CITATION: *The Australian Steel Company (Operations) Pty Ltd v Cranbrook* [2002] NTMC 015

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| PARTIES: | THE AUSTRALIAN STEEL COMPANY (OPERATIONS) PTY LTD<br><br>Plaintiff<br>v<br>RICHARD PIUS CRANBROOK<br><br>Defendant |
| TITLE OF COURT: | Local Court |
| JURISDICTION: | Local Court Act |
| FILE NO(s): | 20018004 |
| DELIVERED ON: | 17 May 2002 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 23 April 2002 |
| DECISION OF: | Mr V M Luppino SM |

**CATCHWORDS:**

Statute of Frauds- Contract of guarantee – Whether requirements of Statute of Frauds satisfied – Whether contract of guarantee is enforceable – Connected documents.

*Instruments Act 1958* (Vic) s 126; Statute of Frauds s 4

*Imperial Bank of Canada v Nixon* [1926] 4 DLR 1052; *AGS Electric Limited v Sherman* [1979] 180 DLR 229; *De Leuil v Jeremy* (1964) 65 SR (NSW) 137; *Ballantine v Harold* (1893) 19 VLR 465; *M'Ewan v Dynon* (1877) 3 VLR 271; *Corcoran v O'Rourke* (1888) 14 VLR 889; *Chambers v Rankine* [1910] SALR 73; *Rossiter v Miller* (1878) 3 App Cas 1124; *Rosser v Austral Wine & Spirit Co Pty Ltd* [1980] VR 313; *Sims v Robertson* (1921) SR (NSW) 246; *Harvey v Edwards Dunlop* (1927) 39 CLR 302.

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | Mr Wallbridge |
| Defendant: | Mr Rowbottam |

*Solicitors:*

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| Plaintiff: | Morgan Buckley |
| Defendant: | Paul Maher |

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| Judgment category classification: | B |
| Judgment ID number: | [2002] NTMC 015 |
| Number of paragraphs: | 32 |

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20018004

BETWEEN:

The Australian Steel Company
(Operations) Pty Ltd

Plaintiff

AND:

Richard Pius Cranbrook

Defendant

REASONS FOR DECISION

(Delivered 17 May 2002)

Mr LUPPINO SM:

1. This case involves a claim made under an alleged guarantee purportedly made in support of an agreement for the supply of goods by the plaintiff to Bayview Group Pty Ltd ("Bayview"). The guarantee is alleged to have been given by the defendant, one of the directors of Bayview. The issue in the case is whether the formalities of the guarantee were satisfied and whether the alleged guarantee is enforceable against the defendant.

2. The hearing time occupied a little over one hour as the parties had agreed all of the essential facts. The only material submitted in evidence were three items comprising:

    2.1 A Statement of Agreed Facts (Exhibit P1);

    2.2 Exhibit P2 which is a document in two parts, the first is titled "COMMERCIAL CREDIT APPLICATION & SUPPLY AGREEMENT" ("Supply Agreement") and the second part

being titled "GUARANTEE AND INDEMNITY" ("Guarantee");

2.3 Extract of ASIC records re Bayview (Exhibit P3).

3. Exhibit P3 was tendered to prove that the defendant was a director of Bayview. This however is unnecessary given that this is one of the facts agreed in Exhibit P1. Mr Wallbridge, who appeared for the plaintiff, submitted that it proved that the defendant is also a shareholder of Bayview. I admitted the document into evidence as proof of the defendant's directorship in Bayview but received it *de bene esse* in relation to the question of proof of his shareholding as the relevance of that was neither established nor conceded at that point.

4. I now rule that the question of the defendant's shareholding in Bayview is not relevant and the reception of Exhibit P3 is therefore confined to proof of the defendant's directorship (which as I indicated is superfluous in any event given the fact that that is an agreed fact per Exhibit P1). Mr Wallbridge had sought to prove the shareholding in anticipation of possible argument by Mr Rowbottam, who appeared for the defendant, suggesting that issue may have been relevant. It is easy to see how Mr Wallbridge may have been under that impression given Mr Rowbottam's outline of submissions. There is a reference therein to the courts approaching the interpretation of guarantees stricter than other contracts in general because the person giving the guarantee otherwise derived no direct benefit from the guarantee. Mr Wallbridge submitted that that is not entirely applicable in this case given that, and consequently he sought to prove, the defendant was also a shareholder. I do not think that makes much difference to the question of whether there was a direct benefit. The benefit is not direct. It is indirect and the defendant also receives an indirect benefit in any event by reason that he is a director of Bayview. Hence I do not see that the shareholding of the defendant makes any difference to the argument. In the world of modern commerce guarantees are generally given by persons who

have some sort of connection with the principal they guarantee. Almost invariably therefore there will always therefore be an indirect benefit.

5. Moreover, I consider that Mr Rowbottam's submission is of general application only, intending to show the general approach of courts to the question of that interpretation. In the absence of some authority indicating that courts are to take a different approach to interpretation in cases where there is some indirect benefit in the case of the person giving the guarantee, the fact of the defendant's shareholding adds nothing. No such authority was cited.

6. The nature of the challenge to the guarantee is essentially based on the Statute of Frauds. Section 126 of the *Instruments Act* 1958 (Vic) has application by reason of the choice of law clause inserted both in the Guarantee and in the Supply Agreement to the effect that the law of the State of Victoria applies.

7. Section 126 of the *Instruments Act* 1958 (Vic) provides as follows:

> "An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person or upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note."

8. Many of the cases I was referred to in the course of argument relate to legislation which, like section 126 of the *Instruments Act* 1958 (Vic), essentially derive from the original *Statute of Frauds* passed by the Imperial Parliament. To put those cases into context it is, I think, important to compare s 126 of the *Instruments Act* 1958 (Vic) and section 4 of the Statute of Frauds. That latter section provides as follows:

> "…no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special

> promise to answer for the debt, default or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

9. Exhibit P2 comprises a document printed on both sides of an A3 size sheet then folded in half resulting in four pages in book form. The first three pages represent the Supply Agreement. Pages one and two of that document sets out variable particulars such as names addresses etc. Page three sets out the terms and then makes provision for signing at the foot of page three. Page four then appears to be the separate document being the Guarantee. On page four there is a box immediately under the title with provision for insertion of a name, according to the instructions appearing in that box which states "Insert Applicant Company Name". Nothing has been inserted in that box. Thereafter, the terms of the guarantee are set out and at the foot of that page provision is made for the separate signing of that document.

10. Mr Rowbottam made it clear when Exhibit P2 was tendered that his consent to the tender did not indicate any acknowledgment that the Guarantee part of that document was the "guarantee and indemnity" referred to in the Supply Agreement. This was crucial to his argument and it is for that reason that I deliberately refer to Exhibit P2 as two separate documents, the first being the Supply Agreement and the second being the Guarantee.

11. Mr Wallbridge argued that despite the omission of the name of the principal debtor in the Guarantee, the *Statute of Frauds* was satisfied as the two separate documents were connected in such a way that the two documents could be read together to satisfy the requirements of the Statute.

12. Mr Rowbottam's argument is that the omission of the name of the principal in the box provided for that purpose at the top of the Guarantee amounts to

the omission of a material particular. He submitted that the requirements of s 126 of the *Instruments Act* 1958 (Vic) were not complied with as the writing requires that all material particulars are to be evidenced in writing. On authority of *Imperial Bank of Canada v Nixon* [1926] 4 DLR 1052 ("Nixon"), he said that the purpose of the *Statute of Frauds* and provisions such as section 126 is to prevent disputes relating to oral contracts. He submits therefore that the introduction of parole evidence negates the intention of the Statute. He relied in particular on the decision of Middleton JA in Nixon where at page 1056 he said:

> "The contract must be found in the writing, and the failure to fill in the name of the customer whose account is to guaranteed results in a document which omits the most material factor of the contract and so fails to supply the evidence in writing required by the Statute of Frauds."

13. Mr Rowbottam submitted that nothing in section 126 changes this and that therefore the decision has direct application to the facts of the current case.

14. His submission, in answer to the principle that the two parts of Exhibit P2 were connected and were to be read together, is essentially that before that principle can apply, it must be established that the two parts or documents are connected in a way consistent with and recognised by the numerous authorities regarding this principle.

15. At this point it is useful to set out the relevant terms in the Supply Agreement. On page three, clause (c) provides as follows:

> "If the applicant is a company the directors must give the guarantee and indemnity in the form annexed. The supplier reserves the right to require a guarantee and indemnity to be given by any person in any other circumstances."

16. Mr Rowbottam's submission is that the very fact that the plaintiff inserts clauses in the separate parts of the document which are duplicitous indicates that the two parts are two entirely separate documents and that the latter is not "the guarantee and indemnity in the form annexed" described in the

former. He relies partly on the contra proferentum rule of construction asking that the contract be construed against the plaintiff. In his submission the duplicitous parts of the documents are as follows:

16.1 Both parts have a choice of law clause, namely clause (d) in the former and clause 12 of the latter;

16.2 The parties names are repeated and that provision is made for the defendant to sign both parts;

16.3 The parties are separately defined and described in both parts.

16.4 Similar credit reporting or Privacy Act type provisions namely, clause (q) in the first and clause 8 in the second part.

17. In consequence Mr Rowbottam argues that the intention evidenced by Exhibit P2 is that it forms two entirely separate documents and consequently on authority of *AGS Electric Limited v Sherman* [1979] 180 DLR 229 ("Sherman") the guarantee is not enforceable against the defendant. The decision in Sherman was predicated on the basis that the *Statute of Frauds* requires a guarantee or indemnity to be evidenced in writing. That case, and many others for that matter, indicate that that requires that every material term of the agreement is to be so evidenced. Consequently it was held that where, as in that case, the guarantee omitted the name of the principal debtor and creditor, the guarantee was not enforceable as it failed to satisfy the *Statute of Frauds*.
18. In answer to the connected documents argument Mr Rowbottam's submission, with which I think I agree, is that all those cases stand for is that appropriate inferences can be drawn from subject documents so that they can be looked upon as a whole and read together to see if the requirements of the *Statute of Frauds* are satisfied. He submits that it is not sufficient simply for the plaintiff to rely on the physical joinder of the two documents to pick up the details omitted from one from the other. He

submits that the correct test is that there must be a nexus between the two documents that unequivocally binds the documents. He submits there is no such unequivocal nexus in this case. No authority was referred to by Mr Rowbottam in support of that test or that principle although it is arguable that it follows logically from the existing authorities. He submits that the connected documents cases simply stand for the principle that an inference can be drawn satisfying the requirements of the *Statute of Frauds* in appropriate cases. He submits however that such an inference is not available here because he submits that the inference to be drawn is that the further document contemplated by clause (c) of the Supply Agreement is another document entirely and not the document which forms the second part of Exhibit P2.

19. Mr Wallbridge's argument is that it is not material that the debtor company name has not been inserted in the box provided for that purpose at the top of the Guarantee as extrinsic evidence is permitted to connect together several documents which overall satisfy the requirements of the *Statute of Frauds*. A number of cases were referred to by both Mr Wallbridge and Mr Rowbottam in the course of argument. In addition to Nixon and Sherman already referred to, these were *De Leuil v Jeremy* (1964) 65 SR (NSW) 137, *Ballantine v Harold* (1893) 19 VLR 465, *M'Ewan v Dynon* (1877) 3 VLR 271, *Corcoran v O'Rourke* (1888) 14 VLR 889, *Chambers v Rankine* [1910] SALR 73, *Rossiter v Miller* (1878) 3 App Cas 1124, *Rosser v Austral Wine & Spirit Co Pty Ltd* [1980] VR 313, *Sims v Robertson* (1921) SR (NSW) 246 and *Harvey v Edwards Dunlop* (1927) 39 CLR 302. I was referred also to an authoritative text namely *The Modern Contract of Guarantee* by O'Donovan and Phillips, Third Edition.

20. Bearing in mind that the requirements of the *Statute of Frauds* as it applies to this case are:-

    1. that there be a note or memorandum of the agreement in writing;

2. that the writing be signed by the person to be charged,

in summary form, the following principles, relevant to the current case, flow from the authorities to which I was referred to, namely:-

1. All the material terms of the agreement must be set out in the writing;

2. The identity of the parties is a material term;

3. In appropriate circumstances two documents can be looked at together to satisfy the requirements;

4. Appropriate circumstances are basically indicators which make it possible for a court to infer that it was the intention of the parties that the two documents would be read together;

5. One of the appropriate circumstances is that there needs be a reference in one document to the other and that can be either express or implied;

6. Parole evidence cannot be led to show the connection if the connection is not apparent expressly or by implication on the face of the documents;

7. The method of annexure of two documents can satisfy the required nexus;

8. An inconsistency in material terms between the two documents can be fatal as it is an indication that the documents are not intended to be read together;

9. The failure to name a party is fatal although generic descriptions are acceptable and will suffice in some circumstances; the authorities show that these circumstances are that the descriptions

given must indicate a certainty as to who the parties are without being required to lead parole evidence to identify the parties;

10. Parole evidence however can be lead to show that the claimed parties correspond to the description referred to in the documents as distinct to leading parole evidence to resolve a possible dispute in the identity which is not acceptable; for example where a contract was entered into by "ABC & Co." evidence could be lead to show who the persons were who comprised this firm at the appropriate time; on the other hand generic descriptions such as "my client", "my friend" and "the customer" fall outside this as there can be a dispute as to which client, friend of customer was referred to if there are in fact more that one such person.

21. Sims v Robertson appears to be the high water mark in this line of authorities. It was held there that the *Statute of Frauds* was satisfied. In that case a loosely worded guarantee neither named nor did it generically describe the person in whose favour the guarantee was to be given. All that the document indicated was that there was to be payment to some person (without name or description) and referred to details of another transaction. The Court there allowed evidence of the other transaction to be led and as a result the identity of the person guaranteed could then be resolved based on documents relevant to that other transaction.

22. In Nixon, a form of guarantee made provision for insertion of the name of the principal debtor, but no name was inserted. The similarity to the current case is obvious. The result was that the only possible description of the primary debtor was the reference in the document to the use of the word "customer". The guarantee in question was to operate in favour of a bank. It was clear, no doubt self evident, that the bank had more than one customer and it was there held that the omission of the name was fatal to the operation of the *Statute of Frauds* as proving which of the bank's many customers was

intended to be the party could only be established by parole evidence and that was prohibited by the Statute.

23. The position was even more apparent in Sherman. In that case the names of both the principal debtor and the creditor were omitted. The court reached the same conclusion as in Nixon.

24. Nixon and Sherman therefore appear to be at odds with Sims v Roberston and the other cases. However, in my view the two are reconciled by the fact that in the latter case, despite the omission of the actual name or in fact even of the generic description, there was a connection with other documentation or another transaction and when looked at together the connected documents satisfied the Statute. Parole evidence may be lead to prove this connection. In Nixon and Sherman there was no such connection. It is indeed quite curious and in fact indicative of the harshness and strict enforcement of the rule that in Nixon, Riddell JA actually noted and agreed that there was no doubt as to who the "customer" was.

25. In light of the foregoing Mr Rowbottam's argument cannot be sustained. His argument is that the omission of the name of the defendant in the Guarantee is fatal in the same way as in Nixon and Sherman. However, it is my view that in this case there is ample evidence to establish the connection to tie in the guarantor (the defendant) and the principal debtor (Bayview) in the Guarantee by reference to the Supply Agreement. This is quite apparent from the two parts of the one document that comprise Exhibit P2.

26. The evidence that the two are to be connected and read together and that it is intended to by the parties is quite evident from the interchangeability of references in the two parts namely signatories, subject matter and the like.

27. I think it is also relevant that the two parts of the document are printed on the one sheet of paper simply folded to form four pages. In my view, notwithstanding Mr Rowbottam's submission on this point, they are

therefore “annexed” with even more certainty to show the intended connection than in the case of M’Ewan v Dynon.

28. Mr Rowbottam’s second argument likewise cannot be sustained. This argument is discussed in more detail in paragraphs 16 and 17 above. Essentially the argument is that the duplicitous nature of some of the terms in the two parts of the document must mean that the Supply Agreement refers to some document other than the Guarantee else why would there be repetition. Although I accept that this can be one of the factors to be considered to determine whether the parties intended the two documents to be read together, I cannot accept it as a bare statement of a general principle. I think the intention of the parties overall is clear that the two parts of Exhibit P2 are to be read together. I remind myself that the applicable principle is to ascertain the intention of the parties, specifically whether it is reasonable to infer that the parties intended the two documents to be read together. There is certainly some duplication in terms and references but I do not consider that this makes them inconsistent or contradictory. I am of the view that repeating terms in the two parts of the document does not indicate an intention that the two documents are not to be read together, not in the same way as a contrary intention was found in Corcoran v O’Rourke and in Chambers v Rankine where it was held that the inconsistent terms did negate the intention.

29. In this case I accept there is some duplicity in the terms. However in examining the relevant clauses and although I note that slightly different wording is used, the subject matter is essentially the same and not inconsistent.

30. In consequence I find that the documents put in evidence satisfy the requirements of section 126 *Instruments Act* 1958 (Vic). Consequently I find that there is a valid guarantee given by the defendant to the plaintiff

guaranteeing the debts of (Bayview). In light of the matters which have been agreed I therefore find for the plaintiff in the agreed some of $16,274.56.

31. In terms of interest, I note that clause (h) of the Supply Agreement provides that an "account service charge" of 2.0 per cent per month may be imposed by the plaintiff in the event of default. The rate nominated is ridiculously high in the current financial climate. In any event this is not an issue as there is no evidence before me that the plaintiff has taken any steps to impose such a charge. Accordingly I cannot find that it was due by Bayview and consequently it has not been proven to be payable by the defendant pursuant to the Guarantee. The plaintiff is however, in my view, entitled to interest pursuant to Rule 39.03 of the Local Court Rules. I am of the view that interest should be calculated on the full amount claimed from 12 April 2000, which is the date of the first demand under the Guarantee. I consider an appropriate rate to be 6.0 per cent per annum averaged over the entire period. Subject to hearing the parties, I propose to allow interest up to the date of judgment in the sum of $2,035.00.

32. I will enter judgment after hearing the parties on interest and I will also hear the parties as to costs.

Dated this 17th day of May 2002.

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V M LUPPINO
STIPENDIARY MAGISTRATE