

BETWEEN

**BD LIMITED
APPLICANT**

AND

**YW
RESPONDENT**

Date of Order:

28 November 2013

Referee:

Referee Reuvecamp

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim is dismissed

Facts

[1] The applicant claims \$5,202.37 in respect of goods to the value of \$3,917.17 supplied to ABC Limited ("ABC", company number #####) during 2011 and interest and enforcement costs. The company is now in liquidation. The applicant claims that the respondent, YW, is liable for that debt pursuant to a Personal Guarantee dated 19 August 2010, the day of incorporation of that company. YW denies liability since, as he claims, he was at no stage in charge of the company nor did he order the goods.

Law

[2] Contract Law, Law of Guarantees, Property Law Act 2007.

Issue

[3] Whether the respondent is liable under the guarantee for the amount of the claim

Decision

[4] Although in general a contract does not need to be in writing, an important exception applies under Section 27 Property Law Act 2007 in respect of a guarantee. Parliament has considered it necessary to ensure that the obligations of a person who accepts liability for the debt of another are detailed in writing to avoid unnecessary dispute about the extent of those obligations at a later stage. If the guarantee is not in writing, it is not enforceable. The terms of the guarantee will therefore need to be clearly defined and will be enforced only to the extent that has happened.

[5] I find that the existence of a supply contract is not denied by YW, nor the fact that he signed the credit application for ABC and also the purported guarantee document. He argues that he was not a shareholder, nor a director of ABC at the time or at any time thereafter, nor exercised any control over it, or ordered the goods. He claims that he had sold his earlier business to that company and just forgot about his potential liabilities under the guarantee and the need to be released from the guarantee.

[6] I find that YW's submission is not sufficient to disclaim liability under a personal guarantee. A person who signs a document purporting to guarantee the debt of another cannot use the argument of lack of control as an excuse to avoid liability, unless the

requirement of existing or continuing control was a specific condition expressed in the guarantee document.

[7] Providing a guarantee is a serious matter, as shown by the specific requirement at law for it to be in writing. A person providing a written guarantee is presumed to carefully evaluate the, often unlimited and continuing, potential liability for the debts of that other person. It is fair to say that a considerable amount of trust and confidence may be required to warrant the risk inherent in giving such an undertaking. If there is any doubt in that regard, the guarantee should not be signed.

[8] It should be noted that a guarantor will not be liable for more than the principal debtor is liable. Nor will he be liable for more than what is stated in the guarantee document. The terms of the guarantee document are therefore determinative for the obligations undertaken and a careful consideration of those terms will be required in order to establish whether the guarantor is liable for the debt the subject of the applicant's claim.

[9] As stated before, the goods were supplied to ABC. The debt is therefore owed by ABC, but since that company is in liquidation the applicant understandably looks to the guarantor for payment.

[10] In this case the relevant personal guarantee was indeed signed by YW, when he applied to open a credit account for ABC. However the text of the guarantee, which is addressed to the applicant, reads:

"To: BD Limited

I/We, YW

(full Christian and Surnames of Guarantors)

OF ABC [sic] (NZ) Ltd

IN CONSIDERATION of you agreeing to supply paint and/or other goods or services at my/our request to

YW

(full names of customer where Limited Liability Company)

(hereinafter called "The Customer") I/we DO HEREBY JOINTLY AND SEVERALLY guarantee to you the due and punctual payment to you by the Customer of all monies which are now or may hereafter become due to you by the Customer, and"

[11] A careful reading of the terms of this purported guarantee shows that YW undertakes to guarantee payment to ABC of monies due for supplies to himself as “Customer”, as defined in this document. YW therefore is guaranteeing his own debt to the applicant and not ABC’s debt. Leaving aside whether this in itself would be effective, it is clear that it does not achieve the purpose the applicant wishes to obtain i.e. that YW guarantees ABC’s debt.

[12] BB, on behalf of the applicant, submitted that YW under the further text of the purported guarantee declares and covenants “that although as between the Customer and me/us, I/We may be a surety only yet as between BD Ltd and me/us, I/we shall be deemed to be a principal debtor and liable to you” *and therefore is liable as “principal debtor”*.

[13] I find that BB is correct that that further statement could be relevant. However, the issue remains: the principal debtor of what exactly? I find that it must necessarily relate back to “all monies which are now and may hereafter become due to you by the Customer”, i.e. by himself. In other words: the argument does not assist ABC.

[14] I find that in view of the specific requirement imposed by Parliament as reflected in section 27 Property Law Act 2007, the legal principle that no oral evidence to contradict the written text of a document is permissible in evidence, and the principle that a restrictive interpretation should be given to the terms of a guarantee, I am unable to read into this document an undertaking by YW to accept liability for the debts of ABC, as considered desirable by the applicant. The applicant’s claim must therefore fail.