SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 9 of 1990

BETWEEN:

SAINT VINCENT INSURANCE LTD - Plaintiff/Appellant

and

1) JULIAN MC INTOSH
2) ISOLA MC INTOSH - Defendants/Respondents

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: A. Cummings for the Appellant
H. Matadial for the Respondent Isola Mc Intosh
A. Williams for the Respondent Julian Mc Intosh

1991; July 16,
Dec. 9.

JUDGMENT

ROBOTHAM, C.J.

The plaintiff/appellant is a duly incorporated Company carrying on the business of Insurers in the State of St. Vincent and the Grenadines.

On 4th December, 1987, they issued a Writ against the defendants/respondents which stated in part as follows:-

(1) ....

(2) On the 23rd day of November, 1985, the Defendants agreed in writing to guarantee unconditionally payments of amounts as are detailed hereunder and on the terms set out hereinafter.

(3) The terms and payments referred to are as follows:

"In consideration of St. Vincent Insurances Limited arranging insurance on M.V. "TEGA" at a cost of $48,762.00 we hereby agree to pay a deposit of $12,000.00 and pay the balance including interest at 12% per annum, as follows:

/$8,000......

	\$8,000.00 by 23/12/85
a further	\$8,000.00 by 23/1/86
" "	\$8,000.00 by 23/2/86
" "	\$8,000.00 by 23/3/86
and a final	\$5,790.00 by 23/4/86

Elroy Lewis

Owners of M.V. "TEGA"

We hereby unconditionally guarantee payments of amounts as detailed above.

....

(4) The sum of \$31,952.84 is still due and owing to the plaintiff by the defendants in respect of the foregoing.

(5) The plaintiff's several demands for payment of the sum aforesaid have gone unheeded by the defendants.

Julian Mc Intosh   Isola Mc Intosh"

The pleadings with all the amendments both after the filing of the Writ and continuing up to and during the trial were such as to produce a state of utter confusion by the time the trial was concluded. The need for more care to be exercised in the filing of pleadings must again be re-emphasized by this Court. Be that as it may, the trial Judge in an oral judgment dismissed the appellant's claim in these terms:

> "Court finds no contract for a principal debt based on the evidence of Patrick Hughes. Having so found Court cannot find any debt guaranteed by the defendants.
>
> Plaintiff's case dismissed with costs to the defendants to be taxed certified fit for two counsel."

For the purposes of this judgment, it is not necessary to refer to the other pleadings.

It is clear from the wording of the agreement that it was a guarantee in which there were three parties namely the creditor (the Insurance Company), the principal debtor Elroy Lewis, and the 2 guarantors Julian and Isola Mc Intosh.

The statement of claim clearly stated that the respondents were acting as guarantors for the liability incurred by Elroy Lewis one of the owners of the boat, but Lewis was not made a party to the action, and did not give evidence.

/This is.......

This is a contract which falls within section 4 of the Statute of Frauds in that it was a promise made by Julian and Isola Mc Intosh to answer for the debt, default or miscarriage of another in this case Elroy Lewis, a co-owner of the boat.

That being the case, as guarantors they assumed a secondary liability which would arise only upon default being made by the principal debtor. No evidence was forthcoming in the case to indicate that any demand for payment was made by the appellant on the principal debtor Elroy Lewis. As stated Lewis did not give evidence, and the appellant through its Chairman Patrick Hughes at various stages of his evidence said:

> "(1) We understood at all times that the owners were the defendants.
>
> (2) I dealt with the No. 2 defendant (Isola Mc Intosh) on the assumption that she was the major owner.
>
> (3) I believed Mrs. Mc Intosh to be one of the owners.... I never met Elroy Lewis...... I have no conception who he is.
>
> (4) I must have read it (the Agreement) but the fact of Elroy Lewis signing as owner did not register on my mind when these proceedings were contemplated. I do not know Elroy Lewis. I made no demands for payment from Elroy Lewis. I never dealt with him."

The position in law is clearly set out in the Law of Contract 11th Edition by Cheshire Fifoot and Furmston at page 195 which reads:

> "By a more comprehensive process of interpretation it has also been ruled that the use of the words "of another person" assumes the continued existence of some primary liability owed by a third party to the plaintiff, to which the defendants' guarantee is subsidiary and collateral. A distinction has thus been taken between and arrangement whereby the original debtor continues liable and one in which he is discharged. In other words, a contract is not a guarantee within the statute unless there are three parties - the creditors, the principal debtor and the secondary debtor or guarantor. The essence of the contract is that the guarantor agrees, not to discharge the liability in any event, but to do so only if the principal debtor fails in his duty."

Counsel for the appellant submitted that the document really was a contract of indemnity or suretyship. He referred the Court to Halsbury's 4th Edition, Vol. 20, para. 158 which reads:-

> "The surety's liability arises when the principal debtor has made default but not until then."

This does not help the appellant's case.

/Chitty on.....

Chitty on Contracts 25th Edition, para. 4406 gives the distinction between contracts of guarantee and indemnity in these words:-

> "The distinction between the two contracts, is in brief, that in a contract of guarantee the surety assumes a secondary liability to answer for the debtor who remains primary liable; whereas in a contract of indemnity the surety assumes primary liability, either alone or jointly with the principal debtor. Whether the contract falls into one class or the other, and whether the normal incidents of a contract of that class are modified, are ordinary questions of construction."

It is clear from the evidence in this case that the appellant's arrangements with the respondents were very loose. In previous transactions, they dealt with the respondent Isola Mc Intosh as one of the owners of the boat and seemed to be completely oblivious of the fact that in respect of the guarantee the subject of this action, it was Elroy Lewis one of the de facto owners who had signed as the principal debtor. It was incumbent upon the appellant therefore to have made a demand for payment on Lewis and only upon his default would the liability of the guarantors arise.

I am constrained to hold that the appellant's action in the Court below must fail not necessarily on the basis as given by the trial Judge but that there was no evidence led whatsoever to show that any demand for payment was made by the creditor upon the principal debtor, Elroy Lewis before the action was brought against the guarantors.

I would dismiss the appeal.

On the question of costs, I would allow costs for one Counsel only both here and in the Court below.

L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal

C.M.D. BYRON,
Justice of Appeal.