GUARANTEES OF INFANTS' CONTRACTS

ROBINSON'S MOTOR VEHICLES LTD. v. GRAHAM AND ANOTHER, [1956] N.Z.L.R. 545.

Since present economic and social conditions in New Zealand have considerably increased the wage-earning capacity of the average minor it is scarcely remarkable that he should take advantage of the hire-purchase agreement which has provided him with the means of acquiring with relative ease articles which used to be regarded as luxuries, but are now regarded by many infants, though not by the law, as necessities. Vendors who wish to do business with infants have therefore had to avoid the legal difficulties surrounding such transactions as best they can, normally by insisting that some responsible person of full age join in the transaction as the infant's guarantor or surety.

Cases on such transactions have only recently come before the Courts. As late as 1946 judicial surprise was expressed in England at the dearth of authority: Coutts and Co. v. Browne-Lecky, [1947] K.B. 104, per Oliver J.; and the only reported decision in New Zealand on the position of a guarantor in such a transaction is the recent judgment of North J. in Robinson's Motor Vehicles Ltd. v. Graham and Another, [1956] N.Z.L.R. 545.

In the light of these decisions vendors to infants under hire-purchase agreements may be disturbed to find it is now apparently significant whether a third party joins in the transaction as surety or guarantor, especially since one would not imagine that there was any compelling reason for such a difference.

In the latter case the defendant Graham, an infant, entered into a customary hire-purchase agreement with the plaintiff company, and the second defendant, Nurse McLeod, signed as guarantor an agreement endorsed on the main agreement. It appears that nothing was said by any of the parties about Graham's age, although there was a printed clause in the main agreement (which appears to have been overlooked by all the parties) declaring that Graham was over the age

of 21 years. Graham fell behind in his payments and after he had returned the car, he learned of his legal position under s. 12 of the Infants Act 1908. During the subsequent proceedings allegations of fraud were withdrawn and the plaintiff company conceded that s. 12 of the Infants Act precluded any possibility of it succeeding against Graham.

The issues which arose for decision were two: firstly whether the second defendant was a principal party to the hire-purchase agreement and secondly, whether if the second defendant were not a principal party, the guarantee remained good nothwithstanding that the agreement was void as against the first defendant.

On the first point North J. held as a question of construction that the second defendant was in the position of a guarantor and not a surety, that her obligation was clearly expressed to be collateral and was not an original obligation, and that the document constituted a contract of guarantee and not of indemnity. On the second point he held, following Coutts and Co. v. Browne-Lecky (supra), that the validity of the contract of guarantee was dependent on the validity of the hire-purchase agreement and that Nurse McLeod could not be bound to guarantee a void contract. He did not reach this conclusion without some misgivings, but stated that he considered Coutts and Co. v. Browne-Lecky to be rightly decided since it was, in his view, consistent with prior decisions and with the relevant statutory provisions. It is submitted that the above authority is far from being authority on the point which arose for North J.'s decision, and the situation appears, with respect, to be far from covered by s. 12 of the Infants Act 1908.

Consideration of the authorities related to this issue is the first necessity in endeavouring to support the above decisions. In Coutts and Co. v. Browne-Lecky the plaintiff bank had allowed the first defendant (of course an infant) an overdraft guaranteed by two other persons of full age and capacity. All parties were at all material times cognizant of the infancy of the first defendant. On these facts Oliver J. held that the collateral contract of the second defendant was one of guarantee and not of indemnity and that a guarantor cannot be bound on a guarantee of a void contract.

To reach this conclusion Oliver J. placed considerable reliance on the decision of the Court of Appeal in Wauthier v. Wilson (1912), 28 T.L.R. 239, the facts of which were practically identical with those in the Coutts case but where the contract had been held to be one of indemnity on which the surety was liable as a principal debtor. As North J. remarked in the Robinson case, "opinions may well differ on a matter of construction" (supra, at 549), and the finding of both North J. in the Robinson case and Oliver J. in the Coutts case on this point is hardly open to criticism. But after arriving at a conclusion different from that reached by the Court of Appeal on the question of construction, Oliver J. proceeded to adopt as the basis of his decision veiled obiter remarks of Farwell L.J. and Warrington J. as being "a plain indication that if the contract had been one of guarantee the guarantor could not have been held liable" ([1947] 1 K.B. 104, 111).

Since the remarks of Farwell L.J. were confined to the expression of gladness at not being obliged to overrule a distinguished brother judge, and since the brief concurring remarks of Warrington J. can hardly be regarded as the epitome of authority, it is perhaps strange that dicta which were plainly obiter in a case which in any event involved a contract of indemnity where the infancy was known to all parties should be used as "a plain indication" of the decision which should be reached in a case where the contract was one of guarantee, where, again, the fact of infancy was known to all parties. It is in this respect that it is submitted that North J. in the Robinson case may have been optimistic in regarding the decision of Oliver J. in the Coutts case an authority on the facts in issue and was in error in following it.

It should be said, however, that North J. also considered two decisions of the House of Lords. In Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17, Lord Selbourne had said (ibid., 24) that

> there can be no suretyship unless there be a principal debtor . . . nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

But in support of this statement Lord Selbourne cited no authority and since the case was one where there was in effect no contract of suretyship as the defendant was the only person who had ever stood in the position of a debtor, and since there is no indication in any other respect that Lord Selbourne's views were supported by any other members of the House, it can hardly be said that his clearly obiter remarks are of any particularly persuasive force in a case with facts such as those in Robinson's case.

The other decision of the House of Lords is that in Swan v. Bank of Scotland (1835), 10 Bligh N.S. 627 [6 E.R. 231] in which the contract the subject of the guarantee was one which was prohibited by, and clearly void under, a revenue statute. It is clear from the speeches that the purpose of invalidating the principal contract was to protect the revenue and in accordance with the rule of statutory interpretation which has become known as the "mischief rule" the House of Lords held that any contract dependent on or collateral with a contract void for illegality was tainted with the illegality also. The question of statutory voidness will be discussed below, but it is submitted here that in effect no general principle is laid down by this decision. It is of very restrictive operation.

North J. also considered briefly the quotation from Pothier on Contracts which caused Oliver J. some little worry in the Coutts case. This quotation from Pothier was taken from de Colyar, Law of Guarantees and of Principal and Surety (3rd ed.), 210:

> As the obligation of sureties is according to our definition an obligation accessory to that of a principal debtor, it follows that it is of the essence of the obligation that there should be a valid obligation of a principal debtor; consequently, if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation. . . . However, where directors guarantee the performance of a contract by their company which does not bind the latter, as being ultra vires, the directors' suretyship liability is enforceable.

Oliver J. says that he would have been grateful if the author had given his opinion why this is so. It is submitted that the answer can be found in the principle stated in Bacon's Abridgement (7th ed.), Vol. IV, 369:

> It is laid down as a general rule, that infancy is a personal privilege, of which no one can take advantage but the infant himself. . . .

Ultra vires and infancy are both privileges of a personal nature and such that only the company and the infant respectively are entitled to the advantages thereof. This would appear to be a general principle to which little consideration has been given in the two most recent cases discussed above and it may be submitted that if attention had been drawn to this principle the results in the Coutts and Robinson cases might well have been different. On the other hand, while it is true that there is a technical distinction between a contract of guarantee and a contract of indemnity, the remarks of Farwell L.J. in Wauthier v. Wilson (1912), 28 T.L.R. 239 are certainly applicable here. Dealing with the appellant's contention that that case was a case of guarantee and that therefore the guarantor could not be held liable on a void contract the learned Lord Justice said that if the contention prevailed

> . . . it would follow that these three parties deliberately sat down to enter into an agreement under which money was to be advanced under a promissory note under which no one was liable at all there being no one liable as principal and therefore no one liable as surety. (Ibid., 239.)

This leads to a consideration of the provisions of the Infants Act 1908, s. 12 of which provides that contracts such as the principal one in the Robinson case when entered into by an infant shall be absolutely void. Naturally an exception is made of contracts for necessaries but the decisions on the section go far to show that these words are not in effect interpreted to mean "absolutely void": see, for example, Valentini v. Canali (1890), 24 Q.B.D. 166.

The object of the avoidance of the contract under this section is plainly to protect infants and not other parties. Consequently, if we may use the same reasoning as that used by the House of Lords in Swan v. Bank of Scotland (supra), the position is that, having regard to the object of the statute, avoidance under the Infants Act can be distinguished from that under a statute such as the one considered in that case. Oliver J. apparently considered that the Swan case laid down a general rule that when a principal contract is void all collateral and dependent contracts were also void. However, in that case the essence of the purpose for which the principal contract was declared void necessitated declaring void all collateral and dependent contracts. But neither the purpose of the Infants Act nor public policy renders this necessary as a plea of infancy will in any event protect the infant against any claim brought by a guarantor who has been held liable under the contract of guarantee in exactly the same way as a plea of infancy protects him from liability under the principal contract. In consequence it can hardly be said that if the above submission is taken to be the rule the object of s. 12 is in any way defeated.

It is submitted that the infancy cases are more analogous to the cases on ultra vires corporation contracts than to the principle (if such it be) laid down in the Swan case which, it is submitted, is limited to those situations where, in order to render the policy of a statute effective, both principal and collateral contracts must be avoided—the statutory illegality affects the principal contract, and consequently the collateral contract, and makes the latter void, as well.

It is therefore submitted that in the Coutts case Oliver J. drew too wide a principle from Swan v. Bank of Scotland (supra) and failed to appreciate the significance of the decision of the Court of Appeal in Wauthier v. Wilson and Another. It may be said, with respect, that, in accepting Oliver J.'s judgment as correct, North J. in the Robinson case extended this new principle even further by incorporating an additional feature, the lack of knowledge by the parties of the infancy of the principal debtor.

In cases where there is a dearth of authority there is, it is submitted, nothing to be lost by approaching the matter from first principles. It is suggested that the analysis suggested in this note is more in accordance with authority than either the decisions of Oliver J. and of North J. It is therefore to be hoped that it will not be long before an appellate court succeeds in bringing some order into this branch of the law of contract and succeeds, as we have submitted it is possible to do on the basis of authority, in bridging the gap between social conditions and the present line of recent decisions, a step which North J. stated was open only to the legislature.
