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COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON



IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS
AMENDED

AND IN THE MATTER OF A PLAN OF ARRANGEMENT
OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD.,
816956 ALBERTA LTD., 1371047 ALBERTA LTD.,
1919209 ALBERTA LTD. and CANADA NORTH GROUP
LP HOLDINGS LTD.

ADDRESS FOR
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**WRITTEN BRIEF OF WESLEASE INCOME GROWTH FUND GP LTD.
AND WESLEASE INCOME GROWTH FUND LIMITED PARTNERSHIP**

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I. **FACTS**

1. Weslease Income Growth Fund GP Ltd. and Weslease Income Growth Fund Limited Partnership ("Weslease") was engaged in the business of lease financing until July 26, 2018, at which time a Receiver was appointed over Weslease's property.
2. Prior to that receivership and prior to the reorganization of the Canada North Group of Companies ("Canada North Group"), the principal of Canada North Group, Paul McCracken ("McCracken"), contacted Weslease to coordinate financing of certain assets owned by a Canada North Group entity.¹
3. The particulars of that financing arrangement can be summarized as follows:
 - a. One company within Canada North Group, being 1919209 Alberta Ltd. ("191") owned a Waste Water Treatment Plant (the "WWTP") valued at \$3,700,000.00;
 - b. The WWTP was to be sold to Weslease for the sum of \$3,700,000.00;
 - c. Weslease was then to lease the WWTP back to 191 (the "Sale and Leaseback Transaction");
 - d. Weslease requested additional security for the transaction; and
 - e. McCracken proposed that two other companies in Canada North Group, being 1371047 Alberta Ltd. ("137") and Canada North Camp Inc. ("CNC"), would guarantee 191's obligations and would grant extra security to Weslease by way of two mortgages against lands owned by 137 and CNC.
4. At all material times McCracken was one of two directors of each of 191, 137, and CNC.
5. The Sale and Leaseback Transaction proceeded and mortgages were granted on the lands owned by 137 and CNC as follows:
 - a. A mortgage executed by 137 in the amount of \$1,500,000.00 on lands owned by 137 (the "137 Mortgage") and legally described as Plan 0826492, Block 3, Lots 7, 8, 11 and 12 (the "137 Lands"); and,
 - b. A mortgage executed by CNC in the amount of \$761,000.00 on lands owned by CNC (the "CNC Mortgage") and legally described as Plan 0325037, Block 2, Lot 1 (the "CNC Lands").
6. McCracken signed each of the 137 Mortgage and the CNC Mortgage on behalf of 137 and CNC respectively.

¹ Affidavit of Keith Talbot sworn October 12, 2018 (the "Talbot Affidavit"), at para 4.

7. Apart from the mortgage security granted by 137 and CNC the Sale and Leaseback Transaction was documented in a number of instruments including:
 - a. An invoice for the sale of the WWTP from 191 to Weslease;
 - b. Leases 160219A and 160219B respecting the WWTP (the "Lease Agreements");
 - c. Notification - Approval of Leases indicating that a condition of the approval of the Lease Agreements was the granting of the 137 mortgage and the CNC Mortgage, initialled by McCracken;
 - d. General Security Agreements granted in favour of Weslease by 191 and McCracken; and
 - e. Promissory Notes by 191 and McCracken (collectively the "Lease Documents").
8. The 137 Mortgage was registered on title to the 137 Lands on March 22, 2016. The CNC Mortgage was registered against title to the CNC Lands on March 11, 2016.

II. ISSUES

9. Did 137 and CNC guarantee 191's obligations pursuant to the Sale and Leaseback Transaction?
10. Do the Lease Documents and the mortgages granted by 137 and CNC taken in their totality constitute a memorandum of guarantee?
11. If the answer to the second issue above is no, has there been part performance by 137 and CNC in granting the 137 Mortgage and CNC Mortgage such that a guarantee in writing is unnecessary?

III. LAW

A. Guarantees

12. A guarantee is a promise to answer for the payment of a debt or the performance of a duty, where the person liable for said payment or performance has failed to do so.²
13. The term "guarantor" includes an individual who has not entered into any personal obligation of their own, but grants security for the performance of or payment by a third party.³
14. The courts have found that even where an individual has not entered into any express covenant to repay any parts of another party's obligation, the individual may nonetheless be found to have guaranteed by way of collateral security the debts of that third party.⁴

² *Re Conley*, (1938) 2 All ER 127 ("*Re Conley*") at page 130 [Tab 1].

³ *Ibid* at page 135.

B. Statute of Frauds

15. In Alberta, the *Statute of Frauds*⁵ applies to situations where a party agrees to guarantee the obligations of another. Section 4 of the *Statute of Frauds* reads as follows:

No action shall be brought ... whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person ... 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 authorized.

16. This section is clear that what is required for a binding guarantee is a "memorandum or note made in writing"; however, that memorandum of guarantee does not need to be limited to a single document styled expressly as a guarantee.
17. Instead, "[t]he statute contains no express indication that the agreement in writing required to satisfy its terms must be in one or even a limited number of documents. It is no doubt true that in 1677 a signed written agreement would often and perhaps always be contained in a single document, but [the claimant] very sensibly did not suggest that that provides a pointer to how the statute should today be construed."⁶
18. The documents comprising a memorandum of guarantee need not take any specific form, but can be in the form of a letter, a receipt, or instructions to a third party.⁷
19. Although a memorandum of guarantee must contain a promisee and a promisor, there is no such requirement that this information needs to appear in any particular part of the written memorandum. The *Statute of Frauds* will be satisfied if the promisee and promisor can be construed by reference to all of the documents.⁸
20. The written documentation comprising the note or memorandum of guarantee must merely, when reviewed collectively, contain sufficient description and reference to the contracts that the nature of the guarantors obligation arises by necessary inference from those terms, with reference to the other documents physically or referentially attached.⁹
21. Parol evidence may be utilized to assess whether a fair and reasonable inference can be drawn that the documents in a written memorandum are connected.¹⁰

⁴ *Ibid* at page

⁵ The *Statute of Frauds*, 1677, 29 Car 2 c.3 [Tab 2].

⁶ *Golden Ocean Group Ltd. v. Salgocar Mining Industries Ltd.*, [2012] EWCA Civ 265 (CA) [Tab 3].

⁷ "The Statute of Frauds in the Email Age: Druet v. Girouard", 65 UNB LJ 404, at page 408 [Tab 4].

⁸ *Ontario Marble Co. v. Creative Memorials Ltd.*, 1963 CarswellSask 35, 42 WWR 315, at para 6 [Tab 5].

⁹ *Ibid*, at para 6.

¹⁰ *Supra* note 7, at page 408

C. Part Performance

22. The doctrine of part performance is an equitable doctrine rooted in the notion that a party to a contract should not be able to rely solely upon a technical defence of an agreement not made in writing to enable them to avoid their contractual obligations. Where a claimant demonstrates that they have partly performed part of a contract to their detriment, the part performance doctrine allows the Courts of equity to enforce the contract despite the agreement not having been reduced into writing.
23. As a general policy rule the doctrine of part performance does not apply to guarantees, as the concern is that to allow a claim for part performance to overcome the absence of a written guarantee would render the *Statute of Frauds* a nullity.¹¹
24. However, the case law in respect of the guarantee exception to the doctrine of part performance relates solely to circumstances in which a lender or creditor claims to have partly performed simply by having advanced funds to a debtor, then seeks to rely on that alleged part performance in order to negate the need for the guarantee in writing by the guarantor. To apply the doctrine of part performance in such an instance would effectively permit the unilateral acts of a claimant creditor to be a sufficient basis upon which to enforce payment against a parol guarantor.
25. What no Court has yet considered, however, is the applicability of the part performance doctrine to a guarantee where the act of part performance is not merely the advancement of funds by a creditor. In such case, as in the case at bar, Weslease submits that the acts would fall outside of the scope of the policy consideration, and the doctrine of part performance should therefore apply for the reasons more fully outline in our analysis below.
26. Insofar as the doctrine of part performance is applicable on these facts, a claimant must establish three doctrinal components:
 - a. The claimant must establish that they detrimentally relied upon the agreement or guarantee alleged;
 - b. The claimant must demonstrate that their act of detrimentally relying on the agreement or guarantee evidences or manifests the existence of the agreement so alleged; and
 - c. Where the link between the detrimental reliance and the agreement or guarantee alleged is sufficiently strong then parol evidence may be permitted to assist the Court in its analysis of the contract.¹²

¹¹ *Rink v. March*, 1921 CarswellSask 36, [1921] 1 WWR 919, at para 12 ("*Rink*") [Tab 6].

¹² *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626, at para 171 [Tab 7].

27. In assessing whether there has been detrimental reliance, the “acts relied on” are not limited to acts of the claimant alone.¹³
28. While the acts of detrimental reliance must unequivocally refer to a guarantee alleged, it is not necessary that the detrimental acts unequivocally refer to the terms of the guarantee in question. What is required is that the detrimental acts support one conclusion: that the parties intended that the guarantor enter into a guarantee of the obligations of a third party.¹⁴
29. Part performance may be relied upon where the terms of an agreement have already been substantially carried out, as the risk of a fraud against the guarantor is averted. “To borrow a phrase from the law of tort, the thing speaks for itself. In the present case, for example, it does not matter so much what was said. What is critical is what was done.”¹⁵

IV. ANALYSIS

A. **Did 137 and CNC guarantee 191’s obligations pursuant to the Sale and Leaseback Transaction?**

30. The Lease Documents between Weslease and 191 expressly refer to the granting of the 137 Mortgage and the CNC Mortgage as security for the Lease Agreements. Particularly, as evidence of 137 and CNC’s intention to guarantee the obligations of 191, the following approval conditions are contained in the Notifications - Approval of Lease for the WWTP:

Collateral mortgage on available property as follows: \$1,500,000.00 collateral mortgage on property described as 0826492; 3; 7, 8, 11, 12 ... and \$700,000.00 collateral mortgage on property described as ... 032037; 2; 1.

31. These Notifications - Approval of Lease are each initialed by McCracken. They do not specify that these are to be collateral mortgages between Weslease and 191, nor do they indicate that 191 is to be the mortgagor. Instead, they indicate that a condition of Weslease’s approval of the Lease Agreements relating to the WWTP is the granting of the 137 Mortgage and the CNC Mortgage as security for the obligations of 191 pursuant to the Lease Agreements.
32. The evidence of Keith Talbot on this point is that McCracken proposed that 137 and CNC, as companies within his control, would “guarantee 191’s obligations pursuant to the proposed lease of the WWTP”.¹⁶
33. That 137 and CNC intended to and in fact did guarantee the obligations of 191 is further reaffirmed in the 137 Mortgage and the CNC Mortgage in the preamble at paragraph B which reads as follows:

¹³ *Ibid* at para 172.

¹⁴ *Ibid*, at paras 173 and 174.

¹⁵ *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69 at para 9 [Tab 8].

¹⁶ The Talbot Affidavit, at para 15.

The Mortgagor [137 and CNC] agrees that this mortgage will secure repayment in favour of the Mortgagee [Weslease] pursuant to the Lease Agreements of all present and future indebtedness and liabilities of the Mortgagor, and any one or more persons or entities, to the Mortgagee pursuant to the Lease Agreements ... and the Mortgagor has agreed to execute and deliver this Mortgage as collateral security for the liabilities of the Mortgagor to the Mortgagee under the Lease Agreements. [Emphasis added]

34. The obligations of 137 and CNC as guarantors arise by necessary inference from the terms contained in this and other paragraphs of the 137 Mortgage and the CNC Mortgage, as well as in the remaining Lease Documents between Weslease and 191.
35. Weslease submits that the uncontroverted evidence of Keith Talbot that 137 and CNC would guarantee 191's obligations pursuant to the Lease Agreements, as well as the clear wording of the mortgages themselves, necessarily leads to the conclusion that 137 and CNC intended to and in fact did guarantee the obligations of 191, which guarantee should be binding without more.

B. Do the lease documents and the mortgages granted by 137 and CNC taken in their totality constitute a Memorandum of Guarantee?

36. As indicated above the Sale and Leaseback Transaction was documented by way of a number of documents including an invoice for the sale of the WWTP, the Lease Agreements, Notification - Approval of Leases, General Security Agreements, and Promissory Notes. Weslease submits that these documents taken together constitute a sufficient memorandum of guarantee from which 137 and CNC's intentions to guarantee the obligations of 191 can be derived.
37. The following is an analysis of the documentation relating to the Sale and Leaseback Transaction which evidences clearly that 137 and CNC intended to guarantee the obligations of 191:
 - a. The mortgages provide that it will secure repayment in favour of Weslease pursuant to the Lease Agreements of all present and future indebtedness of any one or more persons or entities, which would include 137 and CNC;
 - b. The mortgages refer to leases entered into as of March 1, 2016, being those Lease Agreements dated March 1, 2016 and entered into between Weslease and 191 as part of the Sale and Leaseback Transaction;
 - c. The Notification - Approval of the Leases relating to the Lease Agreements expressly provide that a condition of the Lease Agreements being entered into is the granting of "collateral mortgage [s] on available property" being the property of 137 and CNC;
 - d. The Mortgagors, 137 and CNC, have "promised payment to Weslease" of the liabilities incurred pursuant to Lease Agreements dated the 1st of March, 2016, being those Lease Agreements relating to the WWTP; and

- e. The Lease Agreements which provide at paragraph 13(b) that the debtor, one of McCracken's companies, further agrees to execute and deliver such further assurances and conveyances as may be necessary to properly carry out the intention of the Lease Agreements.
38. These documents together constitute an agreement in writing which satisfies on its terms the *Statute of Frauds*, and constitutes a memorandum of guarantee by 137 and CNC of the obligations of 191.
39. The only logical conclusion to be drawn from these documents taken together is that the Lease Agreements were intended to be secured by way of guarantee supported by the mortgage security granted by 137 and CNC, which evidence is substantiated by the evidence of Keith Talbot in his Affidavit sworn October 12, 2018 at paragraph 15. It is apparent that an arrangement binding in law was intended between the parties.¹⁷
40. The Lease Documents comply with Section 4 of the *Statute of Frauds* and constitute a "memorandum or note" of guarantee and should be upheld on its terms.
41. Further, McCracken was authorized as agent of 137 and CNC by virtue of his having been a director of not only those companies but 191 to enter into a guarantee of the obligations of 191, the consideration for which was Weslease's granting of the Lease Agreements at issue. When McCracken signed the Lease Documents and the mortgages in his capacity of director of each of 137, CNC, and 191 "his authority to do so is to be readily implied".¹⁸
42. In this case it is enough that "the names of the parties appear on the face of the Memorandum, either expressed or by reasonable construction or by reference to the other documents physically or referentially attached thereto."¹⁹
43. A contract of guarantee can be made enforceable under Section 4 of the *Statute of Frauds* either by having a written agreement signed by the Guarantor or his agent, or by having a note or memorandum of the agreement, which agreement could be oral, signed by the guarantor or his agent.²⁰
44. In the case at bar, Weslease submits that there is enough evidence to substantiate a written guarantee enforceable as between the parties; however, in the event this Court finds that such a written guarantee is not evidenced on the face of the mortgage documentation itself, the written memorandum of guarantee, being those documents taken collectively which evidence the intention of a guarantee made previously in oral form, is sufficient on the case law to bind 137 and CNC to its guarantees of the obligations of 191.

¹⁷ *Parker et al. v. Clark et al.*, [1960] 1 All ER 93, at page 101 [Tab 9].

¹⁸ *Ontario Marble*, at para 1.

¹⁹ *Ibid*, at para 6.

²⁰ *Elpis Maritime Co. Ltd. v. Marti Chartering Co. Inc.*, [1991] 3 All ER 758, at page 762 [Tab 10].

C. Part Performance

45. As noted above, the rule in respect of part performance does not apply in situations where a creditor or lender has advanced funds for the benefit of the guarantor and then subsequently seeks to rely on a guarantee not in writing.
46. However, Weslease submits that it is a fundamentally different situation when the part performance in question derives from the acts of the guarantor themselves. In this case, by granting the mortgage security for what could be no other purpose than as security for a guarantee, 137 and CNC have partly performed their obligations pursuant to the Guarantees.
47. The rule excepting guarantees from the application of the doctrine of part performance is in substance a policy-based decision: as stated by the Court in *Maddison v. Alderson*, cited in *Rink v. March*, “[w]here a parol promise is to answer for the default of another and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by fulfilling the contract of guarantee. In those cases such a principle [of part performance] would render the statute a nullity”.²¹
48. It is apparent from the case law that the policy consideration driving the rule excepting guarantees from the application of the doctrine of part performance derives from a concern that a creditor or lender will be in a position to unilaterally impose or enforce a guarantee, not in writing, on the alleged guarantor. The statute requiring written evidence of the promise of guarantee would be nullified in that respect.
49. To the contrary where, as in this case, a guarantor partly performs pursuant to an agreement of guarantee the same policy considerations do not arise. 137 and CNC have guaranteed the obligations of 191, and in furtherance and part performance of that guarantee have granted the 137 Mortgage and the CNC Mortgage. As argued earlier herein, the only inference to be drawn from the granting of those mortgages is that 137 and CNC are guarantors.
50. In relying on the 137 Mortgage and the CNC Mortgage there is no unilateral attempt by Weslease to impose or enforce a guarantee which would otherwise be unenforceable. The totality of the evidence shows that 137 and CNC intended, through the representations of their agent McCracken, to guarantee 191’s obligations to Weslease pursuant to the Lease Agreements, and their part performance of those guarantees in the granting of mortgage security should take this situation out of the *Statute of Frauds* and the doctrine of part performance should apply to the facts at bar.
51. Applying the test for part performance, Weslease submits that it is apparent that there has been detrimental reliance on its part in relying on the guarantees of 137 and CNC. Those guarantees were a condition of entering into the Lease Agreements [NTD: pinpoint in affidavit]. No payments have been made on those Lease Agreements since June 30, 2017.

²¹ *Rink*, at para 12.

52. More importantly, 137 and CNC have acted in reliance on the existence of the guarantees, namely, by executing the mortgages in favour of Weslease.
53. Taken together, both the actions of Weslease, and 137 and CNC, support only one, unequivocal conclusion: 137 and CNC had agreed with Weslease to guarantee the obligations of 191 pursuant to the Lease Agreements, and granted security to Weslease on that guarantee.²²
54. The link between the actions of both Weslease in entering into the Lease Agreements with 191, and 137 and CNC in granting the 137 Mortgage and CNC Mortgage is sufficiently strong such that parol evidence, including Keith Talbot's uncontroverted evidence of McCracken's intention regarding the guarantees, is permissible.
55. Ultimately, the policy considerations which have resulted in carving out an exception for guarantees from the doctrine of part performance are not engaged in the case at bar: it is 137 and CNC, not Weslease, who has partially performed and has evidenced their intention to be bound by their guarantee of the obligations of 191. This is not a question of the advance of "credit on the faith of such a parol guarantee to one who makes default"; this is a situation of 137 and CNC acting in compliance with their guarantees and granting the mortgage security as promised by McCracken.
56. Weslease submits that this is a case to which the doctrine of part performance should apply, taking the facts outside of the application of the operation of the *Statute of Frauds*. The oral guarantees granted by 137 and CNC through their agent McCracken should be upheld.

V. CONCLUSION

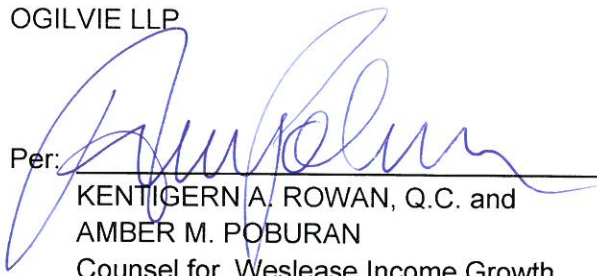
57. Weslease submits that, despite the absence of the word "guarantee" from the 137 Mortgage and the CNC Mortgage, it is patently obvious from the wording contained therein that those parties intended to and understood they were guaranteeing the obligations of 191.
58. The mortgages expressly hold that 137 and CNC as mortgagors are agreeing to secure repayment of "any one or more persons or entities... pursuant to the Lease Agreements". Weslease submits that this Court should find on these facts that a valid subsisting guarantee in writing exists within the mortgages themselves, and that the Court should deny the Monitor's application to have the 137 Mortgage and the CNC Mortgage discharged.
59. In the alternative, there is more than sufficient evidence to support a finding that, through the compilation of records that form the Lease Documents, a memorandum in writing evidencing a guarantee exists and binds the parties.
60. The Lease Documents and mortgages are executed in each instance by McCracken in his capacity as director of 137, CNC, and 191, and in each instance those documents relate back to the terms of the Lease Agreements dated March 1, 2016.

²² Access Mortgage at para 173.

61. Taken together, the Lease Agreements, Notification – Approval of Leases, and mortgages show the parties' intention to grant the 137 Mortgage and the CNC Mortgage as security for their obligations as guarantors of 191's debt to Weslease. The law is clear that when such a memorandum of guarantee, regardless of whether it exists in numerous documents and forms, is sufficient evidence of a guarantee in writing to comply with the *Statute of Frauds*.
62. Finally, in the event this Court finds it is unable to find a written guarantee, or memorandum of guarantee, sufficient to satisfy the *Statute of Frauds*, Weslease submits that the doctrine of part performance should apply and this Court may exercise its discretion and find a valid and subsisting oral guarantee exists between Weslease, and 137 and CNC.
63. The policy considerations which have lead previous courts to conclude that the doctrine of part performance is inapplicable in the case of guarantees do not apply in situations where the part performance at issue is the acts of the guarantor themselves. In such situations, the guarantor has affirmed and performed in furtherance of the guarantee agreement, nullifying the risk of the creditor or lender unilaterally foisting those obligations onto the guarantor.
64. In the case at bar, it is apparent that 137 and CNC accepted and performed in accordance with their responsibilities as guarantors of 191's obligations to Weslease, and in the circumstances (and in consideration of the evidence of Keith Talbot), the guarantees should be enforceable.

All of which is respectfully submitted this 18th day of October, 2018.

OGILVIE LLP

Per: 

KENTIGERN A. ROWAN, Q.C. and
AMBER M. POBURAN

Counsel for Weslease Income Growth
Fund GP Ltd. and Weslease Income
Growth Fund Limited Partnership

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	<i>Re Conley</i> , (1938) 2 All ER 127
2.	<i>The Statute of Frauds</i>
3.	<i>Golden Ocean Group Ltd. v. Salgocar Mining Industries Ltd.</i> , [2012] EWCA Civ 265 (CA)
4.	"The Statute of Frauds in the Email Age: <i>Druet v. Girouard</i> ", 65 UNB LJ 404
5.	<i>Ontario Marble Co. v. Creative Memorials Ltd.</i> , 1963 CarswellSask 35, 42 WWR 315
6.	<i>Rink v. March</i> , 1921 CarswellSask 36, [1921] 1 WWR 919
7.	<i>Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.</i> , 2018 ABQB 626
8.	<i>Hill v. Nova Scotia (Attorney General)</i> , [1997] 1 S.C.R. 69
9.	<i>Parker et al. v. Clark et al.</i> , [1960] 1 All ER 93
10.	<i>Elpis Maritime Co. Ltd. v. Marti Chartering Co. Inc.</i> , [1991] 3 All ER 758

TAB 1

were negligent in leaving it open. Therefore I can say you were negligent, and negligent to me." The answer is obvious: "What might be my liability towards an invitee is perfectly immaterial as between me and you a trespasser." Thus, in this case I think that Reeves can say to the appellants: "Even if, by colliding with him at this spot, I might have been held negligent as against a slow-moving vehicle that passed the light when green, that is *nihil ad rem* on the question whether I was negligent in colliding at this spot with your fast-moving vehicle that had passed the light when it was red."

Appeal dismissed with costs. Order for payment out of money paid into court.

Solicitors: *L. Bingham & Co.* (for the appellants); *Ponsford & Devenish* (for the respondent).

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

Re CONLEY (TRADING AS CAPLAN & CONLEY), Ex parte THE TRUSTEE v. BARCLAYS BANK, LTD. Re CONLEY (TRADING AS CAPLAN & CONLEY), Ex parte THE TRUSTEE v. LLOYDS BANK, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson, L.J., and Luxmoore, J.), February 11, 14, 15, March 17, 1938.]

Bankruptcy—Fraudulent preference—Bank overdrafts secured by mere deposit of documents of third party without any agreement to pay sums owing—Account put into credit and documents released immediately before bankruptcy—Absence of contractual relationship between depositor and creditor—Surety or guarantor—Bankruptcy Act, 1914 (c. 59), s. 44.

In Apr., 1931, and again in May, 1933, the wife of the bankrupt deposited with a bank War Loan as collateral security for the bankrupt's indebtedness to the bank. In Feb., 1933, the bankrupt's mother deposited certain War Loan and Building Society shares for the same purpose. Similar arrangements were subsequently made with Lloyds Bank. Shortly before Nov. 16, 1934, by various means the bankrupt paid large sums into his accounts so that on that day the accounts were in credit. Shortly after that date, the wife and mother demanded the release of the securities and obtained them. On Nov. 30 the business of the bankrupt was closed down and he was immediately made bankrupt. The securities in question were merely deposited with the bank, and neither the wife nor the mother gave any covenant or undertaking of any kind to pay any sum to the bank:—

HELD: the depositors, although they did not enter into any contract to pay the bank, were "sureties or guarantors" within the meaning of the Bankruptcy Act, 1914, s. 44, and there was, therefore, a fraudulent preference.

Decision of FARWELL, J. ([1937] 4 All E.R. 438) reversed.

EDITORIAL NOTE. The statutory enactment was altered in 1913 to extend fraudulent preference to a payment to a creditor in order to prefer a surety or guarantor. In the present case the question is whether a person can be surety or guarantor if he has not entered into any contract to pay the debt or some part thereof to the creditor. Here there was a bare deposit of securities, and the only remedy open to the creditor was to realise the securities by sale. It is here held to be immaterial, in

considering whether a person is a "surety or guarantor" within the Bankruptcy Act, 1914, s. 44, whether or not that person has given any undertaking or covenant to pay the debt or any part of it.

AS TO GUARANTORS AND FRAUDULENT PREFERENCE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 368, 369, para. 498; and FOR CASES, see DIGEST, Vol. 5, pp. 855-857, Nos. 7174-7185.]

Cases referred to :

- (1) *Re Mills, Ex p. Official Receiver* (1888), 58 L.T. 871; 5 Digest 893, 7359.
- (2) *Re Goldsmid, Ex p. Taylor* (1886), 18 Q.B.D. 295; 5 Digest 856, 7178; 56 L.J.Q.B. 195.
- (3) *Re Warren, Ex p. Trustee*, [1900] 2 Q.B. 138; 5 Digest 893, 7360; 82 L.T. 502.
- (4) *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525; 6 Digest 308, 2058; 44 L.J.Q.B. 221; 33 L.T. 420.
- (5) *Duncan, Fox & Co. v. North & South Wales Bank* (1880), 6 App. Cas. 1; 6 Digest 308, 2059; 50 L.J.Ch. 355; 43 L.T. 706.
- (6) *Re Westzinthus* (1833), 5 B. & Ad. 817; 26 Digest 125, 891; 3 L.J.K.B. 56.
- (7) *Perry v. National Provincial Bank of England*, [1910] 1 Ch. 464; 26 Digest 198, 1549; 79 L.J.Ch. 509; 102 L.T. 300.
- (8) *Bolton v. Salmon*, [1891] 2 Ch. 48; 26 Digest 163, 1223; 60 L.J.Ch. 239; 64 L.T. 222.
- (9) *Smith v. Wood*, [1929] 1 Ch. 14; Digest Supp.; 98 L.J.Ch. 59; 139 L.T. 250.
- (10) *Re Lyons, Ex p. Barclays Bank, Ltd. v. Trustee* (1934), 152 L.T. 201; Digest Supp.
- (11) *Re Stanley (G.) & Co.*, [1925] Ch. 148; Digest Supp.; 94 L.J.Ch. 187; 133 L.T. 37.

APPEAL from an order of FARWELL, J., dated Nov. 22, 1937, and reported in [1937] 4 All E.R. 438, where the facts are fully set out.

Roger S. Bacon and *David Renton* for the trustee.

Cyril J. Radcliffe, K.C., and *John Buckley* for Barclays Bank, Ltd. *E*

W. N. Stable, K.C., and *J. B. Blagden* for Lloyds Bank, Ltd.

V. R. Aronson for Mrs. Bessie Cohen.

H. C. Leon for Mrs. Hannah Conley.

SIR WILFRID GREENE, M.R. : These appeals raise a novel and difficult point under the Bankruptcy Act, 1914, s. 44, and they come before us in an unusual form. The trustee in bankruptcy of one Conley claims that certain payments made by the bankrupt to the respondent banks were void, as being fraudulent preferences. The payments in question, or some of them, had the effect of putting the bankrupt's accounts with the respondent banks in credit, with the result that certain amounts of War Loan deposited by the respondents Mrs. Cohen and Mrs. Conley (in the case of Barclays Bank) and the respondent Mrs. Conley (in the case of Lloyds Bank) as security for the bankrupt's overdrafts were set free. The appellant claims that the respondents Mrs. Cohen and Mrs. Conley were sureties or guarantors for the debts due to the banks on the overdrafts, that the payments made to the banks extinguishing the overdraft were made with a view of giving to those ladies a preference over the other creditors, and that those payments are, in consequence, void as against the appellant.

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When the appellant stated realised that, if expensive hearing of the various

A question whether were established invitation the j the facts assume appellant's claim are brought, and to take the view in order that t requested us ver by the judge, in C improbably mea course, and the decision of the j judgment. We and it is unnece

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The short que ruptcy Act, 191 the depositors v F bankrupt to the support the clai If, on the other FARWELL, J., ha The Bankrupt

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When the case was opened before FARWELL, J., counsel for the appellant stated the facts which he was prepared to prove. Both sides realised that, if the facts were to be investigated, a prolonged and expensive hearing would be necessary, and counsel appearing on behalf of the various parties concurred in inviting the judge to decide the question whether or not, upon the assumption that the facts alleged were established, the appellant's contention was right in law. To this invitation the judge assented. He stated in his judgment what were the facts assumed, and held that even if those facts were established, the appellant's claim would be bad in law. From that decision these appeals are brought, and, although at one stage of the hearing we were disposed to take the view that the whole matter ought to go back to the judge in order that the facts might be ascertained, counsel for all parties requested us very earnestly to deal with the appeals on the basis adopted by the judge, informing us that a decision upon that basis would not improbably mean the end of the litigation. We agreed to take this course, and the sole question which arises, therefore, is whether the decision of the judge was correct in law, upon the facts assumed in his judgment. We cannot add to, or subtract from, those assumed facts, and it is unnecessary to restate them.

The deposit of the War Loan was accompanied in each case by a memorandum signed by the depositor. It was argued on behalf of the appellant that each depositor entered into an implied undertaking with the bank to become personally liable for the amount of the overdraft. I am unable to accept this view, and the matter must be treated upon the footing that neither of the depositors incurred any personal liability for the bankrupt's debt to the bank.

The short question, therefore, is one of the construction of the Bankruptcy Act, 1914, s. 44. If, upon the true construction of that section, the depositors were sureties or guarantors for the debts owing by the bankrupt to the bank, the facts assumed would be sufficient in law to support the claim, and the matter would have to go back for hearing. If, on the other hand, the depositors were not sureties or guarantors, as FARWELL, J., has held, the claim must fail.

The Bankruptcy Act, 1914, s. 44 (1), provides as follows :

Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

The words "or any surety or guarantor for the debt due to such creditor" were inserted as a "minor amendment" to the Bankruptcy Act, 1883, by the Bankruptcy and Deeds of Arrangement Act, 1913. Before that amendment, the provisions of the fraudulent preference

section had remained substantially the same since they first appeared in statutory form in the Bankruptcy Act, 1869. The object of the amendment would appear to have been to get rid of the effect of certain decisions under the previous Acts. In *Re Mills, Ex p. Official Receiver* (1), it was held by the Court of Appeal that a payment by an insolvent debtor to his creditor, made, not with a view to giving a preference to the creditor, but with a view to "easing" a surety for the debt, was not a fraudulent preference of the creditor. LORD ESHER, M.R., said, at p. 872:

It is not within the section if the debtor pays one creditor in order to benefit another.

FRY, L.J., said, at p. 872:

It was held in *Re Goldsmid, Ex p. Taylor* (2) that a payment, in order to amount to a fraudulent preference, must be made with a view of giving a preference to the creditor to whom it was made.

In that case, the claim to repayment was made against the creditor who had been paid. In *Re Warren, Ex p. Trustee* (3), an attempt was made to recover from the sureties themselves, but it was held, upon the authority of *Re Mills* (1), that the claim was misconceived. In both these cases, the sureties were under a personal liability.

It was held by FARWELL, J., in the present case that the words "any surety or guarantor for the debt due to such creditor" upon their true construction extend only to cases which, in his view, are cases of suretyship or guarantee strictly so called—namely, cases where a personal liability is undertaken—and do not include the case of a person who, without incurring personal liability, charges his property by way of security for another's debt.

After considerable hesitation, I have come to the conclusion that the judge has placed too narrow a construction upon the words in question. It is, I think, true to say that by a contract of suretyship or guarantee, which is one of the most familiar types of commercial contract, is generally meant a contract by which personal responsibility for the debt is assumed. The earliest definition of guarantee which I have been able to discover in any legal work is contained in FELL'S TREATISE ON THE LAW OF MERCANTILE GUARANTIES AND OF PRINCIPAL AND SURETY IN GENERAL, 2nd Edn., published in 1820. A guarantee is there defined as follows, at p. 1:

A guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance.

It was enforceable by a special action on the case (p. 31). DE COLYAR ON GUARANTEES, 3rd Edn., p. 1, defines a guarantee as follows:

A guarantee is a collateral engagement to answer for the debt default or miscarriage of another person.

In ROWLATT ON PRINCIPAL AND SURETY, 2nd Edn., p. 1, the definition of a surety is:

one who contracts with an actual or possible creditor of another to be responsible

to him by way of security, in addition to that other, for the whole or part of the debt.

In SMITH'S MERCANTILE LAW, 13th Edn., p. 546, a guarantee is defined as :

a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance.

In HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 16, p. 3, a guarantee is defined as :

an accessory contract, whereby the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriages of another person, whose primary liability to the promisee must exist or be contemplated.

All these definitions (with the possible exception of that quoted from ROWLATT ON PRINCIPAL AND SURETY) appear to postulate the existence of a personal liability of the surety or guarantor in respect of the matter guaranteed. No authority was cited to us which supports the proposition

that the words surety or guarantor are, according to their true meaning, limited to cases where a personal liability is assumed, and the question which arises in the present case is whether or not that proposition is correct. In considering this question, it is, of course, important not to be misled by the fact that certain relationships involve the application

of equitable principles similar to those which apply in the case of sureties. Their existence is recognised in the Bankruptcy Act, 1914, itself, for in sect. 28 (4) it is provided that an order of discharge "shall not release any person who was surety or in the nature of a surety" for the bankrupt.

Such relationships are sometimes loosely referred to as cases of suretyship.

For example, in the case of a bill accepted for value, the relationship between drawer and indorsers, on the one hand, and the acceptor, on the other, is referred to as one of suretyship by COCKBURN, C.J., and LUSH and QUAIN, JJ., in *Rouquette v. Overmann* (4), at pp. 536, 537.

We have the authority of the House of Lords for saying that this relationship is not one of suretyship, although it is analogous thereto : *Duncan, Fox & Co. v. North & South Wales Bank* (5), per LORD SELBORNE, L.C., at pp. 11, 13, 14—quoting LORD ELDON, L.C.—and per LORD BLACKBURN, at p. 19.

Nothing that I say must be taken as expressing the view that analogous relationships of this kind fall within the words now under consideration.

I base my decision upon the view that, upon the assumed facts of the present case, the depositors were, at the relevant date, sureties for the debt in the true sense. It appears to me that the assumption of personal liability is not a necessary element in suretyship. "Surety" and

"security" are in origin the same, and a person who provides a pledge or security for the performance of another's obligation is, I think, making himself, by means of that pledge or security, a surety for that other, just as much as if he pledges his personal credit. This view accords with the language used in a number of authorities cited to us but not cited to the judge. I need refer to only two. In *Re Westzinthaus* (6),

DENMAN, C.J., in delivering the judgment of the Court of Queen's Bench, referred to the unpaid shipper of goods for which the bill of lading had been indorsed to, and deposited with, a lender by the consignee, as having "by means of his goods become a surety." In *Perry v. National Provincial Bank of England* (7), a person who, without entering into any covenant to pay the debt, mortgaged his property as security for the debt of others, was referred to in all the judgments of the Court of Appeal (SIR H. H. COZENS-HARDY, M.R., and FLETCHER MOULTON and BUCKLEY, L.J.J.) as a surety. Reference was also made to ROWLATT ON PRINCIPAL AND SURETY, 2nd Edn., p. 8, where it is stated that: a person may become a surety as well by pledging, mortgaging or charging his property for the debt of another as by pledging his personal credit.

The judge was influenced by the view which he held, that the creditor who, on receiving payment, had handed back the deposited security would be left without a remedy against the depositor. I do not think it necessary to go into this question, but it must not be taken from this that I agree with the view of the judge on this point. If, and when, it arises for decision, the question whether or not the delivery of the security to the depositor was made under a fundamental mistake of fact will have to be considered. I express no opinion on this matter, but it is right to point out that, even if the view of the judge is correct, a surety who, in addition to undertaking a personal liability, charges his property as security will be entitled to keep the security as against the creditor who has been compelled to refund. The appeals must be allowed with costs, and the motions must go back to the Chancery Division for hearing.

CLAUSON, L.J.: At the conclusion of the arguments in the present case, I had, with some reluctance, formed the opinion that the judgment of FARWELL, J., was correct, and that the court must treat itself as bound to construe the words "surety" or "guarantor" in a narrow sense, so as to exclude a person who has entered into no general personal obligation, but has merely deposited defined property as a pledge, without incurring further liability. My reluctance arose from an appreciation that there appears to be no reason in principle for applying, in regard to sect. 44 of the Act, one rule to a person who is under a general personal obligation, and another rule to a person who has placed himself under an obligation limited in its execution to a particular piece of property. I felt, however, driven to the narrower construction of the words by what seemed to me to be the *prima facie* meaning of the phrase "surety or guarantor" as shown by the textbook and dictionary definitions.

I have, however, since had the advantage of studying the judgment which is about to be delivered by LUXMOORE, J. His researches satisfy me that there is no reason to believe that in its inception the idea of suretyship necessarily involved the idea of the surety making himself generally liable in person and property for the satisfaction of the obliga-

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tion he undertook. His obligation in its inception seems to have been limited to the pledge deposited or indicated. In the gradual development of suretyship, the obligee, as one would expect, would call for a simpler and wider obligation on the part of the surety—namely, the obligation to satisfy the principal debt to the full by his person or property, without regard to the value of the pledge or gage—and more and more the delivery or indication of a particular piece of property as a pledge tended to become a form. If this be a correct account of the development of the law of suretyship, it is quite intelligible that the terms surety and guarantor should become associated mainly with cases where the sanction for the obligation of the surety or guarantor was not limited to the pledge, but consisted of the surety's liability to answer his obligation in person or in any property available for execution. However, it would remain that an obligation limited to the thing pledged would still be an obligation of suretyship or guarantee, though the limitation would tend to be exceptional. In comparatively modern commercial practice, the pledge (not, as a rule, of hawks or similar chattels, but more commonly of documents of title to choses in action) has again become common practice, often, for obvious reasons, divorced from any wider obligation to be answered in person or in other property available for execution. These considerations have satisfied me that it would be unsound to treat the phrase "surety or guarantor" as necessarily connoting a personal liability, and as failing to cover the very case on which the whole conception of suretyship and guarantee appears as a matter of history to be founded, of a person who has provided a pledge without undertaking liability beyond the pledge. For these reasons I am in agreement with the order as stated by SIR WILFRID GREENE, M.R.

LUXMOORE, J.: These appeals are made by the trustee in bankruptcy of one Morris Conley from two orders made by FARWELL, J., on Nov. 27, 1937. The orders were made on motions whereby the trustee sought to recover from Barclays Bank, Lloyds Bank, and the mother and wife of the bankrupt, all of whom were respondents to one or other of the motions, and are respondents to one or other of these appeals, certain moneys in respect of payments made by the bankrupt into his current accounts with the respective banks within three months of his bankruptcy.

The foundation of the trustee's claim is that these payments were made by the bankrupt for the purpose of preferring his mother and wife, and are void under the Bankruptcy Act, 1914, s. 44. The mother and wife respectively had deposited sums of War Loan with each of the banks by way of collateral security for the bankrupt's overdrafts, the deposit in each case being accompanied by a memorandum signed by the mother or wife, as the case might be, but neither the mother nor the wife entered into any express covenant to repay any part of any overdraft. The

trustee alleged that the bankrupt, on the eve of his bankruptcy, and well-knowing that it was inevitable, obtained by improper means sums of cash, which he paid into his accounts at one or other of the banks, in order to put those accounts in credit, and to enable his mother and wife to recall, as they in fact did, the securities they had respectively deposited.

FARWELL, J., at the request of the parties, and in order to relieve them of the expense of a hearing which would necessarily be prolonged, owing to the involved nature of the bankrupt's dealings, agreed to dispose of the motions on the basis that the facts on which the trustee relied should be assumed to have been proved, and to determine whether, on those assumptions, the respondents to the motions, or any of them, were in law liable for all or any of the sums claimed.

The judge stated in his judgment the facts which he was asked to assume, and held, on the footing that those facts had been established, that the claim of the trustee in bankruptcy failed against each of the respondents. The basis of the decision is that neither the mother nor the wife of the bankrupt was, on the true construction of the Bankruptcy Act, 1914, s. 44, a surety or guarantor of the bankrupt, because neither of them was under any personal liability to the banks, or either of them, in respect of the bankrupt's overdrafts. The trustee in bankruptcy has appealed against the decisions of the judge, and, although at one time during the hearing we were inclined to the view that it would be desirable to have the actual facts ascertained, we agreed, at the urgent request of counsel for all parties, to deal with the appeals on the basis adopted by FARWELL, J., because we were told that our decision would in all probability put an end to the litigation. It is, I think, unnecessary to restate the facts set out in the judgment of FARWELL, J.

The trustee in bankruptcy argued before this court (i) that the mother and wife are under personal liability to the banks in respect of the overdrafts, and (ii) assuming that the first argument failed, that a person who deposits collateral security in respect of the debt of a third party is, on the true construction of the Bankruptcy Act, 1914, s. 44, a surety or guarantor of that debt to the extent of the security deposited. The first point was not, I think, argued in the court below. It was admitted before us that, if the court should be of opinion that either of the trustee's contentions is correct, then it would be proper to remit the motions to the judge for further hearing with the material witnesses, but, if the court should be of opinion that neither contention is correct, then both appeals must fail.

So far as the first point is concerned, the respective contracts between the depositors and the banks are in each case regulated by a written document. In none of these documents is there any express provision that the depositor is to be under any personal liability, and I am unable to appreciate on what ground it can properly be said that personal liability is to be implied, and what is to be its limit. I am satisfied from an examination of the material documents that the intention of the

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parties in each case was to limit the depositor's liability to the amount of the security deposited, and to exclude any personal liability on the part of the depositor. In my judgment, there is no substance in the first point.

The second point, therefore, falls to be determined. It is one of considerable difficulty, although its solution involves the construction of the apparently simple phrase in the Bankruptcy Act, 1914, s. 44, "any surety or guarantor for the debt due to" a creditor. It is, I think, advisable in the first instance to ascertain what is the *prima facie* meaning of the words "surety" and "guarantor," and then to consider whether there is anything in the Act, or in the circumstances in which it was passed, to prevent the application of the *prima facie* meaning to the words in question. The word "surety" in its personal sense is defined in the Oxford Dictionary as meaning:

a person who undertakes some specific responsibility on behalf of another who remains primarily liable; one who makes himself liable for the default or miscarriage of another, or for the performance of some act on his part (for example, payment of a debt, appearance in court for trial, etc.)

In its impersonal sense, it is defined as:

a formal engagement entered into, a pledge, bond, guarantee, or security given for the fulfilment of an undertaking.

The word "guarantor" is defined in the same work as "one who makes or gives a guaranty or security," while "guaranty" in its impersonal sense is there defined as:

the action or act of securing, warranting or guaranteeing; security; warranty; specifically a written undertaking made by a person called a guarantor to be answerable for the payment of a debt or the performance of an obligation by another person who is in the first instance liable to such payment or obligation.

It would seem plain that the dictionary definition of the word "guarantor" is wide enough to cover a person who, without entering into any personal obligation, gives or deposits property belonging to him as security for the performance of some act or payment by a third party, and that the definition of "surety" is at least wide enough to cover a person who promises to deposit property belonging to him to answer for the default or miscarriage of another, without entering into any other personal obligation, and if it is wide enough for this purpose, it is difficult to appreciate why it should cease to be applicable when the agreement to give the security has been performed by the transfer or deposit. If the dictionary definitions are applicable, I should have no hesitation in holding, in the present case, that the mother and wife fall within the description "surety or guarantor" for the debts due from the bankrupt to the bank. It is argued, however, that the words have in law a restricted meaning, or, alternatively, that their meaning is restricted by the Act itself, when the circumstances in which it was passed are considered. The foundation of the argument that the words have in law a restricted meaning must of necessity be the existence of such a

TAB 2

CHAPTER 154

STATUTE OF FRAUDS

LIST OF AUTHORISED PAGES

1	LRO 1/2002
2	Blank
3 – 5	LRO 1/2002

ARRANGEMENT OF SECTIONS

SECTION

Short title.

1. Parol leases and interests of freehold, etc., to have the force of estates at will only.
2. Except leases not exceeding three years, etc.
3. No leases or estates of freehold or copyhold, etc., to be granted or surrendered but by writing signed.
4. No action against executors, etc., upon a special promise, or upon any agreement, or contract for sale of lands, etc., unless agreement, etc., be in writing, and signed.
7. Declarations or creations of trusts of lands to be in writing signed.
8. Proviso for trusts arising, transferred or extinguished by implication of law.
9. Assignments of trusts shall be in writing.
10. Trust shall be assets by descent.
11. But heir shall not by reason thereof become chargeable of his own estate.
17. The day of enrolment of recognisances to be set down; and lands in the hands of purchasers bound from that time only.
22. Proviso for soldiers and mariners wills.
24.

CHAPTER 154

STATUTE OF FRAUDS

An Act for prevention of frauds and perjuries.

[This Act may be cited as the Statute of Frauds.]

29 Cha. 2 c. 3
extended by 2 of
1799
[A.D. 1677]
3 of 2002
Short title.

1. All leases estates interests of freehold or termes of yeares or any uncertaine interest of in to or out of any messuages mannours lands tenements or hereditaments made or created by livery and seisin onely or by parole and not putt in writeing and signed by the parties soe makeing or creating the same or their agents thereunto lawfully authorised by writeing, shall have the force and effect of leases or estates at will onely and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for makeing any such parole leases or estates or any former law or usage to the contrary notwithstanding.

Parol leases and interests of freehold, etc., to have the force of estates at will only.

2. Except nevertheless all leases not exceeding the terme of three yeares from the makeing thereof whereupon the rent reserved to the landlord dureing such terme shall amount unto two third parts at the least of the full improved value of the thing demised.

Except leases not exceeding three years, etc.

3. And moreover that noe leases estates or interests either of freehold or terms of yeares or any uncertaine interest of in to or out of any messuages lands tenements or hereditaments shall at any time be assigned granted or surrendered unlesse it be by deed or note in writeing signed by the party soe assigning granting or surrendring the same or their agents thereunto lawfully authorised by writeing or by act and operation of law.

No leases or estates of freehold or copyhold, etc., to be granted or surrendered but by writing signed.

4. Noe action shall be brought whereby to charge any executor or administrator upon any speciall promise to answere damages out of his owne estate or whereby to charge the defendant upon any speciall promise to answere 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

No action against executors, etc., upon a special promise, or upon any agreement, or contract for sale of lands, etc., unless agreement, etc., be in writing, and signed.

concerning them or upon any agreement that is not to be performed within the space of one yeare from the makeing thereof unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorised.

Declarations or
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trusts of lands to
be in writing
signed.

7. All declarations or creations of trusts or confidences of any lands tenements or hereditaments shall be manifested and proved by some writeing signed by the partie who is by law enabled to declare such trust or by his last will in writeing or else they shall be utterly void and of none effect.

Proviso for trusts
arising,
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8. Provided alwayes that where any conveyance shall bee made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or bee transferred or extinguished by an act or operation of law then and in every such case such trust or confidence shall be of the like force and effect as the same would have beene if this statute had not beene made. Any thing herein before contained to the contrary notwithstanding.

Assignments of
trusts shall be in
writing.

9. All grants and assignments of any trust or confidence shall likewise be in writeing signed by the partie granting or assigning the same [or¹] by such last will or devise or else shall likewise be utterly void and of none effect.

Trust shall be
assets by descent.

10. And if any *cestuy que* trust hereafter shall dye leaveing a trust in fee simple to descend to his heire, there, and in every such case such trust shall be deemed and taken and is hereby declared to be assetts by descent and the heire shall be lyable to and chargeable with the obligation of his auncestors for and by reason of such assetts as fully and amply as he might or ought to have beene if the estate in law had descended to him in possession in like manner as the trust descended, any law custome or usage to the contrary in any wise notwithstanding.

¹ interlined on the roll.

11. Provided alwayes that noe heire that shall become chargeable by reason of any estate or trust made assetts in his hands by this Law shall by reason of any kinde of plea or confession of the action or suffering judgment by nient dedire or any other matter bee chargeable to pay the condemnation out of his owne estate but execution shall be sued of the whole estate soe made assetts in his hands by descent in whose hands soever it shall come after the writt purchased in the same manner as it is to be at and by the common law where the heire at law pleading a true plea judgement is prayed against him thereupon. Any thing in this present Act contained to the contrary notwithstanding.

But heir shall not by reason thereof become chargeable of his own estate.

17. And bee it further enacted by the authority aforesaid that the day of the moneth and yeare of the enrollment of the recognisances shall be sett downe in the margent of the roll where the said recognisances are enrolled, and that noe recognisance shall binde any lands tenements or hereditaments in the hands of any purchasor *bona fide* and for valueable consideration but from the time of such enrollment, any law usage or course of any court to the contrary in any wise notwithstanding.

The day of enrolment of recognisances to be set down; and lands in the hands of purchasers bound from that time only.

22. Provided alwayes that notwithstanding this Act any soldier being in actuall military service or any mariner or seaman being at sea may dispose of his movables, wages and personall estate as he or they might have done before the makeing of this Act.

Proviso for soldiers and mariners wills.

²24.

Husbands not compellable to make distribution of the personal estates of their wives
3 of 2002, s. 29.

² Section 24 has been repealed by section 29 of Act 3 of 2002 only in so far as it applies to deaths occurring after 1st February, 2002. Section 24 originally read as follows: "And for the explaining of one Act of this present Parlyament intituled An Act for the better settleing of intestates estates bee it declared by the authority aforesaid that neither the said Act nor any thing therein contained shall be construed to extend to the estates of *femme-coverts* that shall dye intestate, but that their husbands may demand and shall have administration of their rights credits and other personall estates and recover and enjoy the same as they might have done before the makeing of the said Act".

TAB 3

Case No: A3/2011/0440 and 0438

Neutral Citation Number: [2012] EWCA Civ 265

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION, COMMERCIAL COURT

Mr Justice Christopher Clarke

[2011] EWHC 56 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2012

Before :

LORD JUSTICE RIX

LORD JUSTICE TOMLINSON

and

SIR MARK WALLER

Between :

Golden Ocean Group Limited

- and -

(1) Salgaocar Mining Industries PVT Ltd

(2) Mr Anil V Salgaocar

Respondent

Appellants

Timothy Young QC and Daniel Bovensiepen (instructed by Ince & Co LLP) for the
Respondent

(1) Dominic Kendrick QC and Peter MacDonald-Eggers QC (instructed by MFB
Solicitors) for Appellant (1)

(2) Charles Kimmins QC and Luke Pearce (instructed by Bentley, Stokes & Lowless,
Solicitors) for Appellant (2)

Hearing dates : 7, 8, and 9 November 2011

Judgment

Lord Justice Tomlinson :

Introduction

1. The principal question which falls for decision in this case is whether a contract of guarantee is enforceable where contained not in a single document signed by the guarantor but in a series of documents duly authenticated by the signature of the guarantor. It is common in commercial transactions for a contract of guarantee to be contained in a single document, and it is no doubt convenient that a guarantee should be evidenced in this way. The question however which arises in this appeal is whether it must. Christopher Clarke J, in the Commercial Court, held that it need not – [2011] EWHC 56 (Comm); [2011] 1 WLR 2575. He held that an enforceable contract of guarantee may indeed be found in a properly authenticated series of documents. His decision is said to have been unorthodox and contrary to the understanding of commercial men. It is said to have caused alarm.
2. The Statute of Frauds 1677 (“the Statute”) was “An Act for prevention of Frauds and Perjuries. For prevention of any fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury”. Section 4 thereof prohibited the bringing of actions in respect of certain transactions “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”. Originally section 4 applied to five classes of transaction;
 - i) An agreement by an executor or administrator to pay damages out of his own estate;
 - ii) A contract of guarantee;
 - iii) An agreement made upon consideration of marriage;
 - iv) A contract for the sale or other disposition of an interest in land; and
 - v) A contract that is not to be performed within the space of one year from the making thereof.

The purpose of the Statute was, according to Lord Hoffmann, *Actionstrength Ltd v International Glass Engineering SPA* [2003] 2 AC 541 at 549 “. . . 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 must have decided, thought Lord Hoffmann, that there had been “too many cases in which the wrong side had been believed.” Lord Hoffmann also points out, in the same passage, that:-

“It is quite true . . . that the system of civil procedure in 1677 was not very well adapted to discovering the truth. For one thing, the parties to the action were not competent witnesses. But the question of whether the Act should be preserved in its application to guarantees was considered in 1953 by the Law Reform Committee (First Report, Statute of Frauds and Section

4 of the Sale of Goods Act 1893 (Cmd 8809)) and the recommendation of a very strong committee was to keep it.”

Lord Bingham in his speech in *Actionstrength* said that section 4 was enacted “to address a mischief facilitated, it seems, by the procedural deficiencies of the day . . . the calling of perjured evidence to prove spurious agreements said to have been made orally. The solution applied to the five classes of contract specified in section 4 was to require, as a condition of enforceability, some written memorandum or note of the agreement signed by the party to be charged under the agreement or his authorised agent” – see at 544-545.

3. History does not relate why these five classes of transaction were singled out for special treatment. The “very strong” Law Reform Committee, presided over by Jenkins LJ, reported to the Lord Chancellor in 1953 that the field had been “arbitrarily chosen”. However that may be, section 4 of the Statute in its modern form survives only in respect of contracts of guarantee, although special and now different provision has been made for contracts for the sale or other dispositions of an interest in land – see section 40 of the Law of Property Act 1925 and section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.
4. Thus in its modern form section 4 of the Statute provides:-

“No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriage of another person 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.”

5. The Appellants are anxious to stress that section 4 of the Statute is no dusty relic. Its abolition, or so much thereof as by then survived¹, had been recommended in 1937 by the Law Revision Committee in its Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration (Cmd 5549) paragraph 16. But on that earlier occasion a minority headed by Goddard J, who as Lord Goddard CJ was a member of the later Law Reform Committee, had favoured its retention. The reasons of the minority, as summarised in *Actionstrength*, at page 546, were:-

“(1) that there was a real danger of inexperienced people being led into undertaking obligations which they did not fully understand, and that opportunities would be given to the unscrupulous to assert that credit was given on the faith of a guarantee which the alleged surety had had no intention of giving;

(2) that a guarantee was a special class of contract, being generally one-sided and disinterested as far as the surety was

¹ Special provision had by then been made for the sale or other disposition of an interest in land, where in any event the doctrine of part performance had to some extent mitigated the mischief to which the Statute had given rise – the defeat of commercial expectations by the lack of a written memorandum or note of an oral agreement – see *Actionstrength*, per Lord Bingham at page 545.

concerned, and the necessity of writing would give the proposed surety an opportunity for thought;

(3) that the requirement of writing would ensure that the terms of the guarantee were settled and recorded;

(4) that Parliament had imposed a requirement of writing in other contractual contexts;

(5) that judges and juries were not infallible on questions of fact, and in the vast majority of cases the surety was getting nothing out of the bargain;

(6) that it was desirable to protect the small man; and

(7) that the necessity for guarantees to be in writing was generally understood.”

The Law Reform Committee agreed in 1953 that writing should continue to be required for contracts of guarantee. It recommended repeal of the section so far as concerned its application to the other three remaining classes of contract and the recommendation was adopted by enactment of the Law Reform (Enforcement of Contracts) Act 1954. Section 40 of the Law of Property Act 1925 has now been superseded by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which requires that contracts for the sale or other disposition of an interest in land must be made in writing. A memorandum or note of an agreement is no longer sufficient.

6. Lord Hoffmann points out in *Actionstrength* at paragraph 20 of his speech:-

“The terms of the statute 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.”

The dispute

7. The context in which the application of section 4 falls to be considered on this appeal is very familiar. It is the conclusion of a long term, ten year, time charter of a valuable vessel, a newbuilding Capesize bulker of 176,000 tonnes deadweight. The owners, Golden Ocean Group Ltd, hereinafter (“Golden Ocean”) were negotiating for the hire of their vessel to a substantial conglomerate of industries, the Indian company Salgaocar Mining Industries Pvt Ltd, to which I shall refer hereafter as (“SMI”). SMI is based in Goa. Like many other similar conglomerates SMI has a chartering arm,

“otherwise terms as per Channel Navigator Cp dtd 21.4.2005
with logical alterations and the following amendments . . .”

There then followed a further list of amendments to both the main body of the charterparty, which was on the New York Produce Exchange form, and to the numbered rider clauses. The charterparty, if there was one, remained in precisely this form, subject only to the agreement to add the clause which was agreed on 21 February concerning charterers’ access to dry dock, damage and Port State Control reports and which it was further agreed belonged more appropriately in the charterparty than in the MOA.

21. The Statute contains no express indication that the agreement in writing required to satisfy its terms must be in one or even a limited number of documents. It is no doubt true that in 1677 a signed written agreement would often and perhaps always be contained in a single document, but Mr Kendrick very sensibly did not suggest that that provides a pointer to how the Statute should today be construed. However his argument did, as it seems to me, in all its elegant iterations, always come back to the point that an instrument of that sort would accord with most people’s understanding of what is meant by a contract in writing. That of course may be so, but we are immediately concerned with the understanding of professionals in the shipping market. Moreover the purpose of the requirement that the agreement must be both in writing and signed by the guarantor is not so much to ensure that the documentation is economical but rather to ensure that a person is not held liable as guarantor on the basis of an oral utterance which is ill-considered, ambiguous or even completely fictitious – see per Lord Hoffmann in *Actionstrength* at page 549 E. A combination of writing and an acknowledgement by signature of the solemnity of the undertaking has been chosen to eliminate that mischief. I see nothing in either the mischief sought to be eliminated or the means adopted to achieve that end which requires a limitation upon the number of documents in which the writing is to be found. At paragraph 5 above I set out Lord Bingham’s summary of the reasons which in 1937 informed the recommendation of the minority of the Law Revision Committee led by Goddard J to retain the requirements of section 4 of the Statute for guarantees. Again, I see nothing in those reasons which militates in favour of a limitation upon the extent of the documentation in which an enforceable guarantee may be found, save perhaps on grounds of convenience.
22. The conclusion of commercial contracts, particularly charterparties, by an exchange of emails, once telexes or faxes, in which the terms agreed early on are not repeated verbatim later in the exchanges, is entirely commonplace. It causes no difficulty whatever in the parties knowing at exactly what point they have undertaken a binding obligation and upon what terms. As Mr Young pointed out, it is often a matter of happenstance, or, metaphorically, the pressing of a button, whether a sequence of emails manifests itself in a single document as a thread or string of emails or in a series of individual documents. We were much pressed by Mr Kendrick with the prospect, which he invited us to regard as inimical to the purpose of the Statute, of it being satisfied by an educated trawl through a lever arch file of email exchanges. This was always a forensic exaggeration, but on the facts of this case the spectre invoked by Mr Kendrick is simply absent. All of the terms of the charterparty, and of the guarantee, are to be found in the email dated 2 February 2008 but in fact sent by Mr Hindley to Mr Hintz on 4 February 2008. That was subject only to agreeing

TAB 4

THE STATUTE OF FRAUDS IN THE EMAIL AGE: *DRUET V GIROUARD*

M.H. Ogilvie*

Introduction

It is still too early to compose the final obituary for the *Statute of Frauds*.¹ Notwithstanding its repeal in whole or in part in some common law jurisdictions, this late 17th century legislation has once again proven its adaptability, this time to the age of the Internet, and to the making of contracts for the sale of land by email communications. Commercial parties have operated for much of the last decade on the assumption that enforceable agreements relating to land can be made by email. However, several recent English and Canadian decisions demonstrate that there are legal issues which must be resolved when using email to make contracts for the sale of an interest in land or for guarantees. *Druet v Girouard*,² in particular is a salutary reminder that the underlying reasons for the *Statute of Frauds* continue, *mutatis mutandis*, to justify why certain types of agreements ought to be in writing and authenticated by the signature of the person against whom they are to be enforced. This commentary will focus on these cases within the larger context of the reasons for the *Statute of Frauds* and suggest that those reasons continue to resonate even in the modern Internet age.

Some Historical Background

When first enacted in 1677, the *Statute of Frauds* applied to six types of contracts. Section 4 covered contracts by executors or administrators of estates to cover damages out of their own estates, contracts in consideration of marriage, contracts to be performed more than a year after their formation, contracts for the disposition of interests in land, and contracts of guarantee. Section 17 covered contracts for the sale of goods with a value of at least £10. The preamble to the Act proclaimed its purpose to be the “prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury.” The reason these were problematic is explained partly by then recent changes in the substantive law of contract and the lingering of older rules relating to evidence. The medieval action in covenant had required a sealed writing for enforceability but after *Slade’s Case*³ in 1602, the King’s Bench permitted actions in assumpsit to be enforced. However, two

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¹ *Statute of Frauds*, (1677), 29 Car II, c 3 [*Frauds*].

² *Druet v Girouard*, 2012 NBCA 40, 386 NBR (2d) 281 [*Druet*].

³ *Slade v Morley*, (1602), 4 Co Rep 91a, 76 ER 1074 (KB).

procedural rules made the enforcement of oral agreements difficult. Neither parties to the action nor their spouses could give evidence, even when the action was to enforce an oral promise against a party, and juries were still permitted to decide cases on the basis of their own knowledge. The possibility of dishonest witnesses being used to perpetrate fraud was considerable. In light of the extreme litigiousness following the turbulent period of the English Civil War (1641-1649) and the Commonwealth (1649-1660), Parliament enacted the *Statute of Frauds*, the first statute ever to deal with contract, to provide greater certainty for agreements relating to particular economically significant categories of contracts, and to restore the older requirement of writing for enforceability.

Some 70 years ago, Professor Fuller suggested that the writing requirement served three main functions: (i) an evidentiary function in relation to significant transactions; (ii) a cautionary function to warn against precipitous or ill-considered agreements; and (iii) a channelling function to signal that a contract has now resulted from the negotiations.⁴ While it may be debated whether the Act fulfils each of these functions completely, it cannot be doubted that it was intended to do so. The Act has therefore been subjected to a number of criticisms over the three centuries of its operation, these include: (i) the use of the Act as a defence for non-compliance with the writing and signature requirements to avoid liability when there was a promise to enter an agreement; (ii) the multiple problems of statutory interpretation which have resulted in thousands of cases over the centuries; (iii) the disappearance of the prevailing legal and social conditions of the 17th century, such as the procedural rules stated above, the subsequent admission of parol evidence to prove oral agreements, the increasing experience and skill of courts in adjudicating large financial transactions, and more stable socio-economic conditions in comparison to 17th century England; (iv) the growing divergence over time with actual contract making by oral agreement even for high value transactions; (v) the ambiguous nature of an unenforceable agreement that is still valid, which facilitated the equitable part performance exception undercutting the writing requirements; and (vi) the doubts that the Act ever served cautionary or channelling functions because it requires only a note or memorandum, and not a full contract in writing.⁵

⁴ Lon Fuller, "Consideration and Form" (1941) 41:5 Colum L Rev 799.

⁵ This list reflects the most widespread criticisms drawn from the many law reform reports on the Statute of Frauds over the years. In England: Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)*, Cmnd 5447 (1937); Law Reform Committee, *The Statute of Frauds and Section 4 of the Sale of Goods Act*, Cmnd 8809 (1953); Law Commission, *Formalities for the Sale etc. of Land*, Law Com No 164 (1987). In Canada: Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (1977); Alberta Institute of Law Research and Reform, Background Paper No 12, *Statute of Frauds* (1979) and Report No 44 *The Statute of Frauds and Related Legislation* (1985); Manitoba Law Reform Commission, Report No 41, *Report on the Statute of Frauds* (1980); Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987), ch 5; Law Reform Commission of Saskatchewan, *The Statute of Frauds* (1996) [Law Revision Committee].

In England, the *Statute of Frauds* has been subject to further additions, deletions and statutory reform over the centuries. In 1828, *Lord Tenterden's Act*⁶ amended the *Statute of Frauds* by adding two new categories that were required to be in writing: ratification of infants' contracts on attaining the age of majority and representations as to the credit worthiness of another for which the representor was liable; and by adding sales of future goods to the categories required to be in writing. In 1856, the *Mercantile Law Amendment Act*⁷ clarified that in contracts of guarantee, the consideration for the guarantor's promise did not have to be included in writing. In 1893, the *Sale of Goods Act*⁸ (SOGA) removed the written requirement from s. 4 of the *Statute of Frauds* into SOGA, and in 1925, contracts for the sale of interests in land were removed from the *Law of Property Act*.⁹ In 1954, the *Law Reform (Enforcement of Contracts) Act*,¹⁰ repealed the SOGA provisions and the *Statute of Frauds* provisions relating to executors, marriage contracts and contracts to be performed after a year. In 1989 the *Law Reform (Miscellaneous Provisions) Act*¹¹ superseded the *Law of Property Act*, 1925, but retained the written requirement for transactions relating to land. The 1987 *Law Commission Report* preceding the 1989 changes expressly rejected the abolition of the written requirement for contracts relating to land because of the need for certainty and protection of those making what are likely to be the most valuable transactions they will ever make.¹² Indeed, the 1989 changes are more rigorous than the original *Statute of Frauds*; s. 2(1) states that such contracts "can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each." Thus in England, it is now necessary to have the entire contract in one document or in exchanged documents and signed by both parties. Failure to comply renders the agreement void rather than unenforceable.¹³ The operation of part performance is effectively eliminated, although contracts can still be rectified or subject to properly authenticated collateral agreements, and restitution remains as a remedy for the recovery of a deposit on the ground of total failure of consideration. Briefly, in England, of the original categories of the *Statute of Frauds*, 1677, only guarantees remain enforceable if there is a signed note or memorandum by the party to be charged, while contracts for an interest in land must now comply with the 1989 Act.¹⁴

⁶ *Lord Tenterden's Act*, (1828), 9 Geo 4, s 14, ss 5-6; 17.

⁷ *Mercantile Law Amendment Act* (1856), 19 & 20 Vict, c 97, s 3.

⁸ *Sale of Goods Act*, (1893), 56 & 57 Vict, c 71, s 24.

⁹ *Law of Property Act*, (1925), 15 & 16 Geo 5, c 20, s 40.

¹⁰ *Law Reform (Enforcement of Contracts) Act*, (1954), 2 & 3 Eliz 2, c 34.

¹¹ *Law Reform (Miscellaneous Provisions) Act*, (1989) c 34 [Miscellaneous Provisions].

¹² Law Revision Committee, *supra* note 5.

¹³ *Ibid* at s 2(1).

¹⁴ *Miscellaneous Provisions*, *supra* note 11.

In Canada, the *Statute of Frauds* was originally in force in the common law jurisdictions by virtue of enactment prior to the specific provincial reception date for that jurisdiction. Four provinces have enacted their own versions of the 1989 Act;¹⁵ one has since abolished it but retained the formal written requirements for transactions relating to land,¹⁶ and one has since abolished it completely.¹⁷ In all provinces, provisions relating to the sale of goods have been transferred to provincial consumer protection legislation,¹⁸ but the formal written requirements remain in most provinces for transactions relating to land.

The relevance of the question of whether email is an appropriate means for making contracts relating to land is not limited to real property transactions. Other categories of agreements have been subsequently required by legislation to be evidenced in writing and signed, including various types of consumer transactions,¹⁹ family law agreements,²⁰ and agreements to retain real estate agents.²¹ Jurisprudence on contracting by email may potentially be important for those other categories depending on the precise wording of the legislation at issue.

The provisions of the *Statute of Frauds* at issue in the email cases are those related to the two formal requirements for compliance, a note or memorandum and signature, “unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.”²² The case-law on these provisions demonstrates that the courts take a literal approach to their interpretation.²³

With respect to the requirement for a note or memorandum, the courts have found that the entire contract is not required; only the essential terms of a contract for

¹⁵ *Statute of Frauds*, RSO 1990, c S 19, as amended SO 1994, c 442; *Statute of Frauds*, RSNS 1989, c 442; *Statute of Frauds*, RSREI 1988, c S-6; *Statute of Frauds*, RSNB 1993, c S-14.

¹⁶ See now: *Law and Equity Act*, RSBC 1996, c 253, s 59.

¹⁷ *An Act to Repeal the Statute of Frauds*, CCSM, c F-158.

¹⁸ See, for example, *Consumer Protection Act*, SO 2002, c 30.

¹⁹ *Ibid.*

²⁰ See, for example, *Family Law Act*, RSO, c F -33, s 55 [*Family Law Act*].

²¹ See for example, *Real Estate Act*, RSBC 1996, c 397.

²² *Frauds*, *supra* note 1 at c 3 s 4.

²³ Since this paper presumes the previous settled case law on the meaning of the writing requirements, a brief resume of that law follows based on the extensively footnoted textbook discussions. Interested readers should consult the cases found in the following texts: GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 214-221; John D McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at 173-177. Angela Swan, *Canadian Contract Law*, 2d ed (Toronto: Lexis Nexis, 2009) at 335-337; SM Waddams, *The Law of Contracts*, 6th ed (Toronto: Canada Law Book, 2010) at 166-169.

the sale of land: the parties, the price and the property, are required.²⁴ The note need not take any particular form but can be a letter, will, receipt or even instructions to a telegraph clerk. The note need not be deliberately prepared as a memorandum, and a repudiation of liability can constitute sufficient written documentation as can a memorandum made for internal firm purposes. The note does not need to be contemporaneous with the contract; rather, it needs only to be made prior to the commencement of the action. There is no requirement of delivery of the note from one party to the other.

With regard to the signature requirement, the courts have found that only the party being sued or its authorized agent needs to sign. The signature can take the form of initials, a written signature, a hand-printed name, or a printed name on letterhead or an invoice. The signature may be placed anywhere on the note and need not be at the bottom of the document provided it authenticates the entire note. The name must be the true name of the party.

Finally, the courts have also permitted joinder of one or more documents to satisfy the requirement of a note containing the essential terms of an agreement relating to land. Parol evidence can be admitted to show a fair and reasonable inference that the documents are connected. Any two or more types of documents can be joined, whether mere notes, letters, an interim agreement, or a deposit receipt.

The significance of the prior case-law on what is necessary to satisfy the formal requirements for the *Statute of Frauds* is readily apparent in relation to email exchanges for the sale of land because not only are those exchanges typically informal but they are also multiple, likely deal with certain terms only, but may not be “signed” in any way contemplated when the *Statute of Frauds* was first enacted, that is, on paper. Nevertheless, the background preparation has already been done by the law on the *Act* to facilitate email into the mechanisms which may comply with the *Act*.

Some Recent Cases

From the earliest email cases, the courts have not hesitated to find that email communications may comply with the *Statute of Frauds*. Difficulties arise however in respect to certain aspects of email, particularly in regard to an intention to contract authentically, signified in writing. The two earliest English cases were concerned with this issue. In *J. Pereira Fernandes SA v Mehta*²⁵, when a company failed to pay for goods, the supplier petitioned for a winding-up, and a director of the company asked an employee to send an email to the supplier’s solicitors requesting an adjournment of

²⁴ *Family Law Act*, *supra* note 20.

²⁵ *J Pereira Fernandes SA v Mehta*, [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 (BAILII)[*J Pereira*].

TAB 5

Saskatchewan Court of Queen's Bench

Ontario Marble Co. v. Creative Memorials Ltd.

1963 CarswellSask 35, 39 D.L.R. (2d) 149, 42 W.W.R. 315

Ontario Marble Company Limited v. Creative Memorial Ltd. et al

Disbery, J.

Judgment: April 18, 1963

Counsel: *L. A. Kyle*, for plaintiff.

E. D. Bayda, for defendants, North West Electric Co. Ltd. and Rosen.

Subject: Corporate and Commercial; Contracts

Corporations --- Contracts by corporations — Corporate seal.

Statute of Frauds --- Compliance with statute — Essential elements — What constitutes — Guarantees.

Companies — Contracts of — Making and Discharge — Manner of — Companies Act, S. 99 (1) (b) — Company Placed in Same Position as Private Person.

Contracts — Memorandum of Guarantee — Statute of Frauds — Appearance of Promisee's Name Expressly or by Implication.

Sec. 99 (1) (b) of *The Companies Act*, RSS, 1953, ch. 124, places a company the same footing as a private person with respect to entering into, variation of and discharge of contracts. *Pyramid Construction v. Feil* (1957) 22 W.W.R. 497, 1957 Can Abr 97, agreed with.

The name of the promisee in a memorandum of a promise to pay the debt of another need not necessarily appear either in the body or in any particular other part of the writing. The requirements of the *Statute of Frauds*, 1677, 29 Car 2, ch. 3, are satisfied if the names of the parties appear upon the face of the memorandum, either expressed or by reasonable construction or by reference to other documents physically or referentially attached thereto. *Vandenbergh v. Spooner* (1865-66) LR 1 Exch 316, at 319, 35 LJ Ex 201, distinguished. *Richard v. Stillwell* (1885) 8 O.R. 511, 11 Can Abr 964; *Freeman v. Freeman* (1891) 7 T.L.R. 431; *McEwan v. Dynon* (1877) 3 Vict LR 271, applied.

Disbery, J. (in part):

1 By par. 6 of the defence, North West asserts that it is not bound by the guarantee because such "was not executed and delivered under the seal of the company." Having regard to *The Companies Act*, RSS, 1953, ch. 124, sec. 99 (1) (b) and to the additional fact that by art. 12 of the articles of association of North West, art. 65 of table A requiring a resolution of the board of directors before the company's seal is affixed to any instrument, is omitted from the articles of North West; this defence fails. In *Pyramid Construction v. Feil* (1957) 22 W.W.R. 497, Riley, J. in considering an identical provision in *The Companies Act*, RSA, 1942, ch. 240 (now RSA, 1955, ch. 53), sec. 121, held that this legislation places a company on the same footing as a private person with respect to entering into, variation of and discharge of contracts. With this view I respectfully agree. When Rosen, who was president, manager and majority shareholder of North West, signed the guarantee his authority to do so is to be readily implied, and the plaintiff was entitled to assume that he had such authority to enter into the guarantee.

- 2 Finally, at the trial I gave leave to the defendants to amend their defence by adding the following as par. 12 thereof:

Alternatively the said purported guarantee is unenforcible in that it does not comply with the *Statute of Frauds* [1677, 29 Car 2, ch. 3].

- 3 Sec. 4 of the *Statute of Frauds* enacts as follows:

... no action shall be brought ... whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person ... 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 authorized.

- 4 Learned counsel for the defendants contends that the guarantee (P. 1) is addressed to "Mr. E. Young" and not to the plaintiff, and that the plaintiff is not named in the body of the letter. The only authority submitted in support was *Vandenbergh v. Spooner* (1866) LR 1 Exch 316, at 319, 35 LJ Ex 201. There the memorandum was held insufficient

inasmuch as the seller's name *as seller* is not mentioned in it, but occurs only as part of the description of the goods.

- 5 The *Vandenbergh* case, *supra*, is described as an "extreme case" by Willes, J., with Byles, J. concurring, in *Newell v. Radford* (1867) LR 3 C.P. 52, 37 LJCP 1, and so it seems to me. In any event it is distinguishable from the present case.

- 6 A memorandum of a promise to pay the debt of another must show who is the promisee as well as the promisor. *Huron (County) v. Kerr* (1868) 15 Gr 265; *White v. Tomalin* (1890) 19 O.R. 513; *A. MacDonald & Co. v. Fletcher* (1915) 22 B.C.R. 298; and 18 *Halsbury*, 3rd ed., p. 434. However, I cannot find in the authorities any requirement that such should appear either in the body or in any other particular part of the writing. The requirements of the statute are satisfied if the names of the parties appear upon the face of the memorandum, either expressed or by reasonable construction or by reference to other documents physically or referentially attached thereto. *Richard v. Stillwell* (1885) 8 O.R. 511; *Freeman v. Freeman* (1891) 7 T.L.R. 431; and *McEwan v. Dynon* (1877) 3 Vict LR 271 (26 *English & Empire Digest*, p. 46).

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TAB 6

1921 CarswellSask 36
Saskatchewan Supreme Court, Trial

Rink v. March

1921 CarswellSask 36, [1921] 1 W.W.R. 919, 14 Sask. L.R. 176

Rink v. March and Donawel

MacDonald, J.

Judgment: January 28, 1921

Counsel: *F.W. Turnbull* and *W.R. Kinsman*, for plaintiff.

W.P. Cumming, for defendant March.

E.S. McQuaid, for defendant Donawel.

Subject: Public; Corporate and Commercial; Contracts

Related Abridgment Classifications

Contracts

XVII Statute of Frauds

XVII.2 Compliance with statute

XVII.2.c Part performance

XVII.2.c.i In sale of land transactions

XVII.2.c.i.B Miscellaneous

Personal property security

IX Security interests in grain

Headnote

Grain Laws --- Security interests in grain — Crop payment sales

Statute of Frauds --- Compliance with statute — Part performance — In sale of land transaction

I. Contract — Sale of Land — Guarantee. II. Sale of Land.

I. Contract — Sale of Land — Guarantee — Statute of Frauds — Application of Doctrine of Part Performance as against Guarantor.

The principle of part performance by which a case is taken out of the operation of *The Statute of Frauds* is not applicable against one who has guaranteed the fulfilment of a contract for purchase of land, though the vendor entered into the contract on the faith of the alleged guarantee and the purchaser has gone into possession of the land. *Huron County v. Kerr*, 15 Gr. 265 disapproved.

II. Sale of Land — Crop Payment Plan — Construction of Interest Clause — Interest Payable Over and above Proceeds of Crop — Effect of Acceleration Clause — Question of Default in Payment — Amount of Crop Grown — Onus of Proof.

An agreement of sale provided for the purchaser each year to seed, harvest and thresh a certain acreage of crop and by December 1 to deliver one-half of the crop to the vendor at the market value, the proceeds to be applied on the purchase-price of the land, and "that interest on that part of the purchase-price which shall from time to time remain unpaid ... shall be paid ... on the first day of December ... during each and every year ... all interest on becoming overdue shall be forthwith treated as purchase money and shall bear interest ... and on default being made in delivery of the crop or payment of interest or taxes or any part thereof, the whole purchase money shall immediately become due and payable." *Held*, interest was payable in each year over and above the proceeds of the half crop to be delivered.

An acceleration clause can be effective under a "crop payment" agreement. (*Pattison v. Behr*, [1920] 1 W.W.R. 417, referred to).

In an action by the vendor for default under such agreement, it appearing that defaults had been made in payment of crop but that the purchaser should be credited with certain sums of money paid, a reference was directed to determine whether the purchaser was in default and, if so, in what amount. The burden was put on the purchaser to satisfy the referee as to the amount of crop grown in each year and its value, as the matter was within his knowledge.

Action for recovery of the purchase-price under an agreement of sale of land.

MacDonald, J.:

1 By an agreement in writing, dated June 8, 1911, one Bartolomi Suilea agreed to sell to the defendant Frank March who agreed to purchase from said Suilea the south-east quarter of sec. 32, tp. 23, rge. 18, west of the second meridian, in the province of Saskatchewan, for the price of \$5,440, payable as follows: The sum of \$500 on the execution of the agreement, and the balance in the manner following: During the year 1912 the defendant March agreed properly to seed and harvest 77 acres of land and to thresh and harvest the grain grown on the said land, and, on or before December 1, 1912, to deliver one-half of the crop at Southey as he might be directed by the said Suilea, said Suilea agreeing to purchase and March to sell to Suilea the said grain at the proper market value, the proceeds to be applied on the purchase of the said land, and, during each and every subsequent year until the full purchase-price was paid, March agreed to seed, harvest and thresh 80 acres of the said land, half of the crop to be delivered to Suilea as aforesaid, and the proceeds to be applied on the purchase-price of the land.

2 The defendant March further covenanted that he would pay interest at the rate of six per cent per annum on December 1, 1912, during each and every year that this agreement would remain in force, all interest on becoming overdue to be forth with treated as purchase-price and to bear interest at the rate aforesaid, and, in default being made in delivery of the crop, payment of interest or taxes, or any portion thereof, the whole purchase-price should become due and payable.

3 Said March further agreed to pay and discharge all taxes, rates and assessments wherewith the said land might be rated and charged, from and after June 8, 1911.

4 It was further understood and agreed that March should assume a loan of \$1,400 on the said land and repay the same as in said mortgage provided with all interest.

5 The agreement while on its face purporting only to be an agreement between Suilea the vendor and the defendant March as purchaser is also signed by the defendant Donawel, and, in the statement of claim, it is alleged as follows:

5. The defendant Peter Donawel signed and executed the said agreement under his hand and seal as guarantor to the said Suilea, for the fulfilment for the defendant Frank March of each and every covenant in said agreement contained.

6 The statement of claim alleges an assignment of the said agreement by Suilea to the plaintiff, dated May 21, 1920, and such assignment was proved and filed herein. According to the evidence, however, the agreement had previously been assigned by Suilea to Cornelius Rink, the husband of the plaintiff, and one McRadu in June, 1912. Subsequently by an arrangement between Cornelius Rink and McRadu the former acquired the latter's interest in said agreement. Cornelius Rink desired to have the agreement assigned to the plaintiff, but, instead of making the assignment himself to the plaintiff, he obtained from Suilea the assignment of May 21, 1920, alleged in the pleading. Of course, at that time, Suilea had no interest in the land, the title to which has stood in the name of the plaintiff since February, 1915, nor in the agreement with the defendants, but, to overcome any objection on this head, leave was given to the plaintiff to file the consent of Cornelius Rink and McRadu to be added as plaintiffs whereupon they would be added accordingly. Such consents have been filed, and the said Cornelius Rink and McRadu will accordingly be added as plaintiffs herein.

7 Dealing first with the claim against the defendant Donawel;

8 As above stated there is nothing in the agreement to show why, or in what capacity, he signed. All that appears on the agreement is the signature and seal of said defendant Donawel. Recourse must therefore be had to oral evidence to find out why he signed. The evidence does establish that Suilea would not have entered into the agreement with March unless Donawel signed as guarantor as alleged in the statement of claim. The defendant Donawel, however, pleads *The Statute of Frauds*. The plaintiff's answer to the defendant Donawel's defence is a mere joinder of issue. On the argument, however, counsel contended that the case was taken out of *The Statute of Frauds* by part performance in that Suilea extended credit to the defendant March and allowed March to enter into possession of said land, and, in this connection, plaintiff relies on the case of *Huron County v. Kerr*, 15 Gr. 265. In that case the plaintiffs, owners of the Seaforth and Wroxeter Gravel Road, were in the habit of leasing the toll-gates thereon every year by auction, and of requiring the highest bidder, before a gate was knocked down to him at the auction, to show who were willing to become his sureties. In consequence of this practice, Edward Bennett, before the auction for 1867, applied to the defendants to become his sureties, and they thereupon signed a paper which was held to be an insufficient memorandum under *The Statute of Frauds* because it did not name the person to whom it was given. Toll-gate No. 14 was knocked down to said Bennett who signed the usual lease, took possession of the gate and of the gate-keeper's house, and entered on the receipt of the tolls. When the defendant Kerr was asked to sign the lease he refused to do so. Bennett continued in possession for a year and left in default. The action was brought against Kerr as surety or guarantor. Mowat, V.C. says as follows:

As there is no remedy at law on the agreement, and as the agreement relates to an interest in land, and has been partly performed by possession having been taken under it, this Court seems bound to enforce the agreement against the sureties, as well as the principal. No reason was suggested for holding the law as to part performance applicable to principals only; and no authority to that effect was cited. The practice of the Court has not confined the doctrine of part performance to one clause of the Statute; and for me to exclude the clause as to sureties from its operation, where the contract relates to land, would be an arbitrary determination such as I have no right to make. Indeed, the learned counsel for the defendants did not contend for such a distinction, and I am satisfied none such can be made.

9 The decision of Mowat, V.C. in said case is undoubtedly in point, and, if good law, the plaintiff would be entitled to succeed against the defendant Donawel herein. After careful consideration of the authorities, and of the principles according to which part performance is held to take the case out of the operation of *The Statute of Frauds*, I have come to the conclusion that said decision is not good law and I cannot follow it.

10 In 7 *Halsbury*, p. 380, I find the following:

Whether the equitable doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the provisions of the statute, is confined to contracts for the sale or purchase of land, or for the acquisition of an interest in land, or applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing, is a question with regard to which there is a conflict of authority. On principle, there seems to be no reason why it should be confined to contracts relating to land. The most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement; and the reason for the rule by which he is precluded from taking advantage of the want of writing is that where the defendant has stood by and allowed the plaintiff to fulfill his part of the contract, it would be fraudulent to set up the statute. But this reason equally applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the court would direct to be specifically performed. *It is clear that the doctrine is confined to contracts falling within the jurisdiction to decree specific performance and has no application to contracts of service extending over a period of more than a year, or to contracts of guarantee.*

11 In *Leake on Contracts*, 6th ed., p. 205, appears the following:

But the principle of part performance thus stated is not applied to any other contracts than those concerning the possession of land. It does not apply to a contract of service not to be performed within a year, which is not taken

out of the statute by service rendered under it; nor to a contract in consideration of marriage, which is not taken out of the statute by performance of the marriage; nor to contracts to answer for the debt of another, though performed by the party guaranteed giving credit.

12 In *Maddison v. Alderson*, 8 App. Cas. 467, 52 L.J.Q.B. 737, Lord Blackburn, at p. 490, after discussing the grounds on which in certain cases part performance is allowed to take a case out of the operation of *The Statute of Frauds*, states in effect that

Where a parol promise is to answer for the default of another and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by fulfilling the contract of guarantee. In those cases such a principle [of part performance] would render the statute a nullity.

13 In *McManus v. Cooke*, 35 Ch. D. 681, 56 L.J. Ch. 662, Kay, J. at p. 666, quotes with approval from *Morphett v. Jones*, 1 Swanst. 173, at p. 181, 1 Wils. 100, where Sir Thomas Plumer said:

In order to amount to part-performance, an act must be unequivocally referable to the agreement; and the ground on which courts of equity have allowed such acts to exclude the application of the statute, is fraud.

14 And again he quotes with approval from *Dale v. Hamilton*, 5 Hare. 369, 16 L.J. Ch. 126, where Vice-Chancellor Wigram said:

It is generally of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal right, they would be in if there were no contract.

15 Now, in the present case it cannot be said that we find the plaintiff or the defendant Donawel in any position different from that which, according to their legal rights, they would be in if there was no contract. We do find the defendant March in such position because he is in possession of land owned by the plaintiff, but the defendant Donawel is not in such possession, and he and the plaintiff are in exactly the same position as they would be in if the contract had never been executed.

16 I am therefore of opinion that the plaintiff's claim against the defendant Donawel is barred by *The Statute of Frauds*. The action is dismissed as against him.

17 The claim against the defendant March is that he has made default under the agreement, and that under the acceleration clause the full purchase-price is now due and payable. I have already held, and still adhere to the opinion expressed by me, that the acceleration clause can be effective under the so-called crop payment agreement. *Pattison v. Behr*, 13 Sask. L.R. 137, [1920] 1 W.W.R. 417.

18 The provision as to interest in said agreement reads as follows:

It is further agreed between the parties hereto that interest on that part of the purchase-price which shall, from time to time remain unpaid, at the rate of 6 per cent per annum, shall be paid by the Purchaser to the Vendor on the first day of December A.D. 1912 during each and every year this agreement shall remain in force; all interest on becoming overdue shall be forthwith treated as purchase money, and shall bear interest at the rate aforesaid, and in default being made in delivery of the crop or payment of interest or taxes or any part thereof, the whole purchase money shall immediately become due and payable.

19 On the construction of said provision viewed in the light of the rest of the contract, I am of the opinion that the interest is payable in each year over and above the proceeds of the half crop to be delivered by the defendant March.

20 The first item in dispute between the parties is as to the amount of credit to be given to the defendant in respect of the mortgage mentioned in the agreement. The plaintiff gives credit for the net proceeds of the mortgage but has

made deduction for the expenses of putting the loan through. I find, however, on the evidence that the mortgage was put through at the request and for the benefit of Suilea, and as the defendant March assumed the full amount of the mortgage he is entitled to be credited with the full amount.

21 Then, there is a dispute between the parties as to whether the defendant should be credited with three payments made by him respecting certain implements and a mare. The fact is that while it does not appear in the agreement there was included in the agreement besides the land in question, certain horses and implements on the land. The defendant March paid three respective sums of \$175, \$105 and \$118 which he claims should be credited on the agreement, and on the evidence I find that he should be so credited. In fact, shortly put, I find that the defendant is entitled to the credits set forth in par. 17 of his statement of defence.

22 In 1912 the defendant March did not deliver any portion of the crop to the plaintiff. As the statement of claim alleges, I find the fact to be that on October 17, 1912, the said defendant being in default gave as security for the sum of \$2,000 part payment on the purchase-price a chattel mortgage bearing interest at eight per cent instead of six per cent as provided in the agreement, the full amount of the purchase-price to be paid on October 17, 1914. Accordingly an extension of time was given to the said defendant for the payment of the proceeds of the half crop for said year. Accordingly defendant cannot be charged with default so as to bring into operation the acceleration clause in the agreement in respect of non-delivery in said 1912, but he is chargeable for interest on \$2,000 at the rate of eight per cent instead of six per cent as in the agreement.

23 The defendant March made default in payment of the crop in other years, and it is claimed that even after taking into consideration the credits to be allowed him, he is still in default and that the whole purchase-price is due.

24 There is no satisfactory evidence before me as to the amount of crop grown by said defendant in the years since the execution of the agreement, and it is impossible for me to estimate whether or not this defendant is in default.

25 There will therefore be a reference to the local registrar at Regina to determine whether the defendant March is in default under the agreement in question, and, if so, in what amount. The registrar will, of course, take such account corresponding to the findings made herein, and as to the crop, the matter being within the knowledge of the defendant, the burden will be on him to satisfy the local registrar as to the amount of crop that was grown on his land in each and every year during the existence of the contract and of the value thereof. The admissions as to payments, coupled with my findings herein, leave no question open as to the credits to be given said defendant. If it be found by the local registrar that the defendant March is in default, there will be judgment against him for the amount found by the local registrar to be still unpaid under the agreement with costs. If the local registrar finds that the agreement is not in default, the action will be dismissed with costs. Further directions reserved with liberty to either party to apply.

TAB 7

2018 ABQB 626
Alberta Court of Queen's Bench

Access Mortgage Fund Ltd. v. 1177620 Alberta Ltd.

2018 CarswellAlta 1764, 2018 ABQB 626

Access Mortgage Fund Ltd., B2b Trust, Canadian Western Trust Co., Mary Brown, Randall Brown, Cyril Gregory, Paul Hasbury, 592407 Alberta Ltd., Diane Dyble and Greg Dyble (Plaintiffs) and 1177620 Alberta Ltd. and G&S Diwisch Holdings Inc. (Defendants)

Access Mortgage Fund Ltd. (Plaintiffs) and 1177620 Alberta Ltd. (Defendants)

Access Capital Partners Ltd. and Outlook Commodities Ltd. (Plaintiffs) and 1177620 Alberta Ltd. and G&S Diwisch Holdings Inc. (Defendants)

W.N. Renke J.

Heard: April 7, 2018

Judgment: August 24, 2018

Docket: Edmonton 1503-03408, 150-03407, 1503-03406

Counsel: Andrew K. Maciag, QC, for Plaintiffs
Brian Doherty, for Defendant, 1177620 Alberta Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency; Property; Public; Restitution

Headnote

Administrative law

Civil practice and procedure

Contracts

Estoppel

Evidence

Real property

Restitution and unjust enrichment

Table of Authorities

Cases considered by *W.N. Renke J.*:

AMFAM Trust v. Tallahassee Petroleum Inc. (2017), 2017 ABQB 16, 2017 CarswellAlta 34 (Alta. Q.B.) — considered

Amack v. Yu (2015), 2015 ABCA 147, 2015 CarswellAlta 715, 24 Alta. L.R. (6th) 44, (sub nom. *Amack v. Wishewan*)

602 A.R. 62, (sub nom. *Amack v. Wishewan*) 647 W.A.C. 62 (Alta. C.A.) — considered

Amik Oilfield Equipment & Rentals Ltd. v. Beaumont Energy Inc. (2018), 2018 ABCA 88, 2018 CarswellAlta 389 (Alta. C.A.) — considered

Angus Partnership Inc v. Salvation Army (Governing Council) (2018), 2018 ABCA 206, 2018 CarswellAlta 1049, 90 R.P.R. (5th) 175, 70 Alta. L.R. (6th) 79, [2018] 8 W.W.R. 440, 422 D.L.R. (4th) 721 (Alta. C.A.) — considered

Arndt v. Banerji (2018), 2018 ABCA 176, 2018 CarswellAlta 890 (Alta. C.A.) — considered

Austie v. Aksnowicz (1999), 1999 CarswellAlta 112, 232 A.R. 118, 195 W.A.C. 118, 70 Alta. L.R. (3d) 154, [1999] 10 W.W.R. 713, 27 R.P.R. (3d) 35, 1999 ABCA 56 (Alta. C.A.) — considered

B & R Development Corp. v. Trail South Developments Inc. (2012), 2012 ABCA 351, 2012 CarswellAlta 2016, 72 Alta. L.R. (5th) 336, [2013] 3 W.W.R. 706, (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.*) 539 A.R. 157, (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.*) 561 W.A.C. 157, 27 R.P.R. (5th) 177 (Alta. C.A.) — considered

B & R Development Corp. v. Trail South Developments Inc. (2013), 2013 CarswellAlta 1076, 2013 CarswellAlta 1077, (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.*) 463 N.R. 395 (note), (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.*) 584 A.R. 400 (note), (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.*) 623 W.A.C. 400 (note) (S.C.C.) — referred to

Bahcheli v. Yorkton Securities Inc. (2012), 2012 ABCA 166, 2012 CarswellAlta 940, 21 C.P.C. (7th) 371, 524 A.R. 382, 545 W.A.C. 382, 65 Alta. L.R. (5th) 127, 43 Admin. L.R. (5th) 74 (Alta. C.A.) — considered

Becker v. Pettkus (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — considered

Boyd v. Cook (2013), 2013 ABCA 27, 2013 CarswellAlta 82, 542 A.R. 160, 566 W.A.C. 160, 84 Alta. L.R. (5th) 359 (Alta. C.A.) — considered

Brar v. Roy (2005), 2005 ABCA 269, 2005 CarswellAlta 1096, 371 A.R. 290, 354 W.A.C. 290 (Alta. C.A.) — considered

Bruno Appliance and Furniture Inc. v. Hryniak (2014), 2014 SCC 8, 2014 CarswellOnt 642, 2014 CarswellOnt 643, 37 R.P.R. (5th) 63, 27 C.L.R. (4th) 65, 47 C.P.C. (7th) 1, 2014 CSC 8, 12 C.C.E.L. (4th) 63, 21 B.L.R. (5th) 311, 128 O.R. (3d) 799 (note), 366 D.L.R. (4th) 671, 453 N.R. 101, 314 O.A.C. 49, [2014] 1 S.C.R. 126 (S.C.C.) — referred to

Canada Square Corp. v. Versafood Services Ltd. (1981), 34 O.R. (2d) 250, 15 B.L.R. 89, 130 D.L.R. (3d) 205, 1981 CarswellOnt 124 (Ont. C.A.) — considered

Canada Trust Co. v. Molsberry (2016), 2016 ABQB 38, 2016 CarswellAlta 71 (Alta. Q.B.) — considered

Cappis v. Allen (2016), 2016 ABQB 473, 2016 CarswellAlta 1589 (Alta. Q.B.) — referred to

Central London Property Trust Ltd. v. High Trees House Ltd. (1946), [1947] K.B. 130, [1947] L.J.R. 77, [1956] 1 All E.R. 256, 175 L.T. 332, 62 T.L.R. 557, [1946] W.N. 175 (Eng. K.B.) — considered

Charles v. Young (2014), 2014 ABCA 200, 2014 CarswellAlta 957, 97 E.T.R. (3d) 1, 577 A.R. 54, 613 W.A.C. 54 (Alta. C.A.) — considered

Compton Petroleum Corp. v. Alberta Power Ltd. (1999), 1999 CarswellAlta 31, 242 A.R. 3, 1999 ABQB 42 (Alta. Q.B.) — considered

Condominium Corp. No. 0321365 v. Cuthbert (2016), 2016 ABCA 46, 2016 CarswellAlta 222, 612 A.R. 284, 662 W.A.C. 284, 33 Alta. L.R. (6th) 209 (Alta. C.A.) — considered

Condominium Plan 0125764 v. Amber Equities Inc. (2015), 2015 ABQB 235, 2015 CarswellAlta 616, 55 R.P.R. (5th) 197, 16 Alta. L.R. (6th) 318, 614 A.R. 288 (Alta. Q.B.) — considered

Coulee Creek Consulting Inc. v. Minion Estate (2010), 2010 ABQB 583, 2010 CarswellAlta 1852, 96 R.P.R. (4th) 298, 75 B.L.R. (4th) 131 (Alta. Q.B.) — referred to

Cowper-Smith v. Morgan (2017), 2017 SCC 61, 2017 CSC 61, 2017 CarswellBC 3482, 2017 CarswellBC 3483, 32 E.T.R. (4th) 1, [2018] 1 W.W.R. 209, 416 D.L.R. (4th) 1, 4 B.C.L.R. (6th) 1, [2017] 2 S.C.R. 754 (S.C.C.) — referred to

Currie v. Craig (2018), 2018 ABQB 46, 2018 CarswellAlta 138 (Alta. Q.B.) — considered

Daniels v. Mitchell (2005), 2005 ABCA 271, 2005 CarswellAlta 1332, 36 R.P.R. (4th) 7, 257 D.L.R. (4th) 663, 15 C.P.C. (6th) 266, 371 A.R. 298, 354 W.A.C. 298, 51 Alta. L.R. (4th) 212, [2006] 6 W.W.R. 449 (Alta. C.A.) — considered

David M. Gottlieb Professional Corp. v. Tymkow (2012), 2012 ABQB 262, 2012 CarswellAlta 749, 94 C.B.R. (5th) 145 (Alta. Q.B.) — considered

Dawson v. Dawson (2015), 2015 ABQB 449, 2015 CarswellAlta 1285 (Alta. Q.B.) — referred to

Degelman v. Guaranty Trust Co. of Canada (1954), [1954] S.C.R. 725, [1954] 3 D.L.R. 785, 1954 CarswellOnt 140 (S.C.C.) — referred to

Dempsey v. Bagley (2016), 2016 ABQB 124, 2016 CarswellAlta 394, 29 C.C.E.L. (4th) 213, 30 Alta. L.R. (6th) 237, [2016] 8 W.W.R. 344 (Alta. Q.B.) — considered

Erie Sand & Gravel Ltd. v. Seres' Farms Ltd. (2009), 2009 ONCA 709, 2009 CarswellOnt 6035, 84 R.P.R. (4th) 157, 97 O.R. (3d) 241, 254 O.A.C. 377, 63 B.L.R. (4th) 161, 312 D.L.R. (4th) 111 (Ont. C.A.) — considered

Ewing v. Allen (2015), 2015 ABQB 264, 2015 CarswellAlta 723, 615 A.R. 239 (Alta. Q.B.) — considered

Faryna v. Chorny (1951), 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354, 1951 CarswellBC 133, [1952] 4 W.W.R. 171 (B.C. C.A.) — considered

Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd. (1964), [1964] 2 Q.B. 480, [1964] 2 W.L.R. 618, [1964] 1 All E.R. 630 (Eng. C.A.) — considered

G. Scammell & Nephew Ltd. v. Ouston (1940), [1941] A.C. 251, [1941] 1 All E.R. 14 (U.K. H.L.) — considered

Gainers Inc. v. Pocklington Holdings Inc. (2000), 2000 CarswellAlta 508, 255 A.R. 373, 220 W.A.C. 373, 81 Alta. L.R. (3d) 17, 2000 ABCA 151 (Alta. C.A.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 SCC 25, 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 237 D.L.R. (4th) 385, 43 B.L.R. (3d) 163, 319 N.R. 38, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), 42 Alta. L. Rev. 399, 72 O.R. (3d) 80, 2004 CSC 25 (S.C.C.) — considered

Guarantee Co. of North America v. Gordon Capital Corp. (1999), 1999 CarswellOnt 3171, 1999 CarswellOnt 3172, 178 D.L.R. (4th) 1, 247 N.R. 97, [2000] I.L.R. I-3741, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, [1999] 3 S.C.R. 423, 39 C.P.C. (4th) 100 (S.C.C.) — considered

Haan v. Haan (2015), 2015 ABCA 395, 2015 CarswellAlta 2283, 393 D.L.R. (4th) 253, [2016] 4 W.W.R. 229, 30 Alta. L.R. (6th) 21, 609 A.R. 371, 656 W.A.C. 371 (Alta. C.A.) — considered

Hercules Management Ltd. v. Ernst & Young (1997), 1997 CarswellMan 198, 211 N.R. 352, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Managements Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80, 1997 CarswellMan 199 (S.C.C.) — referred to

Hill v. Nova Scotia (Attorney General) (1997), 142 D.L.R. (4th) 230, 206 N.R. 299, [1997] 1 S.C.R. 69, 157 N.S.R. (2d) 81, 462 A.P.R. 81, 60 L.C.R. 161, 1997 CarswellNS 10, 1997 CarswellNS 11 (S.C.C.) — considered

Hillas & Co. v. Arcos Ltd. (1932), [1932] All E.R. Rep. 494, 147 L.T. 503, 43 Ll. L. Rep. 359, 38 Com. Cas. 23, [1932] UKHL 2 (U.K. H.L.) — considered

Hyde v. Calgary (City) (2004), 2004 ABQB 800, 2004 CarswellAlta 1478, 6 M.P.L.R. (4th) 269, 12 C.P.C. (6th) 301, 378 A.R. 169 (Alta. Q.B.) — considered

IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing (2017), 2017 ABCA 157, 2017 CarswellAlta 1133, 53 Alta. L.R. (6th) 96, [2017] 12 W.W.R. 261, 70 B.L.R. (5th) 173 (Alta. C.A.) — considered

Innovative Insurance Corp. v. E.P.A. Ultimate Concepts Inc. (2007), 2007 ABCA 358, 2007 CarswellAlta 1523, [2008] I.L.R. I-4657, 55 C.C.L.I. (4th) 183, 417 A.R. 273, 410 W.A.C. 273 (Alta. C.A.) — referred to

Janvier v. 834474 Alberta Ltd. (2010), 2010 ABQB 800, 2010 CarswellAlta 2483, 48 Alta. L.R. (5th) 156, 11 C.P.C. (7th) 159, 511 A.R. 76 (Alta. Q.B.) — considered

Jensen v. Collins (2000), 2000 CarswellAlta 1743 (Alta. Q.B.) — referred to

Jordan v. Skwarek (2016), 2016 ABQB 380, 2016 CarswellAlta 1313 (Alta. Q.B.) — considered

Kendell v. Kendell (2006), 2006 ABQB 664, 2006 CarswellAlta 1166, 48 R.P.R. (4th) 215, 411 A.R. 332 (Alta. Q.B.) — considered

Kerr v. Baranow (2011), 2011 CarswellBC 240, 2011 CarswellBC 241, 14 B.C.L.R. (5th) 203, 328 D.L.R. (4th) 577, 93 R.F.L. (6th) 1, 274 O.A.C. 1, [2011] 1 S.C.R. 269, 2011 SCC 10, 64 E.T.R. (3d) 1, [2011] 3 W.W.R. 575, 509 W.A.C. 1, 300 B.C.A.C. 1, (sub nom. *Vanasse v. Seguin*) 108 O.R. (3d) 399, 411 N.R. 200 (S.C.C.) — considered

Ko v. Hillview Homes Ltd. (2012), 2012 ABCA 245, 2012 CarswellAlta 1759, [2013] 2 W.W.R. 52, 69 Alta. L.R. (5th) 312, 5 B.L.R. (5th) 1, 18 C.L.R. (4th) 1, 536 A.R. 93, 559 W.A.C. 93 (Alta. C.A.) — considered

Maddison v. Alderson (1883), [1883] 8 A.C. 467 (Eng. H.L.) — referred to

Maracle v. Travelers Indemnity Co. of Canada (1991), [1991] I.L.R. 1-2728, 125 N.R. 294, 80 D.L.R. (4th) 652, 47 O.A.C. 333, (sub nom. *Travellers Indemnity Co. of Canada v. Maracle*) [1991] 2 S.C.R. 50, 50 C.P.C. (2d) 213, 3 C.C.L.I. (2d) 186, 1991 CarswellOnt 450, 3 O.R. (3d) 510 (note), 1991 CarswellOnt 1019, 3 O.R. (3d) 510 (S.C.C.) — considered

Maxwell v. Wal-Mart Canada Corp. (2014), 2014 ABCA 383, 2014 CarswellAlta 2070, 588 A.R. 6, 626 W.A.C. 6 (Alta. C.A.) — considered

McGowan v. Lang (2015), 2015 ABCA 217, 2015 CarswellAlta 1134, [2015] I.L.R. I-5771, 75 C.P.C. (7th) 258, 22 Alta. L.R. (6th) 221, 49 C.C.L.I. (5th) 22, 602 A.R. 168, 647 W.A.C. 168 (Alta. C.A.) — considered

McNeil v. Corbett (1907), 39 S.C.R. 608, 1907 CarswellNS 180 (S.C.C.) — considered

Milroy v. Klapstein (2003), 2003 ABQB 871, 2003 CarswellAlta 1516, 39 B.L.R. (3d) 316, 342 A.R. 352, 24 Alta. L.R. (4th) 349, [2004] 10 W.W.R. 105 (Alta. Q.B.) — referred to

Nafie v. Badawy (2015), 2015 ABCA 36, 2015 CarswellAlta 106, 381 D.L.R. (4th) 208, [2015] 4 W.W.R. 498, 56 R.F.L. (7th) 28, 599 A.R. 1, 643 W.A.C. 1, 11 Alta. L.R. (6th) 1 (Alta. C.A.) — considered

Nieuwesteeg v. Barron (2009), 2009 ABCA 235, 2009 CarswellAlta 957, 69 R.F.L. (6th) 30, 460 A.R. 329, 462 W.A.C. 329 (Alta. C.A.) — considered

Nikel Investments Ltd. v. Gallaher (2012), 2012 ABQB 276, 2012 CarswellAlta 795, 91 C.B.R. (5th) 156, 30 C.P.C.

(7th) 342, 538 A.R. 373 (Alta. Q.B.) — referred to

P. (W.) v. Alberta (2014), 2014 ABCA 404, 2014 CarswellAlta 2152, 378 D.L.R. (4th) 629, 62 C.P.C. (7th) 111, [2015] 5 W.W.R. 430, 588 A.R. 110, 626 W.A.C. 110, 7 Alta. L.R. (6th) 319 (Alta. C.A.) — considered

P. Burns Resources Ltd. v. Patrick Burns Memorial Trust (Trustee of) (2015), 2015 ABCA 390, 2015 CarswellAlta 2282, 26 Alta. L.R. (6th) 1, 79 C.P.C. (7th) 29, (sub nom. *Burns Estate v. Burns (P.) Estate Ltd.*) 612 A.R. 63, (sub nom. *Burns Estate v. Burns (P.) Estate Ltd.*) 662 W.A.C. 63 (Alta. C.A.) — considered

Pacific Wagondepot Ltd. v. Hudson West Development Ltd. (2017), 2017 BCSC 1593, 2017 CarswellBC 2447, 75 B.L.R. (5th) 86 (B.C. S.C.) — referred to

Palechek v. Canadian Imperial Bank of Commerce (1991), 79 Alta. L.R. (2d) 159, 1991 CarswellAlta 46, 1991 ABCA 8 (Alta. C.A.) — considered

Peter v. Beblow (1993), [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — referred to

Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd. (2003), 2003 ABCA 298, 2003 CarswellAlta 1498, 339 A.R. 165, 312 W.A.C. 165, 27 Alta. L.R. (4th) 62 (Alta. C.A.) — considered

Poff v. Great Northern Data Supplies (AB) Ltd. (2015), 2015 ABQB 173, 2015 CarswellAlta 440, 46 C.C.L.I. (5th) 279, 20 Alta. L.R. (6th) 324, 613 A.R. 367 (Alta. Q.B.) — considered

Pyrrha Design Inc. v. Plum and Posey Inc. (2016), 2016 ABCA 12, 2016 CarswellAlta 165 (Alta. C.A.) — considered

R. v. Baldree (2013), 2013 SCC 35, 2013 CarswellOnt 8032, 2013 CarswellOnt 8033, 3 C.R. (7th) 10, 445 N.R. 247, 298 C.C.C. (3d) 425, 361 D.L.R. (4th) 389, 306 O.A.C. 1, [2013] 2 S.C.R. 520, 124 O.R. (3d) 480 (note) (S.C.C.) — considered

R.P. Choma Financial & Associates Inc. v. McDougall (2008), 2008 ABQB 359, 2008 CarswellAlta 790, 94 Alta. L.R. (4th) 191, 451 A.R. 278 (Alta. Q.B.) — considered

Rensonnet v. Utll (2014), 2014 ABCA 304, 2014 CarswellAlta 1590, 580 A.R. 361, 620 W.A.C. 361 (Alta. C.A.) — considered

Rotzang v. CIBC World Markets Inc (2017), 2017 ABQB 354, 2017 CarswellAlta 969, 29 E.T.R. (4th) 265, 56 Alta. L.R. (6th) 334, 8 C.P.C. (8th) 134 (Alta. Q.B.) — considered

Royal Bank v. Samra (2012), 2012 ABCA 225, 2012 CarswellAlta 1232, 90 C.B.R. (5th) 303, 62 Alta. L.R. (5th) 46, 22 C.P.C. (7th) 204, [2012] 6 C.T.C. 219, 20 R.P.R. (5th) 187, 352 D.L.R. (4th) 280, 533 A.R. 356, 557 W.A.C. 356, (sub nom. *Liberty Mortgage Services Ltd. v. The Queen*) 2012 D.T.C. 5134 (Eng.) (Alta. C.A.) — referred to

Ryan v. Moore (2005), 2005 SCC 38, 2005 CarswellNfld 157, 2005 CarswellNfld 158, 254 D.L.R. (4th) 1, 247 Nfld. & P.E.I.R. 286, 735 A.P.R. 286, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, 18 E.T.R. (3d) 163, 334 N.R. 355, [2005] 2 S.C.R. 53, [2005] R.R.A. 694, 2005 CSC 38 (S.C.C.) — considered

Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta (2015), 2015 ABCA 101, 2015 CarswellAlta 384, 382 D.L.R. (4th) 150, [2015] 7 W.W.R. 53, 39 B.L.R. (5th) 1, 599 A.R. 267, 643 W.A.C. 267, 12 Alta. L.R. (6th) 299 (Alta. C.A.) — considered

Shewchuk v. Blackmont Capital Inc. (2016), 2016 ONCA 912, 2016 CarswellOnt 18794, 35 C.C.E.L. (4th) 1, 404 D.L.R. (4th) 512 (Ont. C.A.) — considered

Spencer Investments Ltd. v. Hansford (1974), 48 D.L.R. (3d) 474, 1974 CarswellAlta 202 (Alta. T.D.) — considered

Stavro Melathopoulos Architect Ltd. v. Webber Academy Foundation (2018), 2018 ABCA 38, 2018 CarswellAlta 137 (Alta. C.A.) — considered

Stefanyk v. Sobeys Capital Incorporated (2018), 2018 ABCA 125, 2018 CarswellAlta 587, [2018] 5 W.W.R. 654, 67 Alta. L.R. (6th) 215 (Alta. C.A.) — considered

Strother v. Darc (2016), 2016 BCCA 297, 2016 CarswellBC 1858, 90 B.C.L.R. (5th) 365, [2017] 1 W.W.R. 492 (B.C. C.A.) — considered

Templanza v. Wolfman (2016), 2016 ABCA 1, 2016 CarswellAlta 1, 612 A.R. 67, 662 W.A.C. 67 (Alta. C.A.) — considered

Tottrup v. Clearwater (Municipal District) No. 99 (2006), 2006 ABCA 380, 2006 CarswellAlta 1627, 68 Alta. L.R. (4th) 237, 391 W.A.C. 88, 401 A.R. 88 (Alta. C.A.) — considered

Transamerica Life Canada v. Price-Goulet (2017), 2017 ABCA 156, 2017 CarswellAlta 873 (Alta. C.A.) — considered

Troika Land Development Corp. v. West Jasper Properties Inc. (2009), 2009 ABQB 590, 2009 CarswellAlta 1622, 86 R.P.R. (4th) 37, 15 Alta. L.R. (5th) 316, [2010] 3 W.W.R. 174, 481 A.R. 242 (Alta. Q.B.) — considered

Whissell Contracting Ltd. v. Calgary (City) (2018), 2018 ABCA 204, 2018 CarswellAlta 1032, 71 Alta. L.R. (6th) 28, 78 C.L.R. (4th) 217, 20 C.P.C. (8th) 43 (Alta. C.A.) — referred to

Woodridge Lincoln Mercury Sales Ltd. v. Paramount Towing Ltd. (2000), 2000 ABCA 147, 2000 CarswellAlta 502, 82 Alta. L.R. (3d) 47, 261 A.R. 372, 225 W.A.C. 372 (Alta. C.A.) — considered

Wright v. Tatham (1838), 132 E.R. 877, 4 Bing. N.C. 489 (U.K. H.L.) — considered

Yugraneft Corp. v. Rexx Management Corp. (2010), 2010 SCC 19, 2010 CarswellAlta 949, 2010 CarswellAlta 950, 68 B.L.R. (4th) 1, 84 C.P.C. (6th) 201, [2010] 6 W.W.R. 387, 22 Alta. L.R. (5th) 166, 318 D.L.R. (4th) 257, 401 N.R. 341, [2010] 1 S.C.R. 649, 482 A.R. 1, 490 W.A.C. 1 (S.C.C.) — referred to

330626 Alberta Ltd. v. Ho & Laviolette Engineering Ltd. (2018), 2018 ABQB 478, 2018 CarswellAlta 1185 (Alta. Q.B.) — considered

571582 Alberta Ltd. v. N.V. Reykdal & Associates Ltd. (2000), 2000 ABCA 330, 2000 CarswellAlta 1540, 90 Alta. L.R. (3d) 37 (Alta. C.A.) — considered

776826 Alberta Ltd. v. Ostrowercha (2015), 2015 ABCA 49, 2015 CarswellAlta 155, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 593 A.R. 391, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 637 W.A.C. 391 (Alta. C.A.) — considered

1214777 Alberta Ltd. v. 480955 Alberta Ltd. (2014), 2014 ABQB 301, 2014 CarswellAlta 821 (Alta. Q.B.) — considered

1738937 Alberta Ltd. v. Fair Waves Coffee Inc (Waves Coffee House) (2017), 2017 ABQB 714, 2017 CarswellAlta 2467, 64 Alta. L.R. (6th) 286, [2018] 4 W.W.R. 408 (Alta. Q.B.) — referred to

Statutes considered:

Limitations Act, R.S.A. 2000, c. L-12

Generally — referred to

s. 1(i) “remedial order” — considered

s. 3(1) — considered

s. 3(1)(a) — considered

s. 3(1)(a)(i) — considered

s. 3(1)(a)(i)-3(1)(a)(iii) — referred to

s. 3(1)(a)(ii) — considered

s. 3(1)(a)(iii) — considered

s. 3(4) — considered

s. 3(5) — considered

s. 7 — considered

s. 7(1) — considered

s. 8 — considered

s. 8(2) — considered

s. 8(3) — considered

s. 8(4) — considered

s. 9 — considered

s. 9(1) — considered

Statute of Frauds, 1677 (29 Cha. 2), c. 3

Generally — referred to

s. 4 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 7.3 — considered

R. 7.3(1) — considered

R. 7.3(3) — considered

W.N. Renke J.:

1 The parties have appealed an Order of Master S. L. Schultz of July 7, 2016 dismissing summary judgment applications by both parties (the Order).

2 The Order concerned foreclosure proceedings commenced by the Plaintiffs respecting three mortgages. The mortgages related to lands in Redwater, Alberta intended for a construction project.

3 The Plaintiff mortgagees demanded payment of the outstanding mortgage balances and sought foreclosure. The Defendant 1177620 Alberta Ltd (117Co) defended on the basis that the limitation periods expired before the Plaintiffs' actions were commenced. The Plaintiffs contended that the communications and course of dealings between Russ McCurdy, the principal of 117Co, and Bill Buterman, a principal of Axcess Commercial Brokers Inc, the loan administrator for the mortgages, precluded 117Co from successfully relying on a limitations defence.

4 117Co and the Plaintiffs each applied for summary judgment. The Defendant G&S Diwisch Holdings Inc (Diwisch

Holdings) has not participated in the proceedings.

5 Following a hearing on July 7, 2016, Master Schultz dismissed both summary judgment applications but made an order for security for costs against 117Co.

6 The Plaintiffs claimed that Master Schultz erred in failing to order summary judgment against 117Co. 117Co claimed that Master Schultz erred in failing to summarily dismiss the Plaintiffs' actions against 117Co. 117Co did not address the security for costs order separately, but it would be nullified if the Plaintiffs' actions were dismissed.

7 I find that Master Schultz did not err in dismissing the Plaintiffs' application for summary judgment against 117Co and did not err in dismissing 117Co's application for summary judgment against the Plaintiffs. For the reasons that follow, both appeals are dismissed.

8 I will (I) set out the background facts and (II) the relevant aspects of the litigation preceding the appeal, (III) confirm the standard of review, (IV) review the tests for summary judgment under rule 7.3, and (V) address the parties' arguments.

...

(i) Statute of Frauds

(A) The Requirement of Writing

167 The *Statute of Frauds* requires that agreements concerning land must be in writing. The *Statute of Frauds* (1676), 29 Car. II. c. 3 was received in Alberta in 1870 and is unmodified respecting real property: J.E. Côté, "The Introduction of English Law Into Alberta" (1964) *Alberta Law Review* 262 at 266; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ontario: LexisNexis Canada, 2014) at 887 [McInnes, *Unjust Enrichment*]; *Coulee Creek Consulting Inc. v. Minion Estate*, 2010 ABQB 583 (Alta. Q.B.), Graesser J at para 28. In modern language, the relevant elements of s. 4 of the *Statute of Frauds* are as follows:

No action shall be brought ... to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them ... unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party.

See, e.g., *Dawson v. Dawson*, 2015 ABQB 449 (Alta. Q.B.) (CanLII), Prowse M at para 39; *Austie v. Aksnowicz*, 1999 ABCA 56 (Alta. C.A.), Côté JA at para 23.

168 A mortgage and an amendment to a mortgage changing its character from a term mortgage to a demand mortgage are agreements concerning land: *Canada Trust Co. v. Molsberry*, 2016 ABQB 38 (Alta. Q.B.), Yamauchi J at para 29; *Kendell v. Kendell* at para 36. In *Coulee Creek Consulting*, Justice Graesser J wrote as follows at paras 28 - 31:

[28] It is beyond doubt that the *Statute of Frauds* is in force in Alberta: *Stochinsky v. Chetner Estate*, 2003 ABCA 226; *Kendell v. Kendell* In *Stochinsky*, the Court of Appeal held at paras. 23-24 that an oral change to the original written contract required further written evidence complying with the *Statute of Frauds*, but only with respect to essential terms. There, no written agreement was required to prove and enforce an oral agreement to change monthly payments to an annual lump sum payment. But an alleged agreement to defer payments due from 1989 to 1995 until payment of a lump sum in 2001 was ruled unenforceable because such an agreement would amount to a change in an essential term.

[29] In *Kendell*, Moen J. applied the Statute of Frauds to an alleged oral agreement to pay interest at 6.9% and later 7.2%, where the mortgage stated that interest was to be paid at the rate set out in the mortgage, but the mortgage was actually silent on the interest rate to be paid. Moen J. held that the interest rate was an essential term.

[30] Similar conclusions were reached by the British Columbia Court of Appeal in *Toronto-Dominion Bank v. Lenec*

(1984), 60 B.C.L.R. 36 (C.A.) and *Ahone v. Holloway* (1988), 30 B.C.L.R. (2d) 368 (C.A.).

[31] I thus conclude that an agreement to vary the payment terms to essentially treat all payments made as principal with minimal interest requires compliance with the *Statute of Frauds*.

169 Hence, as a starting point, without a written agreement the mortgages could not have been transformed into demand mortgages.

(B) Part Performance

170 The Plaintiffs could avoid the unenforceability of oral arrangements under *Statute of Frauds* through the doctrine of part performance. According to the Court of Appeal in *Haan v. Haan*, 2015 ABCA 395 (Alta. C.A.) at para 10,

[10] It quickly became apparent to the common law judges that the Statute might itself become an instrument of fraud (or at least injustice) if it was strictly enforced with respect to contracts that were wholly or partly performed: *Hill v Nova Scotia (Attorney General)*, [1997] 1 SCR 69 at para. 10. The courts developed the concept of “part performance” as an exception. If a contract concerning land was partly performed, that could displace the need for a note or memorandum in writing signed by the party to be charged.

By way of further elaboration, Justice Gillese quoted the following passage from *Hill v. Nova Scotia (Attorney General)* [1997 CarswellNS 10 (S.C.C.)] in *Erie Sand & Gravel Ltd. v. Seres' Farms Ltd.*, 2009 ONCA 709 (Ont. C.A.) at para 58:

[58] In para. 10 of *Hill*, Cory J. explains why Equity created the doctrine of part performance. He does so by quoting the following from *Steadman v. Steadman*, [1976] A.C. 536, [1974] 2 All E.R. 977 (H.L.), at p. 558 A.C.:

.... Where, therefore, a party to a contract unenforceable under the *Statute of Frauds* stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the *Statute of Frauds* “to be used as an engine of fraud.” This became known as the doctrine of part performance - the “part” performance being that of the party who had, to the knowledge of the other party, acted to his detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract. (Citations omitted)

171 The doctrine of part performance has three aspects. First, the plaintiff must establish detrimental reliance. It would be unjust for the defendant to evade obligation by relying on the *Statute*. Second, the plaintiff must establish that the acts of detrimental reliance sufficiently manifest the contract alleged. Third, if the link between the acts and the yet-to-be-in-evidence contract is sufficiently strong, “parol” (oral or non-written) evidence of that contract may be permitted to be adduced: *B & R Development* at para 35; *Erie Sand and Gravel* at para 79; *Cappis v. Allen*, 2016 ABQB 473 (Alta. Q.B.) at para 27; *Jordan v. Skwarek*, 2016 ABQB 380 (Alta. Q.B.) at para 11; *Haan v. Haan* at para 15(c).

172 At the first step, respecting detrimental reliance, the “acts relied on” are not limited to the acts of the plaintiff: *Erie Sand and Gravel* at para 75.

173 At the second step, respecting “evidence of the contract,” acts “sufficiently manifest” the alleged contract (as a matter of current Alberta authority) only if the acts are “unequivocally” referable to the alleged oral agreement: *B & R Development* at para 35; *Erie Sand and Gravel* at para 32; *Degelman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725 (S.C.C.) at 733-4; *McNeil v. Corbett* (1907), 39 S.C.R. 608 (S.C.C.) at 611; *Maddison v. Alderson*, [1883] 8 A.C. 467 (Eng. H.L.) at 479. Since the reference must be “unequivocal” and the reference must be “to a contract affecting the ownership or tenure of the land” (and to nothing else), the doctrine is not satisfied if the acts are only “consistent with” a contract affecting interests in the land. The acts must support only one conclusion — that there was a contract affecting interests in the land. If the acts could support that conclusion but were equally consistent with other conclusions (e.g. of no such contract or of a contract

respecting other lands, no lands, or some rights-bearing relationship other a contract respecting the lands), the “unequivocal reference” test would not be satisfied: *Haan v. Haan* at para 15. In *Haan v. Haan* at para 28, the Court of Appeal clarified that to determine whether the acts support the required “unequivocal reference,” the trial judge may draw inferences from the evidence: “the words and deeds of the parties must unequivocally point to the alleged agreement, without any reliance on the parties testifying as to ‘what was agreed to.’”

174 However, while the acts must unequivocally refer to the type of contract respecting the lands that is asserted, the acts need not unequivocally refer to the terms of the very contract in question. Such specificity of reference would doubtless be rare. *Maddison v. Alderson* referred to “some such agreement as that alleged;” *McNeil* referred to “some dealing with the land”; Justice Cartwright’s decision in *Degelman v. Guaranty Trust Co. of Canada* referred to “a contract affecting the ownership or tenure of the land”; and *Haan v. Haan* required unequivocal reference to the “type of contract alleged.” at paras 14 and 15. See also *Erie Sand and Gravel* at paras 86 - 87.

175 Finally, the “unequivocal reference” test is applied from the perspective of the reasonable person: *Erie Sand and Gravel* at paras 93 and 94.

176 Respecting the third step in the part performance analysis, the Court of Appeal confirmed that only if the claimant has succeeded on the first two issues is the claimant entitled to introduce evidence respecting the oral agreement, “to explain the nature of the agreement, and to show how the background facts and the part performance relate to it:” *Haan v. Haan* at para 15(c).

177 In this case, the Plaintiffs have a strong argument on detrimental reliance, on the grounds canvassed respecting estoppel. The Plaintiffs entered into the Third Mortgage with 117Co. The Plaintiffs advanced funds for the completion of the project. The Plaintiffs did not commence foreclosure proceedings even though the mortgages were in arrears. 117Co acquired the Diwisch lands and took over supervision of the project.

178 The evidence of the parties’ conduct concerned the Lands and no other lands. The conduct supports a finding of a contract respecting those Lands and no other relationship — essentially, 117Co would be responsible for attending to construction on the Lands and the Plaintiffs would provide financing. From the standpoint of a reasonable person, the parties’ conduct is evidence only of express or implied promises of performance and (particularly on the Plaintiffs’ side) forbearance.

179 In my opinion, on the evidence, the Plaintiffs satisfied the doctrine of part performance. That, however, does not entail that the Plaintiffs have proved their contract with 117Co. Rather, the Plaintiffs are not blocked by the *Statute of Frauds* from proving the contract. Avoiding the application of the *Statute* is a necessary condition for going on to prove a contract but not a sufficient condition. Satisfaction of the *Statute of Frauds* does not entail that all other potentially applicable doctrines preventing proof of the contract have been satisfied.

180 Even if the Plaintiffs satisfied the *Statute of Frauds*, 117Co argued that the parol evidence rule prevented the Plaintiffs from setting up a contract inconsistent with the express terms of the written mortgages.

(ii) Parol Evidence Rule

(A) The Rule

181 We read the following at paras 15 and 19 of *Gainers Inc. v. Pocklington Holdings Inc.*, 2000 ABCA 151 (Alta. C.A.):

[15] When the deal is complete in the written contracts, and not subject to an escrow, other evidence (parol evidence) is inadmissible to vary or contradict a clear written contract: *Chant v. Infinitum Growth Fund* (1986), 15 O.A.C. 393, 55 O.R. (2d) 366, 369-70 (C.A.); *Case Threshing Machine Co. v. Mitten* (1919), 59 S.C.R. 118, 49 D.L.R. 30. More classic cases are cited in 1 *Chitty on Contracts* para. 12-094 (28th ed. 1999)

[19] Nor can the court find a collateral parol contract inconsistent with the express written contract: *Catre Ind. v. R.*, *supra*; *Hawrish v. Bank of Mtl.*, [1969] S.C.R. 15, 66 W.W.R. 673. Collateral contracts are viewed suspiciously and must be proved strictly, along with clear intent to contract: *Hawrish* case, *supra*, at 678 (W.W.R.).

TAB 8