

62, 1930

No. 27 of 1930.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN—T. H. HANCOCK (Defendant) Appellant

— AND —

IMPERIAL ~~NATIONAL~~
BANK OF CANADA ... (Plaintiff) Respondent

10 CASE FOR THE RESPONDENT.

1. This is an Appeal from the judgment of the Second Appellate Division of the Supreme Court of Ontario pronounced on the 8th day of March 1929, affirming the judgment herein pronounced by the Honourable the Chief Justice of the Common Pleas at the trial in the Supreme Court of Ontario on the 7th day of December 1928 finding in favour of the (Plaintiff) Respondent for \$23,775.00 and costs.

RECORD.

2. This action was brought by the Respondent upon a guarantee in writing dated the 17th November, 1925, whereby the Appellant and one William Garlock, Jr., guaranteed all liabilities of Garlock Machinery Limited to the Respondent Bank up to \$25,000.

EX. 1
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3. Garlock Machinery Limited, of which William Garlock, Jr., was President and a large shareholder, carried on business in Toronto as Manufacturers' Agents, being chiefly concerned in the sale of wood working and other machinery, and was a customer of the Respondent's Branch at King and Spadina Streets, Toronto.

30 4. The Appellant is an experienced and successful business man and President of T. H. Hancock Limited, a Company carrying on business in Toronto as Lumber Dealers. He had had dealings with a great many Banks and had been a guarantor of other trading accounts before he gave the guarantee in question.

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pp. 23-4-5

p. 25 l. 25
p. 49 l. 1

p. 25 l. 36
p. 23 l. 1

5. The Appellant was for a time at least a shareholder in Garlock Machinery Limited, and according to the books of the Company (the correctness of which he denies) was a shareholder throughout the period in question. He was also, according to instructions received by the Respondent Bank from this Company, a Director, Vice-President, and one of the signing officers of the Company. The Appellant while admitting his signature to the document given by the Company to the Respondent authorizing him and certain other parties to sign for the Company, denies that he was a Director or Vice-President, or that he understood the purpose of this document when he signed it. He alleges that his sole connection with Garlock was as a personal friend. 10

Ex. 1 p. 108

6. By the guarantee sued upon which is admitted to have been signed by the Appellant and by William Garlock, Jr., they jointly and severally guaranteed to the extent of \$25,000—"the due payment and discharge of *all* liabilities" to the Respondent Bank of Garlock Machinery Limited—"whether incurred before or after the date hereof . . . and whether such liabilities are matured or not and whether absolute or contingent, including liabilities in respect of advances and cheques, bills or other negotiable or non-negotiable instruments, drawn, accepted, endorsed or guaranteed by the customer." The guarantee also contains, among other clauses, the following:— 20

Paragraph 2. "This shall be a continuing guarantee, and shall secure the general balance due, or that may be due, from time to time and at any time from the customer to the Bank notwithstanding any payments from time to time made to the Bank, or any settlement of account or any other thing whatsoever."

Ex. 1 p. 111

Paragraph 18. "The delivery of this guarantee to the Bank shall be conclusive evidence against each of the guarantors that the same was not delivered in escrow or pursuant to any agreement that the same should not be effective until any conditions precedent or subsequent had been complied with or the signatures of other persons obtained thereto, unless at the time of delivery of the guarantee the person signing the same obtains from the representative of the Bank receiving the said guarantee a letter setting out the terms and conditions under which the said guarantee was delivered and the conditions, if any, to be observed before it becomes effective." 30 40

Ex. 1 p. 111

Paragraph 19.—"The guarantors and each of them admit that the signature to this guarantee was not obtained by any verbal representation, promise or statement made by or on behalf of any representative or employee of the Bank. No representative or employee of the Bank has any authority to make any

verbal representation or promise and without restricting the generality of the foregoing to verbally represent the financial responsibility of the customer or any other guarantor or as to the state of the account or the business prospects of the customer. The guarantors are hereby estopped from setting up any such representations or promises unless made in writing by the representatives of the Bank receiving the guarantee prior to the execution thereof."

10 Paragraph 20. "Each guarantor represents that he has read over the guarantee before signing the same and is fully aware of the terms and conditions thereof." Ex. 1 p. 111

7. On April 20th 1927 Garlock Machinery Limited having become insolvent and being at that time indebted to the Respondent in excess of \$25,000, the Respondent, pursuant to the terms of the guarantee, gave notice in writing to the Appellant requiring him to pay that sum, and failing payment the Respondent instituted this action by Writ of Summons dated 14th July 1927, claiming \$24,475.11, the amount of the indebtedness having been reduced to this amount by collections received by the Respondent. Ex. 2 p. 121

20 8. The Appellant's contentions are :—
 (a) That the guarantee sued upon was part of one continuing agreement with the Respondent Bank commencing with a prior guarantee of 17th April 1923, and that this prior guarantee was delivered upon the condition, of which, it is alleged, the Bank had notice through its Solicitors, that it was to cover discounts only, i.e., advances on trade paper or assigned accounts. The Appellant counterclaimed for rectification accordingly, but his Counterclaim was dismissed. Statement of Defence p. 3 Notice of Appeal p. 72

30 (b) That at the time of the obtaining, in November 1925, of the guarantee sued upon, there was a material change in the course of dealing between the Respondent and the Company by reason of an accommodation credit of \$5,000 for direct advances being granted to the Company; that the Respondent was bound to disclose to the Appellant, as guarantor, this change in the course of dealing, and that it having failed in this alleged duty the Appellant is released from his guarantee.

(c) That the Appellant was induced to execute the guarantee sued upon by the misrepresentations of William Garlock, Jr., who, the Appellant alleges, was the Agent of the Respondent in procuring his guarantee.

40 9. The action was tried before Meredith C.J.C.P., who, for the reasons which will be stated, held that the Appellant was bound, under the guarantee of November 17th 1925, to pay to the Respondent the amount due thereunder and directed that the

p. 52 l. 25 amount be ascertained by the Judgment Clerk if the parties
 differed. Subsequently the sum of \$23,775 was agreed upon by the
 p. 71 parties and Judgment entered for this amount. From this
 Judgment the Appellant appealed to the Appellate Division of
 the Supreme Court of Ontario, which dismissed the Appeal with
 costs without giving written reasons therefor.

10. Before the guarantee sued upon there were two prior
 guarantees given by the Appellant and William Garlock Junior
 Ex. 5 p. 77 to the Respondent covering the liabilities of Garlock Machinery
 Ex. 6 p. 86 Limited the first dated April 17th, 1923 for \$10,000 and the second 10
 dated March 1st 1924 for \$15,000. These were identical in terms
 with each other and only differed from the guarantee of November
 Ex. 1 p. 108 17th 1925 in that they did not contain paragraphs 18, 19 and 20,
 above quoted. The Respondent's contention is that the three
 guarantees are entirely separate and distinct agreements made at
 different times on different states of fact.

11. The Appellant admits that no representations were ever
 made to him by any officer or employee of the Respondent, and in
 fact that the only communications he ever had with the Respondent
 p. 27 l. 23 were one or two telephone conversations limited to inquiries by him 20
 about certain life insurance policies covering Garlock's life, which
 the Respondent held as additional security. The form of guarantee
 p. 11 l. 24 was in each case obtained by Garlock from the Bank and taken by
 p. 15 l. 35 him to the Appellant for signature and then returned by Garlock
 p. 17 l. 15 to the Respondent.

12. The Appellant's story is that when Garlock approached
 him, previously to the signature of the first guarantee of April
 p. 11 l. 30 17th 1923, Garlock requested him to guarantee advances on sales 30
 to p. 14 l. 2 represented by trade paper discounted with the Respondent Bank,
 and that he told Garlock to get—" from the Bank's Solicitors"—
 Ex. 4B a letter that his guarantee was to be so limited; and that before he
 p. 80 signed this guarantee Garlock brought him a letter signed by
 Garlock himself and addressed to the Appellant agreeing that
 "the guarantee is given for the purpose of discount only." It
 appears that Garlock telephoned to a personal friend of his, one
 p. 58 l. 3 Sturup, the Managing Clerk of Messrs. Bain, Bicknell,
 to p. 60 Macdonell & Gordon, a firm of Solicitors in Toronto, who had
 l. 10 acted on previous occasions for Garlock Machinery Limited, and
 Sturup upon Garlock's instructions prepared a draft letter for
 Garlock personally to sign and give to the Appellant, containing 40
 the following words—" The guarantee which we have signed with
 p. 80 the Imperial Bank is given for the purpose of discount only . . .
 This guarantee is to remain in force for a period of one year
 without the same is further extended by our mutual consent in
 writing." This draft was posted to Garlock with a covering letter

which Sturupp signed, reading as follows:—"Toronto, April 20th, 1923—William Garlock Esquire, 163 Dufferin Street, Toronto, Dear Sir, In pursuance of your instructions I enclose herewith letter to be signed by you which you intend giving to Mr. T. H. Hancock, Yours truly, Bain, Bicknell, Macdonell & Gordon—Encl." Garlock had the draft letter re-typed on his own paper, signed it and delivered it to the Appellant.

Ex. 4A
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10 13. At the date of this letter, Messrs. Bain, Bicknell, Macdonell & Gordon were not acting for the Respondent in any matter relating to Garlock Machinery Limited or the Appellant, and they had no instructions or authority from the Respondent to write any such letter or make any representation to the Appellant. This firm of Solicitors had no general retainer or authority from the Respondent as its Solicitors, but were from time to time employed by its head office in specific cases when they only acted upon instructions from its head office.

p. 31 l. 23
to p. 32
l. 20

p. 65 l. 20
to l. 30
p. 55 l. 4
to l. 33

20 14. Upon the foregoing facts the Appellant finds his contention that the Respondent through the said firm of Solicitors had notice that his guarantee was limited; whereas the Respondent's contention is that Messrs. Bain, Bicknell, Macdonell & Gordon, in drafting (if they did draft) the letter for Garlock to give to the Appellant, were acting solely as Garlock's Solicitors, and not as Solicitors for the Respondent.

30 15. When the first guarantee of 1923 was given the credit authorized for Garlock Machinery Limited by the Head Office of the Respondent was \$10,000 to be advanced on trade paper discounted with, and trade accounts assigned to, the Bank. The Head Office at this time did not specifically authorize any credit for direct or accommodation advances to the Company, but the Branch Manager had general authority to make such advances up to \$2,500, and did so from time to time during the currency of this first guarantee by way of overdrafts which sometimes ran as high as \$2,000. At the time the second guarantee of March 1st 1924 was given the Respondent's Head Office authorized a credit of \$15,000 likewise against trade paper or assigned accounts, but similarly, following this guarantee, the Branch Manager permitted overdrafts from time to time as before and also made other direct advances on his own responsibility, sometimes taking additional security. At the date of the last guarantee of 17th November 1925, 40 Garlock Machinery Limited had applied for an increase of credit to \$20,000 on trade paper and assigned accounts and also for a credit of \$5,000 on accommodation or direct advances, which application was approved by the Respondent's head office, relying chiefly upon the Appellant's guarantee, and thereafter the Respondent did make direct advances to the Company, which,

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p. 37 l. 20
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Ex. 12
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Ex. 12
p. 112

at the date of the Writ, amounted to \$7,500, the excess of \$2,500, being additional accommodation specially authorized and secured.

16. Upon these facts the Appellant contends that there was a material change in the course of dealing in November 1925 because the Respondent's Head Office thereafter permitted direct advances to the extent of \$5,000, that the Respondent was under a duty to notify him, as guarantor, of such change, and that, failing such notification, he was released from his guarantee. The Respondent contends that the guarantee of November 1925 and the nature of the credit authorized at that time were entirely separate and distinct from the previous guarantees or arrangements, and that the Respondent was under no obligation to communicate with the Appellant on the matters referred to. 10

17. At the trial the learned Trial Judge held that the arrangement set out in the letter which the Appellant obtained from Garlock, at the time when the first guarantee was given was an arrangement between Garlock and the Appellant alone, that Messrs. Bain, Bicknell, Macdonell & Gordon in drafting this letter were merely Solicitors for Garlock; that the letter was Garlock's letter and obligation and was never intended to be anything else, and that the Respondent Bank was in complete ignorance of it; that the Appellant in signing the various guarantees knew throughout exactly what they meant and exactly what his obligations were under them; and that Garlock was in no sense the agent of the Bank in procuring the guarantees. 20

18. The Respondent submits that the Judgment of the Trial Judge as affirmed by the Appellate Division of the Supreme Court of Ontario is right and ought to be maintained, for the reasons stated by Meredith C.J.C.P., and for the following among other

REASONS.

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1. The guarantee sued upon was an unconditional guarantee.

2. The guarantee sued upon was a separate agreement and was not connected with, or affected by, either of the two earlier guarantees.

3. No representation or agreement was ever made by the Respondent Bank or any person authorized on its behalf which had the effect of qualifying the guarantee sued upon.

4. There was no such change in course of dealing between the Respondent Bank and Gar- 40

lock Machinery Limited as was alleged by the Appellant and in any event no such change could affect the liability of the Appellant under the guarantee sued upon having regard to its terms.

5. Garlock was not the agent of the Respondent Bank in procuring the guarantee sued upon or in making any representations to or agreements with the Appellant.

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6. Every material issue of fact was decided against the Appellant by the judgment of the Trial Judge affirmed on appeal.

7. The Respondent is precluded by the terms of the guarantee sued upon from setting up the defences upon which he relied.

WILFRID GREENE.

PERCY LE BRETON.

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T. H. HANCOCK

(Defendant) APPELLANT

— AND —

IMPERIAL BANK OF CANADA

(Plaintiff) RESPONDENT

CASE FOR RESPONDENT.

LEE & PEMBERTONS,
44 Lincoln's Inn Fields,
London, W.C. 2.
Solicitors for the Respondents.