

Privy Council Appeal No. 111 of 1926.

The Royal Bank of Canada - - - - - *Appellants*

v.

Joseph Salvatori - - - - - *Respondent*

FROM

THE SUPREME COURT OF TRINIDAD AND TOBAGO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 21ST JULY, 1927.

Present at the Hearing :

VISCOUNT HALDANE.

LORD ATKINSON.

LORD BLANESBURGH.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the judgment of the Supreme Court of Trinidad and Tobago, dated the 24th February, 1926, dismissing with costs an action brought by the appellants against the respondent upon a guarantee signed by the latter and dated the 23rd March, 1921, to recover the sum of \$5,000, or £1,041 13s. 4d., its equivalent in sterling.

By an order of the Supreme Court, dated the 21st June, 1926, final leave to appeal to His Majesty in Council was granted to the appellants.

The appellants at all material times were and are a Banking Corporation registered in Canada with a branch at Port of Spain, Trinidad. The respondent was and is a merchant carrying on business at Port of Spain, and at the date on which the said guarantee was given was the sole partner of the firm of Salvatori Scott & Company. Antoni Brothers at all material times were a

partnership firm carrying on business, *inter alia*, as cocoa merchants at Port of Spain. The firm consisted of three brothers named Antoni and a fourth partner named Roque Antoni. This firm was distinct from Antoni Hermanos, a partnership carrying on business in Venezuela, as was so found by His Honour Mr. Justice Adrian Clark, who tried the action.

This firm of Antoni Bros. was, in March, 1921, heavily indebted to their bankers, the appellants, on two separate accounts—the first, their current account, on which they were indebted in the sum of \$1,592.63, and the second, a loan account, upon which they were indebted in the sum of \$57,000. In respect of this latter indebtedness the bank held as a security two promissory notes of the firm, dated respectively the 6th March, 1920, and the 23rd July, 1920, for the respective amounts of \$40,000 and \$17,000.

It was not questioned in the argument before the Board that during the year 1920, if not before, the firm had obtained from their bankers, the appellants, large advances of cash on credit, to enable them to purchase quantities of cocoa to carry on their trade or business of dealers in that commodity.

In the winter of 1920–21 the market for cocoa in Trinidad simply collapsed, entailing upon this firm losses so heavy as to threaten bankruptcy. To add to their misfortune, the appellants, near the end of the year 1920, ceased to make advances to the firm, as they had theretofore done, to enable them to carry on their trade, with the result that the firm had no capital to carry on their business, and were practically insolvent.

They held, no doubt, at this period documents of title to quantities of cocoa shipped by them, and were entitled in respect thereof to rebates on freight amounting, in the whole, to about \$3,000. They were also entitled to an equity of redemption in a certain house worth \$4,000. These two pieces of property constituted the entire assets of the firm. Both were transferred by them to the appellant bank as security for the debts they owed to that institution. The firm, from about the end of the year 1920, had, owing to their complete lack of capital and their insolvent condition, practically ceased to attempt to carry on their business of cocoa dealers, so that it had become quite obvious that, unless they could obtain financial assistance in the shape of advances of capital, they would never be able to regain to any extent their former commercial position, and would be forced to summon a meeting of their creditors. The instrument of guarantee is, with the exception of the last clause of it, a printed document. It is under seal, and is signed by the guarantor under the name and style of Salvatori Scott & Co.

Before dealing with the construction of its language, it is necessary to consider the condition of things out of which it sprung, and the objects apparently designed by the parties to it to be effected by it. The manager of the bank at the date of

this guarantee was one Jerram Connell. He ceased to be manager in January, 1923, when he went to reside in New York. He was examined in the latter city on commission on the 25th August, 1925. While he was manager a gentleman named Herman Paul Urich was assistant manager. He succeeded Mr. Connell as manager, and was examined as a witness at the trial on behalf of the bank. For some reason not avowed or even suggested, neither Jean Marie Antoni, the principal partner in the firm, nor the member of the firm who signed the deed of guarantee, was called as a witness, though both were apparently available, but the accountant of the firm, one John Anthony Antoni by name, was examined as a witness at the trial. Several passages of his evidence are of importance. First he describes what was the nature of the dealing between the appellant bank and his firm. He said the business of Antoni Brothers in the Port of Spain was general business dealing with cocoa and produce (coconuts, copra, etc.); that from the Royal Bank they obtained credit, sold drafts to them, drew cheques, paid in cheques, had a general banking account, gave notes, sold drafts against produce with bills of lading attached. The bank gave them credit for the proceeds of the drafts. For a firm sale they drew for the lot; for a consignment, for a percentage only. In 1920 prices went right down, he said. By January, 1921, his firm was absolutely insolvent. It never returned to a state of solvency. In reply to the Court, he said, if the price of cocoa had gone up, they might have become solvent. It all depended; No two modes of dealing with this bank could well differ from each other more than the mode thus described, and the mode which it is contended by the appellants is alone the mode authorised by the two opening lines of the guarantee—The words, “*The Royal Bank of Canada agreeing or continuing to deal with Antoni Brothers, herein referred to as ‘the customer,’ in the way of its business as a bank.*” It is contended that these words do not mean that the former mode of dealing between the parties was to be restored to any substantial extent, but that some mode of dealing, which is scarcely the shadow of the former mode, was to be adopted, consisting simply in this, that when any one paid into the bank a sum of money to the credit of this firm, the bank would apply that sum to the payment, *pro tanto*, of the debt owed to them by the firm. That style of dealing really resembled no more a banking transaction, commonly so-called, than would the sending of a cheque to one’s tailor or grocer in payment of the bill owed to the latter resemble a banking transaction.

The accountant gave, in addition, evidence upon another most important point, namely, the circumstances under which this deed of guarantee was executed. He said he had an interview in November, 1920, with Connell, who then asked the firm to stop drawing cheques—told him that he, Connell, had got instructions not to advance any more money to the firm; that when the question arose in January, 1921, the witness and Jean Marie had another interview with Connell, when they told

him they were hopelessly insolvent; that after a long conversation they asked Connell to help them to carry on in the way of further credit. Connell then answered: "*If you want the bank to give you more credit, you must get a guarantee*"; that he then suggested that Salvatori should give a guarantee for further credit. The witness then described the steps which were taken to induce Salvatori to give the guarantee. The witness volunteered the remark that if given credit, they hoped to be able to carry on, and in answer to a question from the presiding Judge, said: "If we had got further credit, it would have been just a fresh starting."

On page 19 of the appendix, the witness further states that after the guarantee was prepared, the guarantor and the witness had a further interview with Connell; that the latter said that he had written to the Montreal office, and had no doubt that the Montreal office would consent to the arrangement for further credit—to continue to draw money, so that Antoni Brothers could carry on—a substantial credit—between \$30,000.00 and \$40,000.00. The witness further states that he went several times during April and May to see Connell, and told him they were ready to start business again, relying on the further credits; that his only reply was that he had not got any answer from the Montreal office.

The present manager, Herman Paul Urich, when examined, said he took no part in the negotiations for, or the signing of, the guarantee.

At page 13 of the appendix, this witness, however, in answer to a question put to him by the Court, said:—

"At time of guarantee Antoni Brothers owed \$57,000.00 against no security. After Bank got Salvatori's guarantee and I was acting manager, I would have carried out no banking transaction for Antoni Brothers at all. None in the line of credit. I should have accepted a deposit but would have given them no credit. I would not have purchased customers' bills nor advanced money against cocoa shipped by them. I would have advanced money against Government Bonds. I would not have cashed a cheque for them even for \$100.00 increase of their overdraft. I considered they were already indebted in an amount they could not pay and which was only partly secured. I do not know Salvatori's reason for guaranteeing \$40,000.00. If he had not given his guarantee we could have put Antoni Brothers into liquidation. I do not know what property they had. So far as the Bank was concerned Mr. Salvatori's guarantee was a fortunate windfall."

That is the kind of dealing, apparently, which it is now contended on behalf of the appellants comes within the opening words of the deed of guarantee, namely, the words "agreeing or continuing to deal with Antoni Brothers as the customer in the way of its business as a bank."

Connell was examined in New York on commission on the 28th August, 1925, which presumably must have been before the trial of this action. There was no opportunity, therefore,

of cross-examining him closely upon the evidence given by the accountant as to the statements, promises and suggestions alleged to have been made by Mr. Connell leading up to the procurement and execution of the guarantee. He was, however, asked: Did he recall a certain guarantee for \$40,000.00 executed by Salvatori, Scott & Co. on or about the 23rd March, 1921? His answer to Mr. Russell, the examining counsel, was: "I do, sir."

He was then asked, Did he recall the terms of the guarantee? and his reply was that, in effect, his recollection was that the guarantee was to be paid by Mr. Salvatori at the rate of \$5,000.00 per annum. He is then asked what about interest, and his answer was that his recollection was that there was no interest; that interest was waived. When asked, Was he speaking only to the best of his recollection, or was he positive of that fact? his reply was that he was positive of the fact that the interest was waived. At page 60 of the appendix, this witness said that in view of the bank's agreeing not to take any immediate proceedings against Antoni Brothers, Mr. Salvatori expressed himself quite willing to give the guarantee for \$40,000.00 on the terms which were eventually granted by the bank, and the guarantee was eventually executed. He is then asked, "Was anything said at or about the time of the execution of the guarantee as to the bank extending further credit to Antoni Brothers?" and his reply was: "Nothing whatever, *nor was it contemplated.*" He then says that he is ready to state positively that he did not promise to extend any further credit.

He was then cross-examined, when suddenly his memory seemed to fail him. Henceforth his answers as to many things, which he must have well known, were confined to his recollection. For instance, he was asked if, after the execution of the guarantee, he ever advanced any money to Antoni Brothers, and his reply is "Not to recollection." He was then asked to look at plaintiffs' Exhibit A, and he replies: "From the account it apparently is so." His attention was then called to the opening words of the guarantee, and he is asked to state what his bank did in the shape of continuing to deal with Antoni Brothers, and his reply was: "That they continued to carry his liability to the bank, but that was all." At page 62 of the appendix he is further cross-examined. The question is put to him, "Did Jean Marie Antoni and the accountant ever ask you for further credit," and his answer is, "Not that I recollect." He is then asked, "Is it untrue that in January, when the statement showing insolvency was placed before you, they then began to ask you for further credit," and again his reply is, "Not that I can recollect." Again he is asked, "Did you suggest to them between January and the date of the guarantee that they should give the bank all their local assets?" and his answer is, "I have no such recollection."

And when further he is asked, "Did you suggest to them that if they would give the bank all their local assets, and if Salvatori signed the guarantee, you would give them further credit?" his answer is in the stereotyped form, "Such is not my recollection." This question is practically repeated to him. He was asked, "When you saw Salvatori did you tell him that if those assets (*i.e.*, those already mentioned) were given to you, and that he, Salvatori, signed the guarantee for \$40,000.00, you would give credit to their firm?" and his answer was, "Such is not my recollection."

He was then asked, "Do you recollect having promised to give them any credit at all?" and his answer, "Not at this late date, not that I can recollect." Most, if not all, of the questions to which the witness gave this stereotyped answer apply to things of which he must have had positive knowledge in the conduct of the business of the bank of which he was manager. It is incredible that he could not have given a positive answer in the affirmative or negative if he wished to speak the truth. His answers were obviously shaped, as they were, to conceal the truth. The learned Judge, in giving judgment, expressed his opinion of this witness's evidence. He said Mr. Connell gave his evidence on commission in New York, and qualified it so completely with such phrases as "To the best of my recollection" as to render his evidence almost valueless. Their Lordships concur in the conclusion at which the learned Judge arrived on this point, save that they would be inclined to substitute the word "absolutely" for the word "almost."

Before dealing with the construction of the language of the guarantee deed, it would be well to point out that if the construction of it, for which the appellants contend is its true construction, the engagement into which the guarantor entered was reckless and improvident to the last degree. Antoni Brothers assigned to the bank all their local assets. They were stripped bare of all property, yet the guarantor bound himself to pay to the bank \$5,000 per annum for eight years—\$40,000 in all—and failed to obtain from the bank any contract to give to the firm the advances on credit which were obviously the only means by which it could be hoped that the firm could recapture its former business and perhaps ultimately become solvent. The payment of the \$40,000 would have still left the firm a debtor to the bank to a large extent, and the guarantor would have failed to gain for the firm the benefit he plainly desired to secure for them.

It is only necessary to set out at length the first and last clauses of this deed of guarantee. They were as follows:—

"To The Royal Bank of Canada.

"In consideration of the Royal Bank of Canada agreeing or continuing to deal with Antoni Brothers, herein referred to as 'the Customer,' in the way of its business as a Bank, the undersigned hereby jointly and severally guarantee payment to the Bank of the liabilities which the Customer has incurred or is under or may incur or be under to the Bank, whether

arising from dealing between the Bank and the Customer or from other dealings by which the Bank may become in any manner whatsoever a creditor of the Customer ; including in such liabilities all interest, computed with quarterly or other rests according to the Bank's usual custom, charges for commission and other expenses, and all costs, charges and expenses which the Bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of Forty Thousand Dollars, ~~with interest at the rate of seven per cent. per annum from the date of demand for payment of the same, without interest~~).

“ And the undersigned agree that the Bank may refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the Customer and with other parties and securities as the Bank may see fit, and may apply all moneys received from the Customer or others, or from any securities upon such part of the Customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the undersigned under this guarantee effect.

“ And the undersigned specially waive and renounce any benefits of discussion and division.

“ And it is further agreed and it is a part of the Guarantee herein contained that we undertake that the amount of \$5,000 (Five thousand dollars) will be paid yearly commencing on the first day of March 1922 on the debt of Antoni Bros., herein guaranteed, and we make ourselves responsible to the Bank for the said yearly payments up to the amount of our guarantee of \$40,000 (Forty thousand dollars) without interest. It is understood that as long as the terms of this Guarantee are fulfilled, and as long as no action is taken by the firm of Antoni Bros., or any of the partners which would be prejudicial to the interest of the Bank in connection with the advances which they have received from the Bank, and as long as no legal action is taken against them by any of the other creditors, that no legal action will be taken against the firm of Antoni Bros. by the Bank, but nothing herein contained shall prejudice the Bank in regard to any claim they may have against the firm of Antoni Bros. in respect of any interest or any other moneys owing to them by the said firm over and above the said sum of \$40,000 (Forty Thousand dollars).

“ Sealed and dated Port of Spain, Trinidad, the 23rd day of March 1921 A.D.”

Their Lordships do not think that the language of this deed is so ambiguous as the appellants contend that it is, but if it be so, then they think that the key to its construction is that laid down by Lord Blackburn, *The River Wear Commissioners v. Adamson* 2 A.C. 734, at p. 763. In the report he expressed himself thus :—

“ . . . though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment. My Lords, it is of great importance that those principles should be ascertained ; and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing ; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used. . . . ”

Adopting that rule of construction, it is impossible, in their Lordships' view, having regard to the circumstances out of which the deed of guarantee arose and in reference to which its language was used, to suppose that what was intended was that these broken and insolvent traders, the firm, should get no help from the bank beyond leaving their account open, merely continuing to carry the liability, as Connell phrases it. The learned Judge, Mr. Justice Adrian Clark, said that the words "*continuing to deal* with Antoni Brothers in the way of its *business as a bank* must involve some *bona-fide* fresh transaction between the parties." Their Lordships concur with him in this view. They think it is impossible to confine these words to merely keeping the account of this firm open, that is, merely receiving payment from anyone who chooses to pay in money to the bank to the firm's credit. The deed really contains two covenants or contracts, one being the consideration for the other, the first covenant being that if the bank continue to deal with the firm as their customer in the way of its business as a bank, the guarantor will pay to the bank the \$40,000 at the times and in the manner specified and do the other things he has undertaken to do. The bank have failed to perform their covenant, they have not continued to deal with the firm as their customer in the way of their business as a bank. The guarantor has not received the consideration, *i.e.*, the whole of the consideration upon which his covenant was based. He is therefore not bound to perform that covenant by reason of this failure. The appeal, therefore, in their Lordships' opinion, fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

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In the Privy Council.

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DELIVERED BY LORD ATKINSON.

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