[2001–02 Gib LR 51]

BARI PROPERTIES LIMITED v. NEW CURIOSITY SHOP LIMITED, VAUGHAN and SHARPE

SUPREME COURT (Schofield, C.J.): March 9th, 2001

Guarantee and Indemnity—surety—discharge of surety—discharge of one co-surety operates as release of both, unless right reserved to sue other—right only reserved if intended and parties direct minds to issue at time of agreement to discharge

The plaintiff brought an action to recover from a surety a debt owed by the defendant on which it had defaulted.

V and S stood surety for the obligations of the defendant under its tenancy agreement with the plaintiff. The defendant ran into financial difficulties and closed its shop, being unable to meet its liabilities. Judgment in default was obtained against the defendant but was not met. V's cash offer to be released as a surety, though less than the full amount due, was accepted by the plaintiff. When an action was brought against the co-surety for the balance of the debt, it was met with the defence that the release of V as surety had the effect of also releasing the co-surety.

The plaintiff submitted that the agreement with V was a covenant not to sue him, which preserved its right to sue S. It was not an absolute release of V's obligations as co-surety, which would also release S's obligations as co-surety.

Held, dismissing the action:

The release of V operated as a release of the co-surety, S, as the release of one of two joint, or joint and several, sureties operated as the release of both. Although the reservation of the right to sue the co-surety would prevent the discharge of the co-surety, there was nothing to show that the plaintiff and V had expressly or impliedly addressed their minds to the question of whether the plaintiff's rights against S were to be reserved. The action against S would therefore be dismissed (para. 10; para. 12; paras. 16–18).

Cases cited:

(1) *E.W.A., a Debtor, In re*, [1901] 2 K.B. 642; (1901), 85 L.T. 31, applied.

(2) *Good, Ex p., In re Armitage* (1877), 5 Ch. D. 46, *dicta* of Bacon, V.-C. applied.

(3) *Nicholson* v. *Revill*, [1835–42] All E.R. Rep. 148; (1836), 111 E.R. 941, applied.

(4) *Watts* v. *Aldington*, [1993] T.L.R. 655, applied.
(5) *Wolmershausen, Re* (1890), 62 L.T. 541, applied.

H.K. Budhrani, Q.C. for the plaintiff;
K. Navas for the third defendant.

1 **SCHOFIELD, C.J.:** Bari Properties Ltd. owns the International Commercial Centre in Main Street, Gibraltar. Its predecessor in title, Pall Mall Ltd., leased unit F10 in I.C.C. to the New Curiosity Shop Ltd. on October 2nd, 1989, for use as a retail outlet for greetings cards, books and stationery. The lease was for 21 years at a rent of £12,552 per annum. In November 1999, the shop acquired Unit 9 in I.C.C. by way of assignment of the lease of the existing tenant.

2 Bernard Vaughan, the second defendant, and Glynne Marie Sharpe, the third defendant, stood surety for the shop's obligations under the tenancy agreements. It seems that Mr. Vaughan had no interest in the shop, but Mrs. Sharpe was its sole director and operated the business.

3 The shop began to run into financial difficulties, and by August 1995 it was in arrears of rent and maintenance costs in the sum of £19,284.50. Bari instructed Mrs. Prescott to take steps to recover this amount and this suit was accordingly filed on September 6th, 1995. Mrs. Sharpe handed over the keys to Unit 10 to the manager of I.C.C. on August 9th, 1995, despite his reluctance to accept them. The remaining keys to the two units were delivered to Mrs. Prescott on September 27th, 1995. The shop has closed and is unable to meet its liabilities under the tenancy agreements, including, of course, its liabilities for past and future rent.

4 Judgment in default was entered in this action on October 18th, 1995, against the shop and Mrs. Sharpe for £21,892.77, together with costs of £254.50. This judgment has since been set aside as against Mrs. Sharpe, on the ground that the writ was not validly served on her.

5 Mr. Vaughan was served with the writ and acknowledged service thereof, giving notice of his intention to defend the proceedings. Mr. Pilley acted for him and entered into negotiations with Mrs. Prescott for his release as a surety. On April 2nd, 1996, Mr. Pilley put an offer to Mrs. Prescott. These are the relevant portions of his letter:

> "*Re: Bari Properties Ltd. v. New Curiosity Shop*
>
> I write further to our meeting, since which time I have had an opportunity of further considering counsel's opinion and discussing matters with my client, Bernard Vaughan.
>
> I have advised my client to make an offer in full and final settlement in the sum of £20,000 . . .

I would stress the figure of £20,000 has not been plucked out of the sky, but is a genuine attempt to settle.

. . . Bernard would be in a position to pay £10,000 within two months, that is to say before the end of May and the balance of £10,000 before the end of this year.

I should be pleased if you would kindly take your client's urgent instructions and come back to me."

6 Mrs. Prescott replied on April 23rd, 1996, in the following terms. Again, I have deleted an irrelevant portion of the letter.

"*Re: Bari Properties Ltd. v. New Curiosity Shop*

I refer to your letter of April 2nd, 1996, and to your letter of April 18th, 1996. I am sorry to have taken a little while to reply, but I was waiting for instructions from my client which have now been forthcoming. Having considered the matter very carefully and discussed it with their bankers, my client has advised me to accept your client's offer in full and final settlement in the sum of £20,000 . . .

My instructions are, however, that the method of payment is unacceptable to my client. My client agrees that your client should pay £10,000 before the end of May 1996; however, the balance of £10,000 should be paid by the end of July 1996. In addition, my client requires some sort of guarantee that payment is to be received, perhaps by bankers draft or a suitable alternative.

I trust you will be able to secure your client's agreement to the above terms, which in all the circumstances I am sure you will consider quite reasonable. I will not progress the matter further in court until I have had your reply to this letter."

7 There was no reply to this letter but it seems to be accepted by the parties that the agreement reached between Mr. Vaughan and Bari was that he would be released as surety on payment by him to Bari of the sum of £20,000, payable as to £10,000 at the end of May 1996 and as to the balance by October 31st, 1996. In the event the first £10,000 was paid on June 3rd, 1996, and the balance by several instalments, the last one being paid on April 30th, 1999. Correspondence relating to the payment of the balance has been exhibited and in particular a letter from Mr. Pilley to Mr. Budhrani, who by the date of the letter, November 16th, 1998, had taken over conduct of the matter from Mrs. Prescott. The relevant portion of the letter reads:

"*Re: Units F9 and F10 I.C.C.—The New Curiosity Shop and Bernard Vaughan*

> I write further to my letter of November 4th and to our subsequent telephone conversation. It is my clear recollection and that of Bernard, that he was required to pay the sum of £20,000 to be released as guarantor. It was not understood to be full and final settlement of the obligations of the lessee under the terms of the lease; nor did the settlement of Bernard have anything to do with the obligations of his co-surety, Mrs. Glynne Sharpe.
>
> The only issue which concerned Bernard, was the release of his obligations and not those of anyone else. I appreciate there have been delays, but Bernard is willing to abide by his agreement. I am content to arrange a meeting between yourself, Bernard and myself if you believe that would be helpful.
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> Bernard tells me he has been approached by Messrs. Phillips & Co. acting for Glynne Sharpe, seeking to enlist our support for the proposition that payment by Bernard is in full and final settlement of the lessee's obligations under the terms of the lease. That is not our position."

8 It took time for Bari to take up the case again against Mrs. Sharpe and it has been met with the defence that its release of Mr. Vaughan as surety had the effect of releasing his co-surety, Mrs. Sharpe. The following preliminary point has been drafted and falls to be decided:

> "Whether the agreement entered into by the plaintiff with the second defendant, in or about April 1996, was an absolute release of the second defendant's obligations as co-surety of the obligations of the first defendant, thereby releasing the third defendant from her obligations as a co-surety with the second defendant, or whether the said agreement was merely a covenant by the plaintiff not to sue the second defendant, which did not release the co-surety and which leaves the second defendant open to claims for contributions by the third defendant, in the event that any judgment is obtained against her by the plaintiff."

9 Mrs. Benady, who was personal assistant to the managing director of Bari, Mr. Massias, testified that she was aware of the proceedings in this case, of their progress and the progress of negotiations and was present at meetings between Mr. Massias and Mrs. Prescott. She handled correspondence. She said that when Mrs. Sharpe handed the keys of the units back to Bari, it did not accept that the tenancy was surrendered, and regarded the tenancy as continuing. There were other units in I.C.C. unoccupied, and that is still the case. It was not her understanding that the £20,000 paid by Mr. Vaughan was in settlement of the amount claimed from the shop. The sum was paid for the purpose of securing his release as surety. She said that Bari was concerned not only to recover the

amount adjudged due to it in respect of past arrears, but to ensure that provision was made for future losses. The lease to the shop still had 15 years to run. Mrs. Prescott was instructed that Bari would not forego any part of the amount adjudged due by the shop and Mrs. Sharpe. She went on to say that it was envisaged and understood by both Bari and Mr. Vaughan, that Bari would enforce judgment against the shop and Mrs. Sharpe. In her witness statement, Mrs. Benady stated that the agreement reached between Bari and Mr. Vaughan was not one which entitled Mr. Vaughan to a release from his obligation under the leases, but was one whereby Bari agreed not to proceed with the action against Mr. Vaughan. When examined on this point, Mrs. Benady had to concede that she was not aware of the difference between these two types of agreement.

10 The general principle of law is that a release of one of two joint, or joint and several, sureties operates as a release of both (see *Nicholson* v. *Revill* (3) and *Re Wolmershausen* (5)). The general rule and the reason for it was stated thus by Bacon, V.-C. in *Ex p. Good, In re Armitage* (2) (5 Ch. D. at 55):

> "Now, in point of law, it is not to be disputed that a release to one of several joint debtors releases them all. The case of *Nicholson* v. *Revill* is one of the many instances in which this rule of law has been applied, and the reason upon which the rule is founded is as clear and as plain as the rule itself. It is to prevent circuity of action, inasmuch as if the released debtor were still liable to an action for contribution by his co-debtor (who had been sued and had paid), he would not be in fact released: *North* v. *Wakefield*."

11 An exception to this rule is where the surety to be released obtains the consent of the other surety. It is common ground that Mrs. Sharpe's consent was not obtained to the release of Mr. Vaughan.

12 Furthermore, where there is an agreement not to sue one surety with a reservation of the right to sue the co-surety, then this will not operate as a discharge as against the co-surety. The position was stated by Collins, L.J. thus in *In re E.W.A., a Debtor* (1) ([1901] 2 K.B. at 648–649):

> "It is clear that, although a document in terms purports to release one of two joint debtors, yet it may contain in terms a reservation of rights against the other joint debtor. Where you find those two provisions you construe the document, not as a release, but merely as an undertaking not to sue a particular individual, and the result is that the right to proceed against the co-debtor is reserved and can be put in force against him. Whenever you can find from the terms of the document an agreement for the reservation of rights against the co-debtor, then, I agree, the document cannot be construed as an accord and satisfaction of the joint debt, and, therefore, as a release of the co-debtor."

13 Bari argues that the agreement between itself and Mr. Vaughan was merely a covenant not to sue Mr. Vaughan, and operates so as to preserve its right to follow Mrs. Sharpe. Mr. Budhrani argues that the issue is what the parties to the agreement intended, so far as the co-surety, Mrs. Sharpe, was concerned. We are here dealing with an oral agreement, he says, whereas the authorities all deal with written agreements for the release of a surety.

14 What seems to be clear from the authorities, is that it must be a term of the agreement between the parties that the rights as against a co-surety are reserved. Such a term may be implied (see *Watts* v. *Aldington* (4))

15 In *In re E.W.A., a Debtor* (1) *A* and *B* became liable on a joint and several guarantee to a bank for the sum of £6,000. Subsequently the bank obtained judgment for that amount from *A* and *B* jointly and severally. The bank presented a bankruptcy petition against *B* alone for the whole judgment debt. The petition was withdrawn upon terms arranged between the bank and *B* and embodied in a receipt given to *B* by the bank for £3,000 and given by *B* "in full discharge of all claims by the bank against *B*." It was held that this agreement operated to release *A* from his liability on the balance of the judgment debt. Collins, L.J. said ([1901] 2 K.B. at 649–650):

> "Accordingly, I am of opinion that the liability on the judgment is clearly embraced in the claims discharged by the acceptance of this receipt. Why, then, should any limitation be placed upon the effect of this discharge of 'all claims'? If there is no such limitation, the effect of the document is that it releases the claim against both co-debtors. If this legal consequence had been pointed out to the bank at the time, they might have said that that was not what they intended, but that is a factor common probably to all cases in which a release is given to one of two joint debtors. The person giving it may not realize the full consequences of it as regards the release of the co-debtor; but that is not, in my opinion, a sufficient ground for reading into the document something that is not expressed in it; and unless you find in it something qualifying the general words, it appears to me that the legal consequences of the general words of discharge must follow, notwithstanding that those consequences may go beyond what the person giving the document would have intended if they had been pointed out to him at the time, and he had had an opportunity of addressing his mind to them."

16 It seems to me that the authorities show that the parties to the agreement must be shown to have intended, at the time the agreement was entered into, that the rights as against the co-surety were reserved and that they must have agreed that such was the case, either expressly or impliedly.

17 There is nothing in the material before me to show that Bari and Mr. Vaughan actually addressed their joint minds to the question of whether the rights of Bari against Mrs. Sharpe were to be reserved at the time they entered into the agreement. There is, of course, the evidence of Mrs. Benady that Mrs. Prescott was instructed that Bari would not forego its action against Mrs. Sharpe. The letters passed between Mr. Pilley and Mrs. Prescott in April 1996 seem to embody the terms of the agreement eventually reached between Bari and Mr. Vaughan, but for minor details of dates of payment. They are silent on the question of Mrs. Sharpe, or the shop for that matter. It is true that subsequent letters from Mr. Pilley state Mr. Vaughan's disquiet at the lack of action against Mrs. Sharpe. No doubt he felt aggrieved at being left with a substantial payment to meet when he had no interest in the shop, but this seems to me to be an afterthought. But Mr. Pilley's letter to Mrs. Prescott of November 16th, 1998 is revealing. It is clear that the parties' minds were on the release of Mr. Vaughan in April 1996 and that no agreement was reached in relation to Mrs. Sharpe at the time the agreement between Bari and Mr. Vaughan was entered into. I find that it was not until after the agreement to release Mr. Vaughan was entered into that the parties again addressed their minds to Mrs. Sharpe.

18 In all the circumstances, I find that the agreement entered into by Bari and Mr. Vaughan operated as a release of the co-surety, Mrs. Sharpe. The action must be dismissed as against her, with costs to follow the event.

Suit dismissed.