Segboer & Anor v A J Richardson Properties Pty Limited & Anor [2012] NSWCA 253

Date : April 15, 2013

Is a deed is effectively "delivered" where the original has not left the possession of the executing party?

Facts

- The Builder was required to provide 2 bank guarantees to the Developer. The Builder requested the Bank provide the Bank Guarantees ("Guarantees"), once approved and issued, to "Stephen Madden at Madden Associates, Project Manager (for the Developer)".
- Clause 4 of the Guarantees provided:

"This guarantee shall continue in force until either notification in writing has been received by the Bank from the Beneficiary that this guarantee is no longer required by the Beneficiary or until payment to the Beneficiary by the Bank of the whole of the guaranteed sum or the first year anniversary of practical completion, whichever occurs first."

- On 15 March 2007 the Bank executed and affixed its seal to the Guarantees.
- On the same day the Guarantees were executed the Bank faxed them to Mr Madden of the Developer under a covering letter written on the Bank's letterhead which stated as follows:

"The Bank is in a position to be able to provide Bank Guarantees to assist Robert Segboer in the construction of the Centrepoint Shopping Centre development. Please find enclosed those guarantees. The originals will be forwarded to you in due course.

I trust this is sufficient. Let me know if you need anything further."

- Shortly after, the Builder collected the original Guarantees from the Bank. However, the Builder never forwarded the original Guarantees to the Developer.
- On or about 25 March 2008, the Builder returned the original Guarantees to the Bank who subsequently cancelled each of the Guarantees.
- On 9 February 2009, a representative of the Developer telephoned the Bank to inquire as to the whereabouts of the Guarantees. The Bank told the representative the Guarantees had been cancelled nearly a year earlier despite none of the conditions identified in Clause 4 having occurred.
- On 13 March 2009 the Developer wrote to the Bank, calling on one of the Guarantees in the sum of $375,000. The letter enclosed a copy of the Guarantee and noted that the Bank held the original.

Issues

The Builder claimed the Guarantees were only enforceable if they were “signed, sealed and delivered”. It was accepted that a deed could be “delivered” either by:

- physical delivery; OR
- the promisor’s actions must demonstrate an intention to be bound immediately by the deed, without any further act occurring.

The Builder claimed that the deed had not been delivered for several reasons, including the covering letter stating “the originals would be forwarded in due course”, but if the guarantees were to be binding immediately, this statement was unnecessary.

Held

The Court of Appeal held that:

“The acts and words of the Bank point overwhelmingly to an intention that the Bank should be immediately bound by the guarantees. The Bank executed the document with the appropriate formality, including the affixation of the seal in the presence of a witness… The Bank’s covering letter to Mr Madden stated that it was in a position to be able to provide the bank guarantees to assist Mr Segboer in the construction of the Centre development. The letter did not say that the Bank would execute the guarantees at some future time or when some stated contingency was satisfied; it attached copies of the executed guarantees. Not only that, but the Bank stated that the originals of the guarantees “will be forwarded in due course”. This was an unequivocal statement. The Bank gave no indication that the originals would be handed over to Mr Segboer if he so requested, nor did it suggest that the originals would be forwarded only if Mr Segboer gave his approval. The Bank clearly implied that there was no obstacle to forwarding the originals, thereby confirming to the Developer that the executed guarantee were intended to take immediate effect… the Bank considered that nothing more needed to be done in order for the guarantees to be binding according to their terms.”

The appeal was dismissed.

Important Lessons

- A bank guarantee can be effectively delivered and therefore binding where the original has not left the possession of the Bank.
- A claim can be made on a bank guarantee even if it has been “cancelled” by the Bank.
- An original document need not be presented for it to be enforced.

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