELMANN CJ:

Hard to read that in this way because it contemplates that, on its face, it contemplates that the guarantor might provide a form that is not acceptable to them and then they just don't go ahead with a loan.

MR KING:

But I would say in reply, Ma'am, that they did proceed to loan the money so they accepted that the guarantee in the contract was enough to be a contract of guarantee, and the Court of Appeal –

WINKELMANN CJ:

It doesn't really answer my point though, does it? He might have executed in anticipation that when he got the deed it was going to save $25,000. It's completely consistent with the narrative because you still haven't shown us the evidence you say proves he accepted he was going to be liable for $50,000. It's consistent with the narrative that she said, "I don't want to be a guarantor." He signs the document, thinking that when he's asked to sign a formal document it'll only have him liable for $25,000. This is why section 27 exists.

MR KING:

I'm not sure if I quite understand your point, Ma'am, but my submission is that –

WINKELMANN CJ:

It all really turns on what evidence there is that he agreed that he'd be liable for $50,000. A proposition he didn't accept.

MR KING:

That is my submission is that the contract itself can be interpreted to bind Mr Brougham on itself.

WINKELMANN CJ:

Yes, and that's where –

MR KING:

But if that's not accepted then yes, the consent of Mr Brougham is required, and the – I won't rehash my submissions on that point but I mean my submissions are that he has, would have signed anything that was put in front of him. He in fact did do that. He reaped the business opportunity. The business subsequently made repayments and he subsequently admitted at trial that he was, had some form of liability and intended to be bound.

WINKELMANN CJ:

Yes, but he was also consistent that he thought he was only liable for $25,000 and that she'd be liable too. So we can't overstate he'd sign anything that was put in front of him. His point is that he is not good at reading documents, isn't it?

MR KING:

Well, I mean if that's the contract that this Court finds is in evidence, I mean I guess, I mean my client would, you know, $25,000, if that's the contract that that is, that is still a contract of guarantee even if it is limited to $25,000, but…

WILLIAM YOUNG J:

But the trouble it's not a contract that's really evidenced in writing.

WILLIAMS J:

No.

MR KING:

No. Sorry, Sir?

WILLIAM YOUNG J:

It's not really evidence in writing. I actually find the case reasonably elusive. Is there evidence that he agreed to go from, I'm not sure if it's decisive if there is, but is there evidence that he agreed to go from $25,000 to $50,000, other than the fact that he signed a document?

WILLIAMS J:

The signatures.

WINKELMANN CJ:

Because if we were just relying on the fact he signed the document then it's circular.

MR KING:

But my submission –

WILLIAM YOUNG J:

What was your client –

MR KING:

If I go to the section 27 – sorry, Sir, did…

WILLIAM YOUNG J:

So what was your client's – the Judge was obviously uncertain as to what had been agreed between them, so his findings are slightly, say, they're not decisive. There's not a decisive finding one way or the other. He makes a bit of a finding in your favour, a bit of a finding in Mr Brougham's favour. Is it Brooham or Brougham?

MR KING:

Brougham, I believe.

WILLIAM YOUNG J:

Brougham. Mr Brougham's favour, and the – so I'm just interested to know what the evidence was as to the detail that was discussed because if your client's position was simply, "I'm not signing the guarantee. You've got to," then it's at least possible that he may have thought, "Okay, well, I'm only, I'm up for $25,000," which was the original deal, "and since she's putting in $50,000 that's fair enough, it means I'm liable for half."

MR KING:

Well, I can only re-emphasise the evidence I've already pointed to. I mean, I've asked him under cross-examination, "You knew you were liable to provide a personal guarantee for the Trust loan?" The Trust loan cannot be disputed, it's $50,000 in the contract, and he says, "Yes."

GLAZEBROOK J:

Right, take us to that again.

MR KING:

It's 201.0089, that's the notes of evidence.

GLAZEBROOK J:

I don't think you did take us to that before so…

WILLIAMS J:

Yes, he did.

GLAZEBROOK J:

No, he mentioned it.

WINKELMANN CJ:

No, we did go to it, 9.18 – no, not 9.18.

MR KING:

Correction, that's…

GLAZEBROOK J:

No, this is a different one.

MR KING:

So it's line 27, it's page 89 of the notes of evidence.

WINKELMANN CJ:

It's interesting actually, because Ms Dey's brief of evidence says it was always the case that he was going to be the only guarantor.

MR KING:

That's not my recollection of the evidence, I'd have to…

WINKELMANN CJ:

Well, that's what she says in her brief of evidence. I imagine she was cross-examined on that and moved, but that's what her initial position was.

MR KING:

Certainly there was a discussion with solicitor, Mr Simpson, because that's why the document reflects $50,000, it doesn't reflect the initial instructions.

WINKELMANN CJ:

She says, "I don't recall noticing that the document stated that we would both be guarantors on the first page. The arrangement was always going to be that Bryce was the only guarantor." That's at paragraph 9 of her brief of evidence.

MR KING:

Is this the brief in reply, Ma'am, or is this…

WINKELMANN CJ:

No, it's her brief of evidence.

MR KING:

The initial brief, yes.

WINKELMANN CJ:

Which is at 202.0228. Which of course is contradicted by the various file notes of her instructions.

GLAZEBROOK J:

Sorry, can you just repeat the page number again?

WINKELMANN CJ:

202.0228, and it's at para 9.

MR KING:

Well, I mean – I'll have to go to the notes of evidence just to get the exact para. But Ms Dey was under cross-examination questioned by that and her evidence was that she talked to Mr Simpson after the initial $25,000 each and that's why the loan documents were changed before she uplifted them and took them back to her place.

WINKELMANN CJ:

But they weren't changed.

MR KING:

Sorry, Ma'am?

WINKELMANN CJ:

They weren't changed. That was why she was cross-examined about it, they weren't change. The loan document we've got is not changed, it still shows her as a guarantor.

MR KING:

That's correct that she is a guarantor, but it is changed from, there's no mention of $25,000 in the loan agreement.

WINKELMANN CJ:

Well, that doesn't mean it's a change, that's not necessarily a change. Because there was going to be separate documentation of the guarantees. So there's no detail about the guarantees.

WILLIAMS J:

In fact if that story is correct her name should have been taken off before it was, before someone punched "print".

WINKELMANN CJ:

Which I think is why the District Court Judge described the evidence as "lame" on the point, because it was inconsistent with the files.

MR KING:

Well, all I can say to that is that that was the evidence that came out at trial, and I would note that in my client's favour on that position there is no mention of a $25,000 liability being several or anything like that, that that's not – yes, I guess there is a –

WINKELMANN CJ:

It's a file note of her instruction. Well, it's actually in an email, for her instruction.

GLAZEBROOK J:

It's an email, yes, from her.

MR KING:

An email, yes.

WINKELMANN CJ:

Yes, her instruction, from her, yes, more than that.

MR KING:

That's correct.

WILLIAMS J:

I must say, for what it's worth, that the more in principal problem with your argument is going to be if you're right then in a situation of named co-guarantors in a deed or a document that's a loan or a lease document or whatever it might be, as soon as the beneficiary of the guarantee gets one signature, they can walk away and all the other guarantors are off the hook, even though the first signing guarantor thought that they were on the hook with five others. That's unlikely to be a very satisfactory way the law should run, is it?

MR KING:

Well the, yes, my answer is the same as earlier in that, my submission is that anybody who signs is a guarantor as pursuant to that condition (c) pre-condition, the word escapes me, clause (c) of the page 2 of the agreement in any event, condition precedent. Anybody who signs is potentially liable for the whole amount, and if someone, a co-surety –

WILLIAMS J:

Yes, but you can feel a lot better about being potentially liable for the whole amount if you've got four mates.

MR KING:

That's correct but unless the guarantor was to obtain financial disclosure from everybody he may well, or she may well be liable for the whole amount in any event, even if multiple other guarantors were named.

WILLIAMS J:

Possibly but as you know the law would even it out.

WINKELMANN CJ:

Your difficulty is that you're setting up this loan agreement as a proper record of what was agreed by Mr Brougham but it doesn't, but if it's what was agreed by Mr Brougham it is for two guarantors. That's the fatal difficulty you – that's not the fatal difficulty, sorry, that's the difficulty that lies at the heart, the

contradiction that lies at the heart of your argument. So you're both approbating it and reprobating it. And I could see you might be able to do that if you could point us to evidence that, clear evidence that he consented, in terms of the authorities, to proceeding – no it's not just on its own, the document, because that can't be it. It must be something outside it, which of course on the face of the document you said proceeding on the basis of two guarantors.

MR KING:

There is also the issue of subsequent conduct and, but that's getting us into the realm of equitable estoppel. But in terms of an unequivocal statement on the loan agreement, or in evidence, that's not there but I reiterate my submissions that the evidence he gave, he was clearly to be bound. This is not a case of an ill-informed, ambiguous, fictitious guarantee. This is a legal instrument and I think perhaps it would be helpful at this juncture to turn to my argument under section 27 because that may provide some weight for Your Honours objection to the co-surety issue.

The main issue that the appellant has advanced on appeal is the in writing requirement under section 27. The first respondent's case is relatively straightforward. It's that under the *Bradley West* precedent guarantees are not required to be in any form, any particular form or using any particular words. So in this case the guarantee I submit can be read from the contract itself, that's the term loan agreement, and the Court of Appeal supported that submission at 18 to 21 of their judgment. Justice Tipping says or finds that the inference is to guarantee something by signing of the guarantor and the legal instrument, and that something is to, can be inferred to answer the default of the debtor in the principal document, and at 117, line 26, the remainder of that paragraph which the Court of Appeal refer to, he uses two which I think are resonating phrases, namely that it's commercially unreliable, sorry, commercial unrealistic or untenable for signing a legal instrument to have no effect. So in application to this case Mr Brougham has signed a legal document, namely a term loan agreement, as a guarantor and that the terms

of that guarantor can be used as “in writing” under section 27 to meet that requirement.

O’REGAN J:
But in this case it does have legal effect, doesn’t it? It nominates him as the person who has to sign the deed of guarantee required as a condition precedent before the loan is advanced and that’s what he signed up for but then nobody ever asked him to do it.

MR KING:
My submission, Sir, is that he, the agreement, as soon as he signs the agreement, the term loan agreement, that is the contract for guarantee. It’s already come into force.

O’REGAN J:
What’s the point of a condition precedent?

MR KING:
It’s for the benefit of the lender to –

O’REGAN J:
No, it’s not. It’s for his benefit too because it defines the term.

MR KING:
My submission, Sir, is that the phrasing of the condition precedent is that it’s for the benefit of the lender only and that has to be in a form required.

O’REGAN J:
Where do you get that from?

MR KING:
From the –

O'REGAN J:

Surely when you ask someone to sign a document it's in both parties' interest to know what the terms are.

WINKELMANN CJ:

It might be for the benefit of the lender only but it's – if the lender chooses to proceed without it, they proceed without a guarantee. That's –

MR KING:

Well, my submission, and it applied in *Bradley West*, that signing as a guarantor on a legal instrument has some legal effect. That's a commercially realistic –

WILLIAM YOUNG J:

You say it's a – it's a belt and braces approach. You've already got the belt in the term loan agreement and the guarantee was just the braces. The deed of guarantee was just the braces.

MR KING:

That would be my submission, Sir.

WILLIAMS J:

Yes, well, the argument for the other side is sometimes belts don't work.

MR KING:

But that's a – legally, it's a signing of a legal instrument as a guarantor and that –

GLAZEBROOK J:

Where does it set out the terms, because it says the contract must be in writing, so do you say that means that you don't have to set the terms out in writing, that all you have to do is say guarantor and be able to infer terms and that means the whole contract is in writing, is that the submission?

MR KING:

The submission is that the essential terms can be inferred from this term loan agreement.

GLAZEBROOK J:

That's what I've just put to you. You're saying that there is no writing that actually says these are the terms? You have to infer it from a document that actually isn't a contract of guarantee at all, doesn't even purport to be one but purports to be a loan agreement, purports to be and is a loan agreement?

MR KING:

That's correct, Ma'am, and that is Justice Tipping's reasoning in *Bradley West*.

GLAZEBROOK J:

Well, that might be Justice Tipping's reasoning but you need to convince me why that means it's a contract of guarantee in writing when no terms are guaranteed and it doesn't even say, "I agree to guarantee. I agree to answer to another person for the debt, default or liability of a third person."

MR KING:

Ma'am, to answer that enquiry, I would take you to the loan agreement itself and in particular the annexure schedule, and you'll see there's a number of tables there and this is at paragraph 301 –

WINKELMANN CJ:

Can you just give us the reference to the loan agreement again?

WILLIAM YOUNG J:

301.17.

MR KING:

It's 301.0019 in the case book.

WILLIAM YOUNG J:

It's 17 I think it starts.

MR KING:

Yes, it's 17 it starts, correction. I'm at page 19, two pages on from that.

O'REGAN J:

But these are all just loan terms, aren't they?

MR KING:

That's correct. So table A sets out what the principal sum is, so I say that's a clear…

O'REGAN J:

Where does it say Mr Brougham has to pay this if the company doesn't?

MR KING:

Well…

O'REGAN J:

If you look at section 27, the definition of a contract of guarantee, that's what has to be in writing, has to be an agreement to pay up if somebody else fails to, and where does it say that on this document?

MR KING:

It has to be inferred and that's the –

O'REGAN J:

But that's not in writing. If you're inferring it, you don't have writing.

WILLIAM YOUNG J:

I suppose it can be implied from what's written.

WINKELMANN CJ:

From the fact it's a guarantee.

WILLIAM YOUNG J:

I mean if someone signs as – I'm giving you a hand here.

MR KING:

Sorry Sir, I can't hear.

WILLIAM YOUNG J:

It maybe able to be inferred from what's written, implied in what's written. Someone signs as a guarantor. That it maybe that implicit in that signature and that word is an obligation to be responsible for the debt.

WINKELMANN CJ:

But as against that there is the fact that there's no stipulation as to the extent of the liability or the timing of the liability, and there's a third difficulty, which is that the contract itself contemplates that there are going to be terms to this guarantee that are not set out in the loan agreement.

MR KING:

I would say –

WINKELMANN CJ:

Which is condition precedent (c) because it refers a document in a form acceptable to the trustee.

MR KING:

My submission is that the, if it is accepted that the *Bradley West* precedent applies, that the terms of the, the guarantee of something is, the something is to answer the default of the debtor. That is the *Bradley West* ratio. So if we take that and apply it to this contract, the default is for the principal sum of $50,000 in table A, it's repayable upon demand, which is table A and table B, and there is an interest rate in table D that's provided, and costs of enforcement are required in clause 12. So my submission is that there are, when there is a default of those terms by the borrower, that using the

Bradley West ratio that Mr Brougham is, as guarantor, a signed guarantor, those terms are in writing that he must answer those as answer the default.

WINKELMANN CJ:
All right, are those all of your submissions on section 27 or have you got more to address?

MR KING:
Well there are a couple of cases my friend has referred to, and I think that those require some submissions.

WINKELMANN CJ:
Go ahead.

MR KING:
I will not spend too long on those, but I think it is important that my clients –

WINKELMANN CJ:
Yes, takes us to it.

MR KING:
So first of all we have *Golden Ocean*, and I'll just, that's number 2 in the authorities, and the Court in that case, as it's already been submitted earlier, there was a charter agreement and it was held to constitute a guarantee. This is different than a, this is not a sort of a section 27 case, however, the submission here is that there was an enforceable guarantee where there were words of guarantee and so again our client has been – sorry, Mr Brougham has been listed as a guarantor and at paragraph 30 of the judgment at line, paragraph B, so this is 862 of the judgment he quotes, "I agree that the document at B106 evidences the contemplation of the parties that the guarantee would be incorporated in a formal written document, here a charterparty. But the guarantee was an integral part of the charterparty and was contained within its terms as summarised in the recap. It is not sensible to contemplate that the charterparty should become binding on the parties

thereto in the absence of a guarantee enforceable by the owners agianst the guarantor."

So that, in my submission, adds weight to Justice Tipping's terms of commercially unrealistic and untenable that it's also not sensible not to contemplate this loan being advanced without a guarantee. At *Victoria Quarter…*

GLAZEBROOK J:
Well, the problem in this case may be that your clients decided not to get the formal guarantee that was contemplated as a condition precedent.

MR KING:
That's accepted, Ma'am. They uplifted a contract that they thought bound a guarantee from their solicitors.

GLAZEBROOK J:
Well, if they were mistaken in that then they might have made a bad commercial decision based on an error of law. But it doesn't turn what isn't a guarantee into a guarantee, does it, and certainly not a guarantee that isn't in writing into one that is in writing?

MR KING:
I'm not sure I understand the point, Ma'am. I would submit that that's irrelevant and I'm just talking about the contract as it is, not the circumstances in which it was prepared or the intention behind it.

GLAZEBROOK J:
Well, I wasn't either. I was just saying actually contemplated in the agreement there's another agreement that is the contract of guarantee.

WINKELMANN CJ:
Is this notion that it's commercially unrealistic for him not to be bound, isn't that, if we let that run fee as an idea wouldn't that rather undermine a whole

intent of section 27 and in keeping with the *Actionstrength*, the points made in *Actionstrength*?

MR KING:

Not at all, Ma'am. My submission would be that the main concern there is ambiguity, fictitious and ill-considered guarantees. This is an appellant who is a businessman requiring, in desperate need of, or the borrower was, of funds, and –

WILLIAMS J:

Sorry to butt in, but the problem you confront here is really ambiguity, because you've got two guarantors named on the face of the document and a promise to enter into a guarantee, that's what makes this hazy. Otherwise you'd be home and hosed and you wouldn't be here.

MR KING:

My submission, as I say, once he signed he's a guarantor and there's no ambiguity in terms of the amount to be repaid, when it's on demand, and –

WINKELMANN CJ:

Okay. But can we just go back to my question, which was this notion that somehow you should enforce as binding documents where someone's signed it reportedly as a guarantor, you should enforce it because it's commercially unrealistic or untenable to have them signing a legal document and then find it has no effect. But that's the very intended effect, really, of section 27 that – well, no, not the intended effect, it's one of the necessary side-effects of the effect of section 27, just as is observed in relation to the Statute of Frauds in *Actionstrength Limited* by Lord Justice Hoffmann, or Lord Hoffmann, I don't know, I haven't been able to open that case.

MR KING:

Well, my submission is that those concerns under the policy for section 27 are not infringed in this case because of those points I mentioned earlier about –

WINKELMANN CJ:

No, but what I'm saying to you is that we don't really decide whether or not to apply section 27 by whether or not the policy is engaged. Because of what section 27 is attempting to stop, which is this kind of grey land that we're now in you just apply it, it's a hard template, that's its intention but, it's a hard template of what's required. It's not something that moves around depending on the overall circumstances of a particular case.

MR KING:

I mean, I would say, Ma'am, that Parliament has not gone further than to say that all that's required is in writing and signed contracts of guarantee. They haven't said that the ADLS form's required, they haven't said that any prescribed form's required, they haven't said that the express terms need to be in the contract.

WINKELMANN CJ:

Yes. It still doesn't answer my point though. I mean, if it doesn't comply with the requirements of section 27 and it was a document which everyone intended should have an effect at the time and it was in a commercial context, but it still doesn't comply with section 27, it doesn't matter that that seems commercially, to defy commercial common sense, it actually is the effect of section 27.

MR KING:

I would submit that Justice Tipping is right on the mark, that for lenders to lend on a principal document where the guarantor signs on there, on a legal instrument, that is protecting a borrower, sorry, a lender, and that that would accord with normal commercial common sense.

GLAZEBROOK J:

Well, what have commercial sense is that they actually set out the terms of guarantee in a document and in this case required them to sign it which was actually a condition precedent, and if they didn't look after themselves properly then that is their problem, isn't it?

MR KING:

I think my answer to that is…

WINKELMANN CJ:

Well, we may have gone around.

MR KING:

Yes.

WINKELMANN CJ:

I think you might have already answered that, given us your answer in relation to that earlier.

GLAZEBROOK J:

I'm assuming you just say that the terms were in that document and therefore there wasn't a need to go into the further document which I think has been your submission all along.

MR KING:

Well, that's my client's case. You don't need to go into the background effects of it. This is a legal document, a legal instrument. Money's been advanced once it's been signed and on that basis the terms are, I would submit, pretty obvious. It's a 50k loan that needs to be repaid. I don't think that answers your question but that is my client's case.

O'REGAN J:

So do you take issue with the *Victoria Quarter* decision? You were just about to come to that, I think.

MR KING:

That's right. So at paragraph 80 of that judgment, so it's number 6 in the authorities. Justice Hinton concludes at the end of that paragraph, "For that matter, the entirety of the tenant's obligations is not clear, as the Schedule expressly says the terms are not exhaustive." So my submission is that

tenant's obligations are much different than borrower's obligations and so the case can be distinguished on that basis. A tenant has the obligations to maintain a property whereas a borrower simply has to repay the loan, and so…

GLAZEBROOK J:
What paragraph were you referring to, sorry? I didn't catch that.

MR KING:
Paragraph 80, Ma'am, the final sentence.

WILLIAMS J:
So you would have said if it was the actual lease document with a guarantee clause that would have got over the line, as opposed to the heads?

MR KING:
In that case, yes, because a tenant's obligations are more wide reaching or broad than a borrower's obligations.

WINKELMANN CJ:
And here we have a clause which expressly contemplates that the terms of the guarantee are not exhaustive. It expressly contemplates that the terms of the guarantee that you can deduce as you say from the loan agreement are not exhaustive, to use Justice Hinton's language.

MR KING:
That's correct, Ma'am.

WINKELMANN CJ:
Well, that's a point against you.

MR KING:
So…

GLAZEBROOK J:

The paragraph C that – I think that the – I suspect what the Chief Justice is putting to you is that paragraph C contemplates that there could well be other terms of the guarantee that are not included in the loan agreement and in that case I think she's putting to you that in fact the entirety of the obligations aren't clear from the document in the same way that that was true of *Victoria Quarter*, and if I've got that wrong…

WINKELMANN CJ:

No. Yes, thank you.

MR KING:

Well, my submission again is that the obligations under the, as, from the borrower, that the, Mr Brougham was guaranteeing, are clear. He is – it's only the $50,000 plus interest and costs he's repaying. That's quite different than any other obligations to maintain a property or anything of the like that a tenant would normally do.

That concludes my submissions on section 27. I will just note one thing in reply to my friend's submission, he refers to the *Paulger* case, and that case was about acceptance of a guarantee to wait the 90 days before enforcing, and in terms of acceptance of this guarantee that I would submit that that ties in with the consent issue in the co-surety ground of appeal in that by Mr Brougham's evidence of his acceptance of the guarantee, in that he did discuss it, well the finding of the District Court was that he did discuss it, the late change, and that he subsequently accepted it by signing it and that a contract of guarantee under that *Paulger* would come into effect.

GLAZEBROOK J:

I'm sorry, I just didn't understand what case you were referring to and what point you were making?

MR KING:

So it's *Paulger*. It's number 3 in the…

GLAZEBROOK J:

Oh *Paulger*, okay.

MR KING:

Forgive my pronunciation, P-A-U-L-G-E-R.

WINKELMANN CJ:

And what is your point?

MR KING:

So at page 550 at line 15, so that's, yes. Here, however, I will quote the judgment, "Here, however, the surrounding circumstances provided sufficient evidence that Butland had accepted Paulger's offer when it responded by providing the consideration requested, which was a forbearance to enforce payment for 90 days. The Master was accordingly correct in holding that Butland was entitled to summary judgment." So I simply say that the evidence that I've given earlier in relation to Mr Brougham's consent could also be used as an acceptance for a contract of guarantee.

WINKELMANN CJ:

Well that's a different thing though. That's Butland, the beneficiary of the guarantee accepting it. Isn't it?

MR KING:

Yes, but my submission is that that could also be persuasive to this Court.

WINKELMANN CJ:

All right.

MR KING:

The way that this has transpired is that we've sort of done the co-surety issue, I think, to death so I won't address, unless Your Honours have any queries for me, I'll refer to my co-counsel for the estoppel.

WINKELMANN CJ:

Thank you. Ms Dempster?

MS DEMPSTER:

May it please the Court. I will address you on equity, how that can intervene in favour of the first respondent if you're not persuaded that there is an enforceable guarantee under contract law.

WINKELMANN CJ:

Thank you.

MS DEMPSTER:

My submission is that equitable estoppel or promissory estoppel can overcome the effects of non-compliance with section 27 of the Property Law Act to remedy the loss of the first respondent for the $50,000 loan to the appellant. In *Tait-Jamieson* Her Honour Justice French held that equitable estoppel applied, and that Mr Tait-Jamieson could not rely on the absence of a signature on a formal contract of guarantee to resile from his obligation to guarantee. The facts in *Tait-Jamieson* were that Mr Jamieson signed a letter, along with two others, to Cardrona, guaranteeing Cardrona's ski training fees for the ski season. Mr Tait-Jamieson then laterally attempted to resile from that guarantee on the basis that there was not an enforceable signed guarantee. It is acknowledged that this case commenced after the enactment of the Property Law Act and that the material guarantee and signed letter took place prior to the enactment coming into force. I refer to page 25, paragraph 78 of my submissions, it refers to Her Honour Justice French's comments at paragraph 64 to 64 of the judgment, if I could just read those out?

O'REGAN J:

Sorry, what paragraph in your submissions is it?

MS DEMPSTER:

Paragraph 78, page 25.

WINKELMANN CJ:

Go ahead.

MS DEMPSTER:

Thank you. "To apply estoppel in the circumstances of this case does not in any way undermine the policy of the Contractual 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. As for the requirement of a signature, the purpose of the 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. 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."

I submit that there are two main issues to look at in regards to equitable estoppel. Firstly, unconscionability, and second would be the subsequent affirmations of the appellant.

WINKELMANN CJ:

So Mr Geiringer said you can't really just jump straight to unconscionability, you have to look at what the representation or actions were which give rise to that, and he took us to *Actionstrength* – no, it wasn't *Actionstrength*, sorry…

WILLIAM YOUNG J:

Actionstrength, wasn't it?

WINKELMANN CJ:

Was it? Was it *Actionstrength?*

GLAZEBROOK J:

Yes.

WINKELMANN CJ:
Yes, on that point.

MS DEMPSTER:
I do recall that paragraph 55 of *Tait-Jamieson* also refers to that *Actionstrength* and those four points. The assumption on the part of a creditor that goes beyond the primary assumption that a guarantor will honour the promise.

WILLIAM YOUNG J:
But what is the "here" that goes, I mean assuming you've got a contract of guarantee but it's incompletely recorded in writing, what is there beyond the loan agreement?

MS DEMPSTER:
Well I would submit that he made interest payments when they were due in that first year.

WILLIAM YOUNG J:
He didn't. the company did.

MS DEMPSTER:
I would submit that those payments were made as well because he would be liable for that loan so he ensured those payments were made.

WILLIAM YOUNG J:
Presumably, I mean I'm making an assumption, I assume the payments were made by the company.

MS DEMPSTER:
Yes but –

WILLIAM YOUNG J:
Well so what then?

MS DEMPSTER:

But further in *Actionstrength* there was no agreement signed, whilst in this situation there was that term loan agreement. So he went further by signing –

WILLIAM YOUNG J:

But the loan agreement doesn't cut the mustard then there isn't anything else, is there?

MS DEMPSTER:

But I would submit that there is that further affirmation he signed as guarantor, so you've got that affirmation that he –

WILLIAM YOUNG J:

But that's just, you've got to go beyond the agreement.

MS DEMPSTER:

There is also in the notes of evidence in the District Court he did acknowledge that he intended to be bound.

WILLIAM YOUNG J:

But that's after the event. That's in court. It's not something that encouraged the Trust to make the payment.

WINKELMANN CJ:

I mean you could see this as the Trust actually just relied upon their own view, that the agreement was sufficient to bind him as a guarantor, so they proceeded to make the loan. So what is there he did in addition to signing the agreement, before the advance of the loan, to amount to give rise to an estoppel?

MS DEMPSTER:

My submissions are that in addition to as guarantor he did on behalf of the company make those interest payments within the first year and as stated he

did acknowledge that he was bound. Those are the three things that we are relying on.

WINKELMANN CJ:

So interest, yes, he signed the agreement, he made the interest payments and he –

WILLIAM YOUNG J:

No the company made the interest payments.

WINKELMANN CJ:

The company made the…

GLAZEBROOK J:

Well the company would be bound to make the interest payments whether or not there was a guarantee because the company had agreed to take the money and to make the interest payments and to repay the principal. The company was the principal debtor.

MS DEMPSTER:

Yes, I do acknowledge your point, but to go back one step, when it comes to *Actionstrength* you need the further affirmation, that was solely an oral agreement. There was nothing recorded with the person being guarantor, whilst in this situation he has affirmed that by signing as guarantor, and that was missing in *Actionstrength*.

WINKELMANN CJ:

I think you might be mixing up the section 27 issue with the estoppel issue.

GLAZEBROOK J:

To get to estoppel you have to have not had a written guarantee, don't you, because if you have a written guarantee you're just enforcing the guarantee.

MS DEMPSTER:

My submission would show though that that was him further affirming to the lender that he intended to be guarantor.

WILLIAMS J:

You say it's not a complying document but nonetheless has some meaning?

MS DEMPSTER:

Yes.

WILLIAMS J:

And the meaning is consistent with your case? You can't completely ignore it, yes.

MS DEMPSTER:

If you were to find that it was not complying then it would submit he did know that he was to be guarantor and purported himself as being such to the lender.

GLAZEBROOK J:

So what do you say about *Actionstrength* that's wrong?

MS DEMPSTER:

There was only an oral agreement. There was no subsequent affirmation or inducement.

WINKELMANN CJ:

But that's a principle. No, no, that's distinguishing it on its facts but you have to engage with the principle of *Actionstrength* which is that you can't rely upon the non-complying agreement as representation. So the fact that they entered into this arrangement which was oral, yes, but this non-enforceable oral agreement can't be the representation that you rely upon. It has to be something extra, and Lord Walker suggested it might be a representation, a

separate representation that even though it wasn't compliant with Statute of Frauds, it was binding.

MS DEMPSTER:
And again my submissions would be that he accepted the loan, made the interest repayments and then made that comment at the trial that he acknowledged he was to be bound.

WINKELMANN CJ:
All right, thank you.

MS DEMPSTER:
And I understand this is crossing over a little bit into section 27 argument, however it's further submitted that the guarantee terms in this current case are no less certain than those in *Tait-Jamieson*. In *Tait-Jamieson* all that existed was a letter offering to guarantee the payment of ski training fees without any substantive guarantee contractual terms. In the present case there is the oral agreement guarantee subsequently recorded in writing with the appellant as guarantor and his signature confirming the same on the term loan agreement. It is submitted that the guarantee terms are no less certain or less similar between the *Tait-Jamieson* letter and the present case's term loan agreement. It is submitted that it is clearly unconscionable in this situation as it was in *Tait-Jamieson* for the appellant to rely on the alleged absence of compliance with section 27. The appellant agreed to provide a guarantee and is seeking to resile from his obligations in circumstances that are very clearly similar to those in *Tait-Jamieson*.

And my learned friend referred to *Northcott v Davidson*. If I may go through and distinguish that case from this present one. In *Northcott* the Court declined summary judgment when –

GLAZEBROOK J:
Can you just tell us again what that case was?

MS DEMPSTER:

Northcott v Davidson.

GLAZEBROOK J:

Northcott, thank you.

MS DEMPSTER:

In *Northcott* the Court did not go as far to say that equitable estoppel would succeed at trial, nor did the Court hold that equitable estoppel could not apply post-enactment of Property Law Act. The facts of *Northcott* were that Mr Davidson did not sign a formal written guarantee. He only signed a covering letter of an instruction to invest which provided that Mr Davidson would personally guarantee the *Northcott* investment. There are some factual similarities to the present case in that there was a principal document containing the words to guarantee and advance moneys, and there were subsequent affirmations of that guarantee. However, this present case can be distinguished because the appellant signed on the principal document, being the term loan agreement, and not just on the covering letter, whilst in *Northcott* it was just the covering letter that was signed.

In summary, the first respondents submit that applying *Tait-Jamieson* the appellant has acted unconscionably in attempting to resile from an agreement to guarantee. There has been subsequent affirmations through business conduct, repaying the interest of the principal loan, encouraging the contribution of the loan while the business was still trading and there was some money still available for recovery, and acknowledgement of the guarantee by the appellant at the trial. It is stated the *Northcott* precedent can be distinguished from the difference in the signing of the appellant as the appellant only signed that covering letter. It is submitted that equitable estoppel can be used in this situation to prevent the appellant from resiling from his obligations.

Unless you have any questions, those are my submissions.

WINKELMANN CJ:

Thank you very much, Ms Dempster.

MR KING:

That rests the first respondent's case.

WINKELMANN CJ:

Thank you, Mr King. Mr McKenna?

MR McKENNA:

Thank you, Your Honours. As I've referred to in my written submissions, the second respondent's position effectively aligns with the first respondent's at this point. So I don't have any new to add so I can be very brief.

WINKELMANN CJ:

Well, yes, we don't want to hear the same material again. But if there was any clarification or…

MR McKENNA:

There's two general areas I want to address and I do that very briefly. The first is picking up on something that my friend spoke about right at the beginning of the day, and that's the effect on the change in, well, the effect of section 27 of the Property Law Act when that was enacted. The submission from my friend, if I understand it correctly, and I hope I am not over-simplifying it, is that the changes in section 27 created a requirement for a contract of guarantee to be in writing and for that writing to include the terms of the guarantee. While I agree with my friend that section 27 raised the bar, I would contest that the nature in which that bar was raised is completely consistent with what he had submitted. The words, "In writing and signed by the party –

WINKELMANN CJ:

Which friend are you talking about?

MR McKENNA:

Sorry, Ma'am?

WINKELMANN CJ:

Are you talking about Mr Geiringer?

MR McKENNA:

Yes, Mr Geiringer.

WINKELMANN CJ:

So are you saying that the way in which the bar was raised is not consistent with what he said?

MR McKENNA:

That's right. So, I'll cut to the chase. I would submit that it does not require all of the terms of a guarantee to be listed in that writing.

WINKELMANN CJ:

Well, it would require all the terms of the guarantee that you're relying on to be listed in the writing, wouldn't it?

MR McKENNA:

My submission is it requires enough detail to ensure and to satisfy that Court that the person signing was not entering into an obligation that was ill-considered, ambiguous or potentially fictitious, and I recognise that the ultimate question in this case is whether or not it is too ambiguous. I don't believe we have any issue with the other two concerns.

WINKELMANN CJ:

Well, it'll have to satisfy the Court that it created an obligation of guarantee in terms of the Act, would you accept that?

MR McKENNA:

Yes, I would, and I believe Mr Geiringer referred to "words of guarantee" or need that the contract set out that the person signing by doing so to answer

the debt of another, and to that I would say that those words are simply the definition of what a guarantee is. So a contract could equally say that, "By signing this I agree to guarantee the debt of the principal debtor," or words to that effect.

WINKELMANN CJ:

Yes. So would you also agree that it would have to be clear what was being guaranteed?

MR McKENNA:

Yes. Yes, I would submit that you need to have clear identification of a debt that is being guaranteed and clear identification of the party who is guaranteeing, and that really would be the minimum standard. And if we go too far in the other direction –

O'REGAN J:

Where are you getting this from? it's completely contrary to what the section says and it's completely contrary to what the Law Commission said.

MR McKENNA:

Well, the section, Your Honour, says that a contract for guarantee, "Must be in writing and signed by the party charged therewith."

O'REGAN J:

Yes, and it defines the contract of guarantee being the contract under which the person agrees to answer for the debt of another.

MR McKENNA:

Yes.

O'REGAN J:

So what's ambiguous about that?

MR McKENNA:

Well, it doesn't say, it doesn't say that a contract for guarantee must list specific terms, it doesn't say –

O'REGAN J:

But if it doesn't do that it's not a contract of guarantee.

MR McKENNA:

A contract for guarantee, as the section points out, is one where one party agrees to answer the debt of another, that's the definition of the word "guarantee". And so the definition of the word "guarantor" is a person who agrees to answer the debt of another. So I would submit that the word "guarantor" is known as defined both legally and known in common practice to mean an agreement to be bound to pay the obligation of another, and so the submission ultimately that I will make is that the word "guarantor" is sufficient to make it clear in the writing in the term loan agreement in this case that Mr Brougham was agreeing to answer the debt of the company set out in that loan agreement on the basis that that is the definition of the word "guarantor".

O'REGAN J:

But it has to be a contract under which the person agrees to do that. Where does the document we're looking at have anything that indicates that he agrees to answer for another person's debt?

MR McKENNA:

By the fact that he signed it as a guarantor, that he signed on the line that says "guarantor" and he's named at the front of the document as a guarantor. The submission is it has to be, can't be any more than this.

O'REGAN J:

So you say you could have a contract and just at the end have the word "guarantor" in a signature and that would mean the person who signed it guaranteed everything in that contract?

MR McKENNA:

I don't think we can simplify it that much.

O'REGAN J:

You only have to state that to realise how that would completely subvert the whole purpose of section 27.

MR McKENNA:

The purpose of section 27, and I don't think this is a matter of contention between us, is to ensure that people aren't held to guarantees that are entered into ill-considered, ambiguous or fictitious. I would submit that –

GLAZEBROOK J:

But if that's all it's doing why didn't it say so, because there's lots of provisions that deal with unconscionable bargains, consumer credits, that deal with that. So don't you have to – what they said, and that's what is said in *Actionstrength*, is that in order to ensure that they have had a blanket indication that everything has to be in writing and they accept, well, at least the Judges in *Actionstrength* accepted that that meant that some contracts where somebody clearly agreed to be a guarantor and somebody else relied on it were not going to be upheld.

MR McKENNA:

That's right. So *Actionstrength* identifies that there is a potential evil to be avoided at both ends of the scale and that if we impose too strict technical rules it too readily enables people to escape obligations on technicalities.

GLAZEBROOK J:

Well, I think *Actionstrength* says tough, that that is actually what Parliament chose to say that people can get out of guarantees if the writing requirement is not met, and if that's the technicality then it's a technicality that was actually imposed by Parliament.

MR McKENNA:

Yes, what *Actionstrength* says is that we cannot assume that Parliament did not anticipate that because of this rule people would be able to resile from promises they made that had been relied upon. I don't think we can take that so far as to say that we cannot bear that in mind as a potential risk factor and that an overly technical application of section 27 has the potential to swing the pendulum too far and create too wide a loophole for people to escape obligations that they intended to enter into. There is a point at which the respect for contractual intention has to temper the application of section 27.

WINKELMANN CJ:

So you're saying because he's signed as guarantor, when you look at that in the context of the document he's undertaking to guarantee every obligation under the document and that's fair?

MR McKENNA:

Yes, in this case we can say that and this is where –

WINKELMANN CJ:

All right, so just going through our list, do you also say that the circumstances in which the guarantee will be called upon need to be clear?

MR McKENNA:

I wouldn't submit that it's necessary to set out a clear mechanism for calling it in and I would submit that the word "guarantee" implies within it that one must pay when the primary debtor does not and that that is sufficient. I would suggest that if for a guarantee to be enforceable we have to set out a process whereby there is default by the primary debtor that must first be called upon and there's a defined period of time that the primary debtor has to pay after which notice to the guarantor can be provided, if we go that far we're putting some very technical requirements on guarantees and we're setting up a situation where it's unlikely lay people are going to be able to satisfy section 27 without the input of a solicitor.

WILLIAMS J:

In this case if Mr Brougham had written separately to the Trust with a simple note that says, "The company has borrowed $50,000 from the Trust. I'll be the guarantor," signed, "Bryce Brougham," that would be enough? It's not a trick question. I think that's the essence of what you're saying.

WINKELMANN CJ:

You're saying that the company has borrowed – yes, that is the essence of what you're saying, isn't it?

MR McKENNA:

Yes, so you're referring to a separate document where he's –

WILLIAMS J:

Yes, I'm not – yes, this is a separate document saying, "I'm guarantor of that loan."

WINKELMANN CJ:

Justice Williams is not putting to you that it has to be a separate document.

WILLIAMS J:

No.

MR McKENNA:

Okay.

WINKELMANN CJ:

He's putting to you that all that is required is that he effectively clearly puts in writing that the company has borrowed this money and an undertaking to pay all these costs and penalty interest and, "I'm happy to guarantee that."

MR McKENNA:

Yes, yes, I –

WINKELMANN CJ:

No, "I'm happy to be guarantor," is actually all you can take from the document, not that, "I'm happy to guarantee that," because that'd be an additional document.

WILLIAMS J:

"I'm the guarantor," yes.

WINKELMANN CJ:

"I'm the guarantor."

MR McKENNA:

"I will be the guarantor," which is consistent with this case where I'm relying on the word "guarantor" to establish the nature of the contract.

WILLIAMS J:

The trait. So you say, look, if that – your argument is if that gets by, and it does seem to me there are quite good arguments for that to be the case, then a signature on the primary document should get by if that person is called the guarantor, right, that's the essence of it?

MR McKENNA:

Correct.

WILLIAMS J:

Again, the difficulty you face is the document itself has some problems.

WINKELMANN CJ:

We don't need to hear you on that. I think we –

WILLIAMS J:

Yes, unless you want to make some submissions that haven't been made.

MR McKENNA:

I don't have any different submission to my friend so I don't need to revisit that.

WINKELMANN CJ:

All right, so that's one point. Did you have another point? I think you said you had a couple.

MR McKENNA:

It related some evidential questions that Your Honours had earlier. If I can take you to the brief of evidence in reply from Ms Dey. This is 202, to the briefs of evidence, and .0234. Sorry, starting at .0233, right at the bottom of that page. It was pointed out by Your Honours that Ms Dey in her initial brief of evidence stated that it had always been the case that Mr Brougham would be the sole guarantor and you had queried that evidence and I wanted to point out that in this reply brief that is somewhat tempered and it starts at the bottom of that page with the key –

GLAZEBROOK J:

Which page, sorry?

MR McKENNA:

At the bottom of page – yes, paragraph 14, page 3 of the brief, .0233 of the bundle, the…

WINKELMANN CJ:

"It was decided".

MR McKENNA:

At the very top of the next page she simply states that, "Other options were considered, including limited the amount I guaranteed, ultimately however it was decided that he would be the sole guarantor."

WINKELMANN CJ:

Well, we don't know who decided that.

MR McKENNA:

That's right. That is a matter of contention and I'll leave Your Honours to make of that what you will, other than to say that –

GLAZEBROOK J:

It doesn't make any sense, does it, because supposedly – that paragraph doesn't make any sense because supposedly she had guaranteed the whole amount to the bank. She was mindful of not encumbering herself with debts but apparently she had guaranteed the whole of the amount to the bank.

MR McKENNA:

Not necessarily, and I'm probably speculating here.

GLAZEBROOK J:

Well, that's what we were told she had done and one of the reasons why she didn't enter into the guarantee.

MR McKENNA:

Yes. So she was to be encumbered with the guarantee directly to the bank for the Trust loan and didn't want to further encumber herself with a further guarantee of effectively the same debt.

WINKELMANN CJ:

Yes, so it's an illogical point.

MR McKENNA:

It's somewhat circular.

WINKELMANN CJ:

And what was the effect of what she is contending is not that she didn't, she did want to further encumber herself, she was actually, her argument is she wanted to offload that encumbrance completely onto Mr Brougham.

MR McKENNA:

Quite possibly. I can't speak to her state of mind at that point. Unless Your Honours have further questions?

WINKELMANN CJ:

No. Thank you.

MR McKENNA:

Thank you, Your Honours.

WINKELMANN CJ:

So, Mr Geiringer, you want to do the reply? Are you doing a reply? Anything by way of reply?

MR GEIRINGER:

Yes, I'm just turning the mike back on. I don't want to keep you long. I'm just checking my notes to see if there's much I need to cover. Mostly simply a couple of points I thought would be of assistance to clarify matters that have been discussed.

The question was raised assessed to who paid the interest payments, and just to give Your Honours the – the exhibit is at 301.0042 and it's the copy of the B & R bank statements that include the interest payments coming out of it to the Trust.

The question was raised about trying to rationalise who brought what to the table in B & R to try and understand why the parties might have an arrangement of one kind or another in relation to the guarantees, and I just wanted to direct Your Honours to 202.0239, which is part of a brief of evidence from Mr Brougham where he explains that he brought infrastructure, personnel and know-how. So Your Honours will remember from the underlying judgments that Mr Brougham had a joinery operation to begin with and then Ms Dey joined him in that operation and then together they sought to take advantage of this franchise. So Mr Brougham's evidence

consistent with that description and the facts described in the Courts below is saying that in terms of the new enterprise he brought to the table existing infrastructure and personnel and know-how, that's 202.0239.

Your Honours, I have gone in the luncheon adjournment to try and find a better articulation of the consent issue in relation to varying from multiple guarantors to one, but I'm not sure how much more we want to go down that track. I think the simplest answer is that, as with all contracts, they have to be interpreted on their words and in their context. So whether or not the lack of a signatory means that the remaining one is bound or the contract is unenforceable against any of them depends on what seems to be expected on the face of the contract, and our case is that what was expected on the face of this contract was two signatories.

The one issue, if I may enquire, Justice Williams has mentioned a couple of times the fact that on the face of the contract there appears to be one guarantor struck out, and I was just concerned that we weren't on the same page, I wasn't sure what that was a reference to.

WILLIAMS J:
No, we were on the same page, the last page, but I've worked out what the situation is so you needn't bother.

MR GEIRINGER:
Okay. I think that is it. I'm just…

WINKELMANN CJ:
So what time is it there, Mr Geiringer?

MR GEIRINGER:
It is 5.44 am.

WINKELMANN CJ:
So it's about half an hour before your children wake up, is it?

MR GEIRINGER:

Something like that, yes.

WINKELMANN CJ:

Oh, well…

MR GEIRINGER:

Your Honours, can I say thank you very much for allowing me to join in this non-standard fashion, I know it required quite a lot of extra work from your staff and I'm very appreciative of being able to do it. Thank you for hearing from me.

WINKELMANN CJ:

It went quite smoothly, I think, only one glitch, so, yes.

MR GEIRINGER:

Pretty good then.

WINKELMANN CJ:

Yes. Thank you all counsel for your very careful submissions. We'll take some time to consider our decision. Thank you.

COURT ADJOURNS: 3.45 PM