

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA665/2020
[2021] NZCA 397**

BETWEEN

DANNY JOHN CANCIAN
Appellant

AND

CARTERS, a division of Carter Holt Harvey
Limited
Respondent

Hearing: 15 June 2021

Court: Courtney, Mander and Hinton JJ

Counsel: N W Coyle and L G Clarke for Appellant
P J Morris and O J Ward for Respondent

Judgment: 24 August 2021 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Hinton J)

[1] This appeal turns on whether Carters can enforce a personal guarantee by Mr Cancian or whether there has been a material variation to the principal contract which entitles Mr Cancian to be discharged from his liability as guarantor.

[2] On 29 October 2020 Wylie J found that Mr Cancian had no defence to Carters' claim and granted judgment in favour of Carters in the sum of \$1,078,668.23 plus interest.¹ Mr Cancian appeals against this decision.

Factual background

[3] In October 2016 Bella Vista Homes Ltd (BVH), through its sole director Mr Cancian, entered into a "credit account application and terms of agreement for supply" with Carters (the BVH agreement). The BVH agreement related to the supply of building products by Carters to BVH on credit.

[4] As indicated by the title of the BVH agreement, the process for entering into it involved BVH making an application for a credit account with Carters and accepting Carters' standard terms of trade. In the application, BVH requested that an account be opened with a credit limit of \$700,000 and stated that the anticipated value of its monthly purchases would be \$400,000. The application listed Mr Cancian as the sole director of the company. It also set out Carters' standard terms and conditions of sale. Mr Cancian signed the application on behalf of BVH on 12 October 2016.

[5] At the same time as BVH made that application, it provided a deed of guarantee and indemnity signed by Mr Cancian under which he unconditionally and irrevocably guaranteed to Carters the due and punctual payment of all monies which are now, or may in the future be, owing or remain unpaid by BVH to Carters.

[6] Carters then granted the application, advising BVH of that in a letter dated 21 October 2016. The letter stated that the credit limit on the account was to be \$50,000. This was apparently standard practice as an opening figure for a large customer to get the account "up and running". On 31 October 2016, Carters made an internal decision to set a credit limit of \$800,000. It did not notify either BVH or Mr Cancian about that decision.

[7] The first supply of product by Carters to BVH under the credit account was covered by an invoice dated 2 November 2016. Thereafter there were regular supplies

¹ *Carters v Cancian* [2020] NZHC 2838.

and up until early June 2017 BVH made reasonably regular payments in reduction of its account balance. As at 7 June 2017 the account balance was \$46,732. Thereafter, supplies continued but credit payments by BVH largely dried up. By 30 June 2017 BVH owed \$213,415 to Carters; by 31 July 2017 the debit balance had risen to \$532,777; by 31 August 2017 it was \$816,441; by 30 September 2017 it was \$1,025,906; and by 31 October 2017 it was \$1,078,668.23.

[8] On 1 November 2017, Carters' solicitors sent a letter of demand to Mr Cancian under the guarantee. Later that month BVH was put into liquidation. No payments under the guarantee were made by Mr Cancian, and Carters issued this proceeding.

High Court judgment

[9] There was and is no issue as to the quantum of the debt owed by BVH to Carters.

[10] Mr Cancian defended the proceeding on the basis that:

- (a) Carters' agents had made pre-contractual representations to the effect that the scope of Mr Cancian's guarantee would be limited to \$50,000; and
- (b) When Carters altered the credit limit from \$50,000 to \$800,000 that amounted to a variation of the agreement such as to discharge Mr Cancian from any liability under the guarantee in terms of the rule in *Holme v Brunskill*.²

[11] The focus of the case in the High Court was on the alleged pre-contractual representations. Wylie J did not accept Mr Cancian's evidence and preferred the evidence of Carters' witnesses that no such representations had been made.³

² *Holme v Brunskill* (1878) 3 QBD 495 (CA).

³ *Carters v Cancian*, above n 1, at [36].

[12] As to the second point, Wylie J, apparently assuming that there had been a variation, held that as the guarantee contained a clause which gave Carters the power to make variations to the BVH agreement, the rule in *Holme v Brunskill* did not apply.⁴

Argument on appeal

[13] Mr Cancian's argument as to alleged pre-contractual representations is not pursued on appeal. His second point in the Court below is pursued, namely that the increased credit limit is a material variation of the terms of the BVH agreement, which discharges him as surety. In written submissions Mr Cancian also advanced an argument under s 27 of the Property Law Act 2007 which Mr Coyle, for the appellant, advised us was abandoned.

[14] Carters say:

- (a) There has been no material variation of the principal contract.
- (b) Even if the increased credit limit is a variation, the guarantee is unaffected because the guarantee gives the creditor power to vary the BVH agreement and expressly provides the guarantor is not to be discharged as a result.

[15] Carters also raised additional arguments that Mr Cancian is liable in any event as a principal debtor under the guarantee and a further argument based on estoppel. We do not see the need to traverse these further points.

Discussion

[16] The principle emanating from *Holme v Brunskill*, which has been applied in New Zealand in *Dunlop New Zealand Ltd v Dumbleton*, is that a material variation of the terms of a contract between a creditor and a principal debtor will discharge a surety. The Court in *Dunlop* put it as follows:⁵

⁴ At [40], citing *Pogoni v R & W H Symington & Co (NZ) Ltd* [1991] 1 NZLR 82 (CA).

⁵ *Dunlop New Zealand Ltd v Dumbleton* [1968] NZLR 1092 at 1096 (emphasis in original).

It is trite law that (unless there is an express reservation in the instrument preserving the creditor's rights against the surety in such event) a material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety. It is immaterial that the variation *may* be to the advantage of the surety; unless it is clearly so or obviously does not affect him materially, he is discharged.

[17] The rationale as stated in *Dunlop* is that the party benefitting from a guarantee cannot keep a surety bound, and transact what is in effect their affairs, without consulting them as to a material or substantial alteration in the agreement.

No variation

[18] In this case we consider that the rule in *Holme v Brunskill* does not come into play. We agree with the primary submission for Carters that there was no variation to the BVH agreement. While Carters' letter dated 21 October 2016 referred to a credit limit of \$50,000, cl 2.2 of the BVH agreement states:

CARTERS may impose a credit limit on the Customer's account and alter the credit limit without notice. Where the credit limit is exceeded, CARTERS may refuse to supply Goods to the Customer.

[19] It is clear that cl 2.2 prevails over any particular credit limit set at any time. At best for Mr Cancian the letter and cl 2.2 can be read together, providing in effect for a credit limit of \$50,000 or such other limit as imposed by Carters without notice from time to time. In this context, any subsequent change to the credit limit does not constitute a variation to the BVH agreement but is rather simply effected pursuant to the agreement.

[20] It is also clear that the parties did not view a change in credit limit as a variation as, quite differently to cl 2.2, the preamble to the standard terms and conditions of the BVH agreement provides for variation "by signed agreement in writing between [the parties]."

[21] The position here can be distinguished from this Court's decision in *Benchmark Building Supplies Ltd v Weatherby*.⁶ A subsequent agreement between a creditor and principal debtor (again for building supplies) increasing a credit limit

⁶ *Benchmark Building Supplies Ltd v Weatherby* CA278/00, 19 July 2001.

under the principal agreement had been held by the High Court to constitute a material variation of the terms of the principal agreement.⁷ This conclusion was upheld on appeal. The clause relating to the alteration of the credit limit, unlike cl 2.2 in this case, required an application to be made in writing by the customer for the credit limit to be increased. Such an application was made and agreed. The consequence was a varied agreement. Here the agreement is unchanged. Clause 2.2 does not require or enable the customer to do anything. We note further that the decision in *Benchmark* was on a summary judgment application and on appeal this Court said only that the finding “seems correct”.⁸

Anti-discharge provision

[22] We also agree with Carters’ second submission which is the point on which Wylie J relied. Even if the alteration to the credit limit were a variation to the BVH agreement, an exception to the principle in *Holme v Brunskill* and in *Dunlop* (as confirmed by this Court in *Pogoni v R & W H Symington & Co (NZ)*) applies where the guarantee contains a clause which gives the creditor power to make variations to the contract with the debtor.⁹ Such clauses are known as “anti-discharge” provisions.

[23] Mr Cancian’s guarantee contains an anti-discharge provision in cl 5(b) which provides as relevant:

- b) the Guarantor is not to be discharged nor are its obligations to be affected by any matter or thing whatsoever which, but for this clause, would or might have discharged the Guarantor or affected its obligations, including:
 - i) the giving of time, credit or any indulgence or other concession to the Customer or to the Guarantor or any other person;
 - ii) anything done or omitted or neglected to be done by CARTERS in the exercise or non-exercise of its authorities, powers and discretions;
 - iii) any variation or alteration in the terms of any contract between CARTERS and the Customer, or in the terms of any other security, guarantee, indemnity or other agreement (whether or not this might increase the liability of the Guarantor);

⁷ *Benchmark Building Supplies Ltd v Weatherby* HC Auckland CP248/00, 7 December 2000.

⁸ *Benchmark Building Supplies Ltd v Weatherby*, above n 6, at [12].

⁹ *Pogoni v R & W H Symington & Co (NZ) Ltd*, above n 4.

...

it being the intent of the parties that the guarantee and obligations of the Guarantor are to be absolute and unconditional in any and all circumstances; and CARTERS shall be under no liability to the Guarantor in respect of the foregoing, even though the Guarantor's rights in subrogation or otherwise may be prejudiced as a result;

...

[24] Mr Coyle submitted that the Judge erred in treating the principle in *Pogoni* as a “blanket rule”. He relies on the “purview” doctrine discussed in UK authorities. The purview doctrine says that where a variation is so fundamental that it could not properly be described as a variation at all, it will fall outside the general purview of the guarantee and will not be covered by an anti-discharge provision, or, put at its best for the guarantor, that any variation still has to be within the general purview (in the sense of reasonable contemplation) of the guarantee.¹⁰ Mr Coyle submits that a reasonable person in Mr Cancian's position would not have contemplated at the time the credit application was concluded and the credit limit of \$50,000 notified, that it was likely the limit would be extended to \$800,000 without notification to either BVH or Mr Cancian.

[25] We see no error in the Judge's application of *Pogoni*. As this Court held, and as Wylie J acknowledged, in each case it is a matter of construction as to whether the particular clause operates to prevent the guarantor from being discharged.¹¹ The Judge went on to analyse the effect of the anti-discharge provision on the guarantee, and was satisfied that it did not discharge Mr Cancian.¹² It cannot therefore be said that the Judge simply applied a “blanket rule”.

[26] There is debate as to the extent and nature of the purview doctrine, but it is a debate we do not need to enter into in this case. We are satisfied in any event that a significant increase in the credit limit was well within the purview of this guarantee. The fact the BVH agreement provided expressly that Carters could unilaterally and without notice set another credit limit, and that the anti-discharge clause in the

¹⁰ *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 (HL) at 21.

¹¹ *Pogoni v R & W H Symington & Co (NZ) Ltd*, above n 4, at 85. See also *Carters v Cancian*, above n 1, at [40].

¹² At [41]–[45].

guarantee specifically included giving of credit, is sufficient to bring the “variation” clearly within Mr Cancian’s purview. While we consider it unnecessary to go further, this was clearly going to be a large account that would likely require a high credit limit. BVH had itself requested a credit limit of \$700,000. It had stated the anticipated value of its monthly purchases would be \$400,000 and Mr Cancian had said BVH had a minimum of 30 houses under construction at any one time.

[27] Mr Cancian was the sole director of BVH and directly involved in operation of the company. He had attended the meeting with Carters to set up the credit account and signed both documents.

[28] We are quite satisfied that a very substantial increase in the credit limit, without notification to either BVH or Mr Cancian, was within the general purview of the guarantee. Therefore, even if there was a variation of the BVH agreement, cl 5(b) would operate to prevent Mr Cancian being discharged from his obligations under the guarantee.

[29] On each of the two grounds we have considered, the guarantee remained on foot and Mr Cancian has no defence to Carters’ claim.

Conclusion

[30] The appeal is dismissed.

[31] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Keegan Alexander, Auckland for Appellant
Stace Hammond, Auckland for Respondent