1989 February 13

(A LOIZOU, P , DEMETRIADES, KOURRIS, JJ)

THE CYPRUS DEVELOPMENT BANK LTD ,

Respondents-Plaintiffs,

v

KRINI EVANGELOU KYRIACOU,

Respondent-Defendant

(Civil Appeal No 7440)

Contract — Signature of document — Defence of «non est factum»— Burden of proof rests on party relying on such defence — The necessary prerequisites for successfully establishing the defence

The appellant sued the respondent on the basis of a guarantee

The respondent opposed appellant's - plaintiff's application for summary judgment on the ground that when she signed the guarantee she thought by reason of fraud or misrepresentation of one of the other guarantors, who was, also, a director of the principal debtor company, that she was signing a contract for the transfer to her of shares in the principal debtor in consideration of services rendered The trial Judge gave the respondent an uncounditional leave to defend Hence this appeal, where the issue is when as a result of somebody's fraud which has nothing to do with the plaintiff absolves a defendant from the duty to take care and precautions before signing a document

Held, *allowing the appeal* (1) For the defence of «non est factum» the defendant, in order to be successful, he must prove that -

(a) there was undue influence by the plaintiff or a person acting as his agent,

(b) the defendant had exercised reasonable care in the circumstances in connection with the transaction, and

(c) Where a creditor or intended lender desires the protection of a guarantee from a third party and the circumstances are such that the debtor could be expected to have influence over that third party, the

creditor must, for his own protection, insist that the third party had independent advice (see, in this respect, the *Kingsnorth* case at p. 428).

(2) In the present case, non of the above prerequisites appear in the affidavit of the respondent to have existed when she signed the guarantee.

Appeal allowed. Judgment for the plaintiffs-appellants as per claim with costs here and in the Court below.

Cases referred to:

L' Estrange v. Graucob Ltd. [1934] 2 K.B. 394;

Blay v. Pollard and Morris [1930] 1 K.B. 628;

Thoroughgood v. Cole, (1584) 2 Co. Rep. 9a;

Foster v. McKinnon, [1869] L.R. 4 C.P. 704; 38 L.J. C.P. 310;

Carlisle and Cumberland Banking Co. v. Bragg [1911] 1 K.B. 489;

Muskham Finance Ltd. v. Howard and Another [1963] 1 All E.R. 81;

Howatson v. Webb [1908] 1 Ch. 1;

United Dominion Trust Ltd. v. Western a.o. [1975] 3 All E.R. 1017;

Avon Finance Co. Ltd. v. Bridger [1985] 2 All E.R. 281;

Kingsnorth Trust Ltd. v. Bell [1986] 1 All E.R. 423;

Coldunell Ltd. v. Gallon [1986] 1 All E.R. 429.

Appeal.

Appeal by plaintiff against the ruling of the Distric Court of Nicosia (N. Nicolaou, D.J.) dated the 10th July, 1987 (Action No. 1844/86) whereby leave was granted to the defendant to defend the action brought against her.

P. Polyviou, for the appellant.

A. Andreou, for the respondent.

Cur. adv. vult.

A. LOIZOU P.: The judgment of the Court will he delivered by H.H. Demetriades, J.

DEMETRIADES J.: This is an appeal made by the appellants plaintiffs against the Ruling of a Judge of the District Court of Nicosia by which unconditional leave was granted to the respondent in the appeal - the first defendant in the action - to defend the action brought against her.

The facts that led to the proceedings, as these appear from the record of the trial Court which was before us, are the following:

By virtue of a written contract dated the 24th May, 1980, which was made in Nicosia between the appellants, Zoyanna Meat Market Ltd. (hereinafter referred to as the company) and a number of other persons as guarantors of the company, amongst whom the respondent in this appeal, the appellants loaned to the company the sum of £8,000. This loan of the company, according to the terms of the agreement, had to be paid by instalments and had to be fully paid by the 30th June, 1985.

As it appears from the specially indorsed writ to the action the company failed to meet its obligations for the payment of its debts. An action was filed by the plaintiffs against the company and a number of the guarantors to the agreement. The respondent was not made a party as defendant to that action.

After the appellants obtained judgment in their favour against the company and a number of persons, excluding the respondent who guaranteed payment of the loan contracted by the company, they filed an action against her by which they claimed £10,047.26 plus interest at the rate of 9% per annum as from the 1st January, 1986.

The writ was filed on the 25th February, 1986 and on the 2nd June, 1986 counsel for the plaintiffs filed an application by which they prayed for summary judgment. Their application was opposed by the respondent.

The trial Court, after hearing submissions by counsel for the parties, granted unconditional leave to the respondent to defend the action.

The trial Judge found that the defendant based her case for leave to defend on two grounds and I quote from the judgment:

«1. Denial of paragraphs 1, 2 and 3 of the affidavit filed in support of the application for summary judgment.

2. If due execution of the loan agreement is proved to exist defendant's signature as guarantor was obtained due to the false and/or fraudulent misrepresentations which were made to her by the Director of the principal debtor company Zoyanna Meat Market Ltd. namely Yiannakis Demetriou who at all material times was a co-guarantor onto this loan agreement labouring under the belief that by this document she was given shares in the said principal debtor company for services rendered to the aforesaid Yiannakis Demetriou. Due to the above, the respondent contended, this loan agreement is null and void and/or of no legal effect».

He then ruled that as the first issue was «merely a denial, it was groundless and unfounded» and proceeded to deal with the second ground that the defendant put forward which, he said, was based on «the well known defence of *non est factum*».

The first ground put forward by the respondent in opposing the application of the appellants for summary judgment was indeed groundless and unfounded as the affiant has, in the affidavit which was filed in support of the application, said the following:

«1. I am in the employment of the Plaintiffs and authorised by them to make this affidavit.

2. I am personally well aware of the facts and details of the plaintiffs' claim and all the documents relevant to this case are in my possession and custody.

3. The claim of the plaintiffs is true and genuine.»

With regard to the second ground, the trial Judge had this to say:

«Although she never, not even for a moment, alleged that plaintiffs themselves either defrauded her or induced her or even fraudulently misrepresented to her as to the true contents, nature and legal effect of the document she admitted signing, she nevertheless insisted that she was misled by the said Yiannakis Demetriou making her believe that she was signing a document radically different from the one she signed thus rendering it in Law null and void. The general rule of Law is that a person is bound by the terms of any instrument which he signs or seals even though he did not read it or did not understand its contents (*L'Estrange v. Graucob Ltd.*, [1934] 2 K.B. 394 and *Blay v. Pollard and Morris*, [1930] 1 K.B. 628).

An exception to this general rule arises where a person signs or seals a document under a mistaken belief as to the nature of the document and the mistake was due to either:-

(a) the blindness, illeteracy or senility of the person signing, or,

(b) a trick or faudulent misrepresentation as to the nature of the document, provided that person took all reasonable precautions before signing.

Where therefore, a person signs a document or executes a deed in these circumstances, he may raise the ancient defence of non est factum (it is not his deed).

Until the decision of the House of Lords in *Saunders v. Anglia Building Society* [1970] 3 All E.R. 961 it was thought that the defence was available even where there had been negligence, unless the instrument signed was negotiable».

After he referred to and quoted from the Saunders' case he made reference to a number of other authorities, namely *Thoroughgood v. Cole*, (1584) 2 Co. Rep. 9a; *Foster v. Mackinnon*, [1869] L.R. 4 C.P. 704; 38 L.J.C.P. 310; *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489; *Muskham Finance Ltd. v. Howard and Another*, [1963] 1 All E.R. 81 and *Howatson v. Webb*, [1908] 1 Ch. 1.

The trial Judge then concluded his Ruling by saying the following:

«Before concluding this subject I feel I owe to make reference to the headnote of the *Saunders* case (supra) which gives a clear picture of the situtation from the practical point of view in a nutshell and on whose shoulders the burden of proof lies whenever a situation arises as the present one.

The plea of non est factum can only rarely be established by a person of full capacity and although it is not confined to the blind and illeterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.

The burden of establishing a plea of non est factum falls on the party seeking to disown the document and that party must show that in signing the document he acted with reasonable

care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading non est factum on the principle that no man may take advantage of his own wrong; it is not, however, an instance of negligence operating by way of estoppel.

In relation to the extent and nature of the defference between the document as it is and the document as it was believed to be, the distinction formerly drawn between the character and the contents of the document is unsatisfactory and it is essential, if the plea is to be successful, to show that there is a radical or fundamental distinction.

It follows from all the above and perusing the facts and allegations existing in the respective rival parties' affidavits and the able arguments advanced by both counsel, I arrived at the conclusion that in exercise of my discretion, I rule that the second issue raised by the defendant is one which ought to be tried and leave to defend ought to be given to her».

The plaintiffs appealed against the Ruling of the trial Judge by which the first defendant - respondent in this appeal - was granted leave to defend on the following grounds:

«1. The learned judge erred in ruling that defendant ought to be given leave to defend.

2. The learned judge erred in ruling that defendant should be granted unconditional leave to defend.

3. The learned judge erred in holding that defendant satisfied the court that she had a good defence and/or that defendant had disclosed sufficient facts entitling her to defend the action.

4. The learned court erred in holding that the second issue raised by defendant (i.e. the defence of non est factum) was one which ought to be tried.

5. The learned court failed to consider the credibility and/or persuasiveness of defendant's affidavit, in view particularly of the rejection by the court of the first line of defence advanced by defendant, i.e. the denial of the facts as averred by plaintiffs.

6. The learned judge erred in formulating the matter as one of discretion, and, in any event, in exercising such discretion as he possessed in favour of defendant.

7. The learned judge erred in failing to hold that defendants affidavit utterly failed to put forward sufficient facts and/or condescend upon sufficient particulars, especially with regard to defendant's only remaining defence, i.e. the defence on non est factum.»

Before proceeding to deal with the submissions and arguments made before us, it is useful to refer to the affidavit of the respondent which was filed in support of her opposition and in particular to those paragraphs of it that supposedly put her case before the trial Court. They are:-

«3. Ουδέποτε έχω υπογράψη την εις την Ε/Α αναφερομένη συμφωνίαν ως εγγυητής ή άλλως.

4. Εάν ήθελεν αποδειχθή η ύπαρξις υπογραφής εις το αναφερόμενον ως άνω έγγραφον ισχυρίζομαι ότι προέβηκα εις την υπογραφήν στηριζομένη επί ψευδών και δολίων παραστάσεων γενομένων προς εμέ υπό του διευθυντού των πρωτοφειλέτων και εγγυητού Γιαννάκη Δημητρίου ότι υπέγραφα έγγραφον παραχωρήσεως εις εμέ μετοχών της πρωτοφειλέτιδος Εταιρείας λόγω της μακράς υπηρεσίας μου εις τας εργασίας του ρηθέντος Γιαννάκη Δημητρίου την δε εν λόγω υπογραφήν έθεσα εν τη πεποιθήσει ότι υπέγραφα έγγραφον παραχωρήσεως και/ή μεταβιβάσεως μετοχών χωρίς να γνωρίζω ότι ήτο εγγύησις και χωρίς οιανδήποτε αμέλεια εκ μέρους μου.

ΛΕΠΤΟΜΕΡΕΙΑ ΨΕΥΔΩΝ ΚΑΙ ΔΟΛΙΩΝ ΠΑΡΑΣΤΑΣΕΩΝ ΤΟΥ ΔΙΕΥΘΥΝΤΟΥ ΤΗΣ ΠΡΩΤΟΦΕΙΛΕΤΙΔΑΣ ΕΤΑΙΡΕΙΑΣ ΖΟΥΑΝΝΑ ΜΕΑΤ MARKET LTD.

α. Παρέστησε εις εμέν εν γνώσει του ψευδώς και δολίως ότι το αναφερόμενον εις την Ε/Α έγγραφον αποτελούσεν έγγραφον παραχωρήσεως και/ή μεταβιβάσεως μετοχών.

β. Απέκρυψεν δολίως και ψευδώς εν γνώσει του από εμέ ότι το ρηθέν έγγραφον ήτο συμφωνία

δανειοδοτήσεως της πρωτοφειλέτιδας εταιρείας και θα υπέγραφα ως εγγυητής.»

(«3. I have never signed as a guarantor of the agreement referred to in the Statement of Claim.

4. If the existence of the signature is proved on the said document I allege that I have put my signature after false representations to me by Yiannakis Demetriou the director of the debtors and one of their guarantors that I was signing a document by which shares in the debtor company were transferred to me because of the long services offered by me to the said Yiannakis Demetriou and that I put my signature believing that I was signing a document of assignment and/or transfer of shares without knowing that it was a guarantee and without negligence on my part.

PARTICULARS OF FALSE AND FRAUDULENT REPRESENTATIONS BY THE DIRECTOR OF THE DEBTOR COMPANY ZOYANNA MEAT MARKET LTD.

a. He knowingly falsely and fraudulently represented to me that the document mentioned in the Statement of Claim was one for the assignment and/or transfer of shares.

b. Falsely and fraudulently failed to disclose to me that the said document was one for the financing of the debtor company and that I was to sign as a guarantor.»)

The allegation made by the respondent in her said affidavit, by which she denied that she ever signed the document the subject of these proceedings, was withdrawn by her counsel during the hearing of the application and any reference to it is immaterial to these proceedings. For this reason we do not propose to deal with the argument of counsel for the appellants on this issue that was argued before us.

Counsel for the appellants argued before us that the defence of «non est factum» is a very specialized defence; that it can only be invoked in very special circumstances on demonstration of exceptional facts and that there was no indication in the affidavit of the respondent of either special circumstances or exceptional facts. Counsel further submitted that the non est factum can apply only when three elements have been shown to the satisfaction of the Court: Firstly that the instrument or document signed is radically different from that which the signer thought it to be.

Secondly, the person invoking the defence of non est factum must fall into a particular category of vulnerability, low mental intelligence, very old and so on and so forth. And, thirdly, sufficient facts must be shown to the Court that the signer was not careless but took the reasonable precautions required to read the document and that is why the two last elements are connected because if you have taken the step of reading the document and you are not of low intelligence, you will realize that you are signing a particular type of document.

Counsel for the respondent in addressing us submitted that the trial Court was right in reaching the conclusion that the defence of «non est factum» was made out in that there were enough particulars to set up this defence. There is no allegation by the respondent that the Managing Director of the principal debtor was acting as the agent of the appellants. What she is alleging is that she was misled in signing as guarantor believing that shares in the company were to be transferred to her.

Having heard the arguments of counsel, we find that the issue that poses for decision is when, as a result of somebody's fraud which has nothing to do with the plaintiff absolves a defendant from the duty to take care and precautions before signing a document.

As it appears from the authorities cited by counsel and the trial court, as well as from later authorities to the *Saunders* case, (see *United Dominion Trust Ltd. v. Western a. o.*, [1975] 3 All E.R. 1017; *Avon Finance Co. Ltd. v. Bridger a.o.*, [1985] 2 All E.R. 281; *Kingsnorth Trust Ltd. v. Bell a.o.*, [1986] 1 All E.R. 423, and *Coldunell Ltd. v. Gallon a.o.*, [1986] 1 All E.R. 429), for the defence of «non est factum» the defendant, in order to be successful, he must prove that -

(a) there was undue influence by the plaintiff or a person acting as his agent;

(b) the defendant had exercised reasonable care in the circumstances in connection with the transaction; and

(c) where a creditor or intended lender desires the protection of a guarantee from a third party and the circumstances are such that the debtor could be expected to have influence over that third party, the creditor must, for his own protection, insist that the third party had independent advice (see, in this respect, the *Kingsnorth* case at p. 428).

In the present case, none of the above prerequisites appear in the affidavit of the respondent to have existed when she signed the guarantee securing the payment of the loan that the appellants intended to make to the company of her employers. Therefore, the defence put forward by her of «non est factum» was without merit and the trial Judge ought not to give her unconditional leave to defend the claim of the appellants.

In the result, the appeal is allowed and judgment is given in favour of the plaintiffs and against defendant No. 1 for £10,047.26 with interest at 9% per annum from 1.1.86, with costs here and in the Court below.

Appeal allowed with costs.