CITATION: *Boz Electrical Supply v. Ulcar, et al.*, 2019 ONSC 3565
NEWMARKET COURT FILE NO.: CV-17-130619
DATE: 20190620

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Boz Electric Supply Ltd. Plaintiff	)	John Lo Faso, for the Plaintiff
– and –	)	
Andrew Ulcar (also known as Andy Ulcar), Cynthia Ulcar, and Kamnik Electric Limited Defendants	)	Charles Baker, for the Defendants
	)	**HEARD:** May 21-23, 2019

REASONS FOR DECISION

LEIBOVICH, J.

Overview

[1] The plaintiff, Boz Electric Supply Ltd. ("Boz"), sold the defendant, Kamnik Electric Limited ("Kamnik"), electrical materials and equipment. Boz alleges that Kamnik owes $376,392.62, including approximately $14,000 in interest, for unpaid invoices. Boz alleges that the owner of Kamnik, Andrew Ulcar, is personally liable for the amount because he signed a personal guarantee. Boz also alleges that Mr. Ulcar fraudulently conveyed to his wife, Ms. Ulcar, the matrimonial home he bought, to prevent Boz from collecting on the monies that they are owed and asks that the conveyance be set aside.

[2] For the reasons set out below, I find that Kamnik is liable for the amount of $376,392.62. I find that Mr. Ulcar is not personally liable for this amount and I dismiss the claim against him and Mrs. Ulcar. I find that the guarantee that Mr. Ulcar signed was a valid one, but it was limited to account 627, and the debt from that account has long been extinguished and not the subject of this action.

Facts

[3] While the circumstances surrounding the signing and meaning of the guarantee are in dispute, most of the facts are not.

[4] Boz is an Ontario corporation that carries on business as a supplier of electrical equipment and supplies. Kamnik is an Ontario corporation that carries on business as an electrical contractor. Andrew Ulcar is the sole director and officer of Kamnik. Cynthia Ulcar was formerly an officer and director of Kamnik from 1995 to 2015 and is married to Mr. Ulcar.

[5] Boz and Kamnik have been doing business with each other for 20 years, dating back to 1999. Mr. Vaccher is the sole owner of Boz, and Mr. Ulcar is the sole owner of Kamnik. They know each other very well.

[6] In 2008, Kamnik owed Boz approximately $800,000 for unpaid invoices. Boz put Kamnik's account on hold and Kamnik was not extended any more credit, but Kamnik continued to make cash on demand purchases. Boz's account number for Kamnik was account 627.

[7] In 2013, Kamnik reduced the debt from $800,000 to approximately $365,000. In April 2013, Boz created a second account for Kamnik, account 627A. While Kamnik was technically making cash purchases, Boz allowed them a few weeks to pay, and by the last quarter of 2013, account 627A had a debt of approximately $99,000.

[8] On August 9, 2013, Mr. Ulcar signed a new credit application that contained the personal guarantee at issue in this trial. In or around September 2013, Boz and Kamnik executed a forbearance agreement that acknowledged the account 627 debt that was owing to Boz from Kamnik. On September 1, 2013, the 627 account had a debt totalling $364,763.38. Kamnik paid off the account 627 debt on or about December 5, 2013. Kamnik continued to make purchases from Boz under account 627A until on or about December 4, 2015, at which point, Boz placed a hold on Kamnik's credit. Kamnik thereafter purchased material and goods on a cash on delivery basis from Boz until on or about September 20, 2017. These purchases were processed under account 627. Invoices rendered under account 627A are the subject of this trial.

Issues

[9] Kamnik has admitted liability. The issue is whether Mr. Ulcar is personally liable for the debt, and if so, did he fraudulently convey his house to his wife. The answers to these questions revolve around whether the August 9, 2013 credit application Mr. Ulcar signed is a valid guarantee. Kamnik submitted the following arguments in support of their position that it was not a valid guarantee:

1) There was material misrepresentation leading to the signing of the guarantee, in essence that Boz duped the unsuspecting Mr. Ulcar into signing it;
2) Boz's action was not preceded by a formal demand as set out in the guarantee;
3) No consideration was given to enter into the guarantee;
4) The guarantee required two guarantors and only one was provided;

5) The language of the guarantee was confusing; and
6) The guarantee only covered account 627, which has been paid off, and not account 627A.

Law and Analysis

Issue 1 - Was there material misrepresentation leading to the signing of the guarantee?

[10] Mr. Ulcar claims that he did not read the August 9, 2013 credit application containing the guarantee. He trusted Mr. Vaccher and was tricked by him. He thought he was signing a simple credit application.

[11] As a general proposition, in the absence of fraud or misrepresentation, a person is bound by an agreement that he has signed even if he or she has chosen not to read the agreement. A business person signing an agreement is presumed to be aware of the terms and be bound by them; failure to read the agreement is not a legally acceptable basis for refusing to abide by it. Moreover, the fact that the agreement was not derived from negotiations and was generated from a standard pre-printed form does not vitiate the agreement: *Fraser Jewellers (982) Ltd. v. Dominion Electric Protection Co. et al.* (1982), 34 O.R. (3d) 1 (Ont. C.A.).

[12] In the context of a commercial agreement "it is expected that a party who executes a document will exercise reasonable care before doing so, and that parties who are careless enough to execute a document without reviewing it will do so at their peril": *Suhaag Jewellers ltd v. The Alarm Factory Inc.*, 2015 ONSC 3542, at paras. 32-33, affirmed 2016 ONCA 33, leave to appeal to S.C.C. refused, [2016] S.C.C.A. No. 91. However, there is a common law duty that applies to all contracts to act honestly in the performance of contractual obligations. One does not have to serve the other party's interest, but one also cannot undermine the other party's interest in bad faith: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494.

[13] Mr. Ulcar claims misrepresentation and bad faith by Boz. The plaintiff and the defendant Mr. Ulchar have two very different views regarding how the August 9, 2013 guarantee came to be signed. In essence, Mr. Ulcar testified that he had no advance notice of the application. He was presented with it at the Boz store counter and signed it. He thought it was a credit application and had no idea he was signing a personal guarantee. He trusted Boz and he did not read the application. He then brought it home, placed it on a pile of papers in the home office and the application was forgotten until the plaintiff filed their Statement of Claim.

[14] In contrast, Mr. Vaccher testified that the circumstances surrounding the guarantee were explained to Mr. Ulcar ahead of time. Mr. Ulcar took it home for a week and brought it back and signed it. Mr. Vaccher testified that he told Mr. Ulcar when he took the document home to show it to Ms. Ulcar that he wanted Ms. Ulcar to also be a guarantor. When Mr. Ulcar returned, he told Mr. Vaccher that Ms. Ulcar was not signing, but that he would. The signing was witnessed and took place in the office of the sales manager, Peter Zoffranieri. I accept the evidence of Mr. Vaccher and the other Boz employees on this point. There was

no misrepresentation, bad faith, or attempt to trick Mr. Ulcar into signing anything. I make this finding having regard to the following:

1) Mr. Ulcar was adamant that the signing took place quickly and while at the store counter. His evidence was contradicted by not only Mr. Vaccher, but Ms. Costigan, the Boz sales representative who witnessed the signing of the credit card application, and Peter Zoffranieri, the sales manager. Ms. Costigan testified that the application was signed in Mr. Zoffranieri's office. Mr. Zoffranieri testified that he could not remember the actual signing, but he recalled the initial discussion of the application took place in his office and that Mr. Ulcar took the application home with him. In addition, Mr. Ulcar, especially after his stroke in 2008, routinely was allowed to use Mr. Zoffranieri's office to go over the paperwork for the orders he just bought. I do not accept the defendants' position that I should reject these witnesses' evidence because they work for, and thus are beholden to, Boz. I saw no attempt by Ms. Costigan or Mr. Zoffranieri to guild the lily or embellish their evidence. They each only had bits of the puzzle to present to the court and when they did not know something they testified that they did not know.

2) The theory that the plaintiff was trying to trick Mr. Ulcar into signing the application makes no sense, especially considering that the application had a spot for Ms. Ulcar to sign. Mr. Ulcar admitted at trial that Mr. Vaccher told him, albeit after he signed the document, that he should show it to his wife. Advising Mr. Ulcar to discuss the matter with his wife is not consistent with the defendants' position that the plaintiff wanted this done quickly and quietly. The guarantee contains a cancellation policy that could be invoked at any time. Mr. Vaccher wanted Mr. Ulcar to discuss the matter with his wife for the simple, logical reason that he also wanted Ms. Ulcar to sign as a guarantor. In addition, one reading of Mr. Ulcar's evidence from his examination in discovery is that he agreed that Ms. Ulcar was asked to sign the credit application before it was signed but refused. This is inconsistent with his trial evidence on this point. Mr. Ulcar's evidence from his examination for discovery is consistent with Mr. Vaccher and Mr. Zoffranieri's evidence that there was a gap in time before Mr. Ulcar was originally shown the credit application and it was signed.

3) I do not accept that Mr. Ulcar simply signed the application blindly without looking at it. Mr. Ulcar was, and is, a smart businessman. There was no dispute in the evidence that Mr. Ulcar would scrutinize each one of the orders he purchased to make sure that everything lined up. Exhibit 5 contains numerous emails from Kamnik complaining about small discrepancies. Mr. Ulcar said in his trial evidence that all of the errors that were made were always in Boz's favour. Mr. Ulcar was not a man who trusted blindly.

4) I do not accept the defendants' position that his mental faculties were impaired after his 2008 stroke and that the plaintiff knew this to be the case. No medical evidence was led on what affect, if any, the stroke had on Mr. Ulcar. All the witnesses acknowledged that the stroke affected him physically, but none of the witnesses that testified for the plaintiff noticed a mental decline. It was undisputed that no one told anyone at Boz that Mr. Ulcar had difficulties with his mental faculties. Mr. Ulcar

testified that while he was recovering at the hospital, he continued to work. Furthermore, that since the stroke he had only missed five days in the past eleven years. Only Ms. Ulcar testified that he was different and had to have things explained more often. Yet, she agreed that he knew what he was doing. Mr. Ulcar testified at trial that his mental faculties are similar to how they were at the time of August 9, 2013. I saw no evidence that he had trouble understanding the proceedings or the questions posed of him.

5) Lastly, the defendants' position depends on the testimony of Mr. Ulcar. Ms. Ulcar did not sign the guarantee and testified that she was not aware of it until the lawsuit was launched. Mr. Ulcar was evasive in cross-examination, and he did not answer the questions put to him when pressed on critical issues.

[15] Furthermore, Mr. Vaccher's explanation for the new line of credit and the guarantee makes perfect sense and I accept it. Mr. Vaccher testified that in 2008 he placed Kamnik's account on hold; the amount owing was approximately $800,000. Mr. Vaccher testified that he was scared. Mr. Ulcar continued to make payments and buy new products with cash on delivery. At some point at the end of 2010 or the beginning of 2011, Mr. Ulcar was at Boz and Mr. Vaccher asked him for payments on some of the monies that were owed. Mr. Ulcar said it was past the two-year limitation period. Mr. Vaccher confirmed this with Ms. Martin who told him that, after two years, they have no ability to go after the outstanding debts. Mr. Vaccher was still hopeful, as he had known Mr. Ulcar for a while. Mr. Ulcar was coming in more often and was making purchases on a cash on demand basis. The outstanding debt had been reduced from approximately $800,000 to $360,000, and Mr. Ulcar wanted to be extended credit. Mr. Vaccher had extended him some time, two-to-three weeks, to make the cash on demand payments, and by September 2013, Mr. Ulcar had approximately $99,000 in new debt.

[16] Mr. Vaccher explained to Mr. Ulcar that the new credit application came with a personal guarantee, and if Kamnik could not pay, Mr. Ulcar would be liable. Mr. Ulcar said he would pay. Mr. Vaccher testified that if the guarantee was not given, credit would not be extended. Mr. Vaccher testified that Mr. Ulcar tried to read through the application, but he was not sure so he took it home. Mr. Vaccher wanted Ms. Ulcar to sign as well. He told Mr. Ulcar to show it to her. Mr. Vaccher testified that Mr. Ulcar came back the next week, they went into Mr. Zoffranieri's office and he signed it and Ms. Costigan witnessed it. Mr. Ulcar said that Ms. Ulcar was not going to sign it. Mr. Vaccher testified that the new credit application was only used once Mr. Ulcar signed the forbearance agreement as that was necessary to ensure that the old debt would be paid.

[17] In my view, Mr. Ulcar signed the new credit application with the guarantee because he wanted a regular line of credit instead of the "extended cash on demand purchases" and he believed, based on his track record that he would be able to pay off the debt. He had been able to reduce the debt from approximately $800,000 to $360,000, and in fact the original $360,000 debt from account 627 was paid off in December 2013.

Issue 2 - Does the plaintiff's failure to make a demand foreclose them from relying on the credit application and guarantee?

[18] A document that states it is payable on demand does not always require a demand before it can be enforced, as "[i]t depends on the nature of the obligation and the construction of the document": *Bank of Nova Scotia v. Williamson*, 2009 ONCA 754, 97 O.R. (3d) 561, at para. 11. The need for a demand as a condition precedent to an obligation is acute where the guarantor is a third party. The demand gives the third party guarantor an opportunity to obtain the funds before the obligation is due: *Williamson*, at para. 14. In considering whether the failure to make a demand set out in the agreement is fatal to an action, the court must consider whether there was any prejudice to the party who was to receive the demand; *Business Development Bank of Canada v. Almadi*, 2016 ONCA 428, 36 C.B.R. (6th) 221, at para. 5. Where a demand is required the limitation period does not start to run until the demand is made. As stated by the Court of Appeal for Ontario in *Williamson*, at paras. 13-14:

> However, the courts have long held that this rule does not apply to a collateral obligation such as a guarantee or collateral mortgage given by a third party to secure the debt obligation of the primary debtor. Where the obligation of a third party guarantor is to pay on demand, then demand is a condition precedent to that obligation. The rationale is that where the guarantee obligation is made on demand, the third party guarantor is given an opportunity to marshal the funds before the obligation is due.
>
> The issue of the need for a demand has traditionally arisen in the context of a claim by a third party guarantor that an action on the guarantee was statute barred because the action was commenced more than six years (the former limitation period) after the principal debt was due. However, where a demand is a condition of the guarantee obligation, the time for commencing an action does not begin to run until a demand is made. [Citations omitted.]

[19] The August 9, 2013, agreement states:

> **Enforcement of Claim**
>
> The Guarantor understands that BOZ may demand and expect payment of the Debtor's account in full upon written demand, made and addressed to and delivered to the attention of the Guarantor at the address set forth in this agreement or at such address as the Guarantor may from time to time designate to BOZ in writing. BOZ shall not be bound to seek or exhaust resources against the Debtor or any other persons or to realize on any securities it may hold in respect of the Guaranteed Obligations before being entitled to payment form the Guarantor under this agreement and the Guarantor renounces all benefits of discussion and division. BOZ retains the right for enforce its claim for liabilities incurred by the Guarantor by whatever means it deems necessary in order to meet the Guaranteed Obligations, including but not limited to, construction liens, property liens,

> property and personal possessions held by the Debtor or the Guarantor, and wage garnishment.

[20] The plaintiff only made a formal written demand on April 22, 2019, a few weeks before the trial started. Mr. Vaccher was asked whether he made a formal demand earlier. He testified that he never demanded that Mr. Ulcar pay him personally, but he asked him on a weekly basis to pay him. Mr. Vaccher placed Kamnik's account on hold again in 2015. Mr. Vaccher told Mr. Ulcar that he was not going to repeat what he did in 2008 and let the limitation period elapse. He told Mr. Ulcar that if he had to he would sue him, so "please pay me." He made this request more than once before and after the account was placed on hold in 2015.

[21] The plaintiff's failure to make a written demand does not prevent them from relying on the August 9, 2013 credit application. There is no prejudice to the defendants. Mr. Ulcar is the sole owner of Kamnik, and he was the personal guarantor. This is not a case where a third party guarantor needed the advance notice so that he or she could marshal the funds. Mr. Ulcar knew the exact status of his account with Boz. He was the one who picked up the shipments and talked directly with Mr. Vaccher. He was told and warned by Mr. Vaccher that he would be sued if he did not pay. I do not see what value a written demand would have in these circumstances. In addition, I see no purpose in dismissing the action and then having the plaintiff restart the proceedings based on the April 22, 2019 demand. As noted by the Court of Appeal for Ontario in *Business Development Bank of Canada v. Almadi*, 2016 ONCA 428, noted at para. 5:

> The motion judge did not make a finding whether the respondent's demand complied with the terms of s. 7 of the guarantee. There was evidence going both ways on this point. The motion judge instead rejected this submission on the basis that any failure to make the formal demand as required by s. 7 caused no prejudice to the appellant (see paras. 25-27). In our view, it was open to the motion judge on the evidence to reject this submission on that basis. [Citations omitted.]

Issue 3 - Was consideration given to enter into the guarantee?

[22] The threshold for consideration is not high, as legions of cases have stated, even a peppercorn will do. As stated above, I find that Mr. Ulcar signed the new credit application with the guarantee because he wanted a regular line of credit instead of the "extended" cash on demand purchases. He had much more payment flexibility and credit when operating under the 1999 and 2013 credit application than the cash on demand purchases and he wanted to continue working with Boz. According to Mr. Ulcar, Mr. Boz, a former electrical contractor himself, understood the business much more than others. The consideration requirement, is in my view, easily satisfied.

Issue 4 –Did the guarantee require two guarantors?

[23] This point was only briefly argued by counsel for the defendants. Originally, the August 9, 2013 agreement had a place for Ms. Ulcar to sign as a guarantor as well, but she never did.

Counsel for the defendants agree that the case law where guarantees have been ruled unenforceable are distinguishable from the facts of this case. In those cases, the remaining guarantor is caught unaware that the other proposed guarantor has backed out and refused the role: see *Richview Investments Inc. v. Dynasty Social Club*, 87 B.C.A.C. 223 (B.C.C.A). In this case, based on Mr. Vaccher's evidence, which I do accept, it was Mr. Ulcar who informed Mr. Vaccher that "Cindy was not signing." Mr. Ulcar's evidence does not assist this ground because he claimed that he never read the guarantee, and therefore, Ms. Ulcar's role was not a factor for him. This ground for invalidating the guarantee fails.

Issue 5 - Was the language of the guarantee objectively confusing to render it unenforceable?

[24] The defendants complain about the use of multiple undefined terms and lack of highlighting that the August 9, 2013 agreement was a personal guarantee as well. Mr. Ulcar's position is that he never read the document before he signed it.

[25] I have gone through the document, and although it can certainly be approved, I do not find that it is confusing and that an individual who read the document would have understood that he or she was personally liable for Kamnik's debts to Boz. I say this for the following reason:

1) The document is short, three pages in total and contains only two pages of content.

2) While the first page looks like a credit application with space for banking and credit references, at the bottom of the first page it states in bold, capital letters that the credit application will not be processed without the personal guarantee of the owner:

> **IN ORDER FOR THIS APPLICATION TO BE PROCESSED THE GENERAL TERMS AND CONDITIONS OF SALE MUST SE READ AND THE PERSONAL GUARANTEE SIGNED AND DATED BY THE OWNER.**

3) The second and third pages have the aforementioned general terms and conditions, and it sets out the liability of the guarantor. The terms are not inconsistent with each other and they all point in one direction, that the guarantor is responsible for the debtor's debts.

4) The document ends with two additional clauses that further highlights the responsibility of the guarantor. It states:

> ……..In consideration of BOZ ELECTRIC SUPPLY LTD. dealing with the company I unconditionally and irrevocably guarantee payment to BOZ of all present and future debts liabilities, now or at any time hereafter, charged to the account, person in the employ, or associated with the above company. No change in name of the company shall affect the personal liability undersigned.
>
> **The undersigned acknowledges he or she has read and understood the contents of both this Guarantee and the General**

Terms and Conditions and understands that the signing of this Guarantee personally binds the undersigned to the terms.

[26] An individual reading this agreement could not think this was simply a credit application. It is quite clear that it is a personal guarantee and the bulk of the document deals with the liability of the guarantor.

Issue 6 - Does the guarantee apply to all of Kamnik's debts or just account 627?

[27] There is no dispute that the front page of the August 9, 2013 agreement references only account 627. The defendants claim that the guarantee only applies to that account. The plaintiff states that the account is Kamnik and that 627 is simply an internal tracking mechanism.

Creation of the two accounts

[28] The creation of the two accounts was explained at trial by Judy Martin, Boz's credit manager since 2007, and by Boz's owner, Mr. Vaccher.

[29] Ms. Martin testified that 627 was Kamnik's original account number. Ms. Martin testified that in 2013 account 627 was on hold because of non-payment. Kamink had owed Boz approximately $800,000 in 2008 and had paid off a significant portion of that debt, but by September 1, 2013, Kamnik still owed Boz $364,763.38. Ms. Martin explained that once an account is placed on hold it is very cumbersome to re-open it for new purchases as the computer has the account locked down and only Ms. Martin and Mr. Vaccher can unlock it.

[30] Boz still allowed Kamnik to make purchases. These purchases had to be paid with cash on delivery. To facilitate this, Ms. Martin opened up a new account, 627A, in and around April 2013, with duplicate pricing. She described the system as two streams of the same account, one for old debt (627) and one for the new cash on delivery purchases (627A). Boz allowed Kamnik to make extended cash on delivery payments, within a couple of weeks of picking up the purchases. These amounts owing were tracked in 627A. Ms. Martin testified that she needed separate revenue streams to track the old and new debt. At the time that the credit application was signed, there was approximately $99,000 owing on 627A. Ms. Martin testified that she emailed Kamnik and told them that she was applying all the payments to 627, and once that account was paid and closed, she would apply payments to 627A. Ms. Martin testified and it was admitted that the old debt from 627 was paid by December 5, 2013. Afterwards, Account 627 was closed. Ms. Martin testified that the account was Kamnik not account 627. She said in her examination for discovery that the "A" was insignificant.

[31] While Ms. Martin testified that these were two streams of the same account, in her emails to Kamnik[1] she repeatedly described the system as two accounts:

---

[1] Exhibit 4, tabs 12, 13, and 22

1) Hi Chris,
   We have 2 accounts on the go for Kamnik. Up until September he was paying C.O.D. off a new account 627A.
   From September forward payments have been applied to the old invoices in 627.
   Once 627 is paid in full it will be closed and only 627A used.

2) Please see the attached file for invoices relating to cheque 10071.
   The original account 627 is now closed and all purchases and payments will be through 627A.
   Payment will continue to be applied to the oldest invoices.

3) Attached is our record of cheques received from January 1, 2013 forward.
   Account closed is the former Kamnik account that has now been paid off.

[32] Mr. Vaccher testified that setting up account 627A was an accounting necessity otherwise it was impossible to keep track of the old and new stuff. The old debts had to be separated from the new debts. He never told Mr. Ulcar that the credit application guarantee was just for the old debt. He testified that the forbearance agreement was for the old debt. The August 9, 2013 agreement was for new debt. Mr. Vaccher testified that there was one account but two numbers.

[33] Ms. Ulcar testified that Judy told her about the two accounts and that 627 was for the old debt and that 627A was for the new debt.

Adding an "A" to the August 9, 2013 agreement to turn 627 into 627A

[34] Ms. Martin testified that she placed an A to Exhibit 2 to make it 627A. She scanned the signed document into a pdf and using Adobe Reader she placed an "A" to the 627 to make it 627A. A copy of the original signed agreement is at Schedule A and a copy of the modified agreement is at Schedule B.

[35] She testified that she never spoke to Mr. Ulcar about adding an "A" to 627. She thought that it was just for internal purposes and that he would not object. Ms. Martin explained the rationale. She testified that within a month or so of the new credit line being active, around October 2013, Ms. Ulcar complained that all the invoices had an "A" on it. Ms. Martin testified that she explained that the "A" was required to separate the old from the new debt, and it was a simple internal accounting agreement. Ms. Martin was asked in cross-examination whether Ms. Ulcar asked her to put an "A" on the application. She said, "not exactly." She then said that during the conversation with Ms. Ulcar about the invoices, Ms. Martin asked Ms. Ulcar if she wanted an "A" on the credit application. Ms. Ulcar said "yes". Then, Ms. Martin, using Adobe, placed an "A" on it and emailed it to Ms. Ulcar. Ms. Martin no longer had this email as a number of emails were deleted to free up space on the server. She did not know why Ms. Ulcar wanted an "A" on the application. In her examination for discovery she was more explicit and said that Ms. Ulcar contacted her and

asked for the "A" to be added to the application. Ms. Ulcar testified and denied that she made this request. She did testify that Ms. Martin told her that all the new invoices and payments had to have account 627A.

[36] Ms. Martin denied that she purposely altered the credit application after the lawsuit started to assist Boz. In her affidavit, dated April 17, 2017, she attached Exhibit 4 as a copy of the original agreement instead of a copy of Exhibit 2. She blamed Boz's lawyers for the mistake.

The forbearance agreement

[37] Ms. Martin testified that she and Mr. Vaccher were concerned about the old 627 debt because of the two-year limitation period. The receivable was large and there was a lot of money owing. Mr. Vaccher asked her to prepare the forbearance agreement which would acknowledge the original debt and have $25,000 paid each month to the old debt. She witnessed the forbearance agreement contained at Exhibit 5, Tab 3. The forbearance agreement itself does not have a personal guarantee.

The Law

[38] In interpreting a guarantee, the ordinary rules of contractual interpretation apply, and courts should give effect to the intention of parties as expressed in their written document. However, where the wording of the guarantee supports more than one meaning, the court may apply the *contra proferentem* rule and the ambiguity will be resolved against the party who drafted the contract. In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, Cory J. explained for the majority, at paras. 7-8:

> In many if not most cases of guarantees a contract of adhesion is involved. That is to say the document is drawn by the lending institution on a standard form. The borrower and the guarantor have little or no part in the negotiation of the agreement. They have no choice but to comply with its terms if the loan is to be granted. Often the guarantors are family members with limited commercial experience. As a matter of accommodation for a family member or friend they sign the guarantee. Many guarantors are unsophisticated and vulnerable. Yet the guarantee extended as a favour may result in a financial tragedy for the guarantor. If the submissions of the bank are accepted, it will mean in effect that a guarantor, without the benefit of notice or any further consideration, will be bound indefinitely to further mortgages signed by the mortgagor at varying rates of interest and terms. The guarantor is without any control over the situation. The position adopted by the bank, if it is correct, could in the long run have serious consequences. Guarantors, once they become aware of the extent of their liability, will inevitably drop out of the picture with the result that many simple and straightforward loans will not proceed since they could not be secured by guarantors.

> In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.

[39] As noted, by Geoff R. Hall, in *Canadian Interpretation Law*, 1st ed. (Markham: LexisNexis Canada, 2007), at p. 168, the interpretation of guarantees is one of the few areas in which the courts "use contractual interpretation to advance certain social and policy goals beyond…interpretive accuracy."

[40] The *contra proferentem* principle applies only where there is a genuine ambiguity. As stated by the Court of Appeal for Ontario in *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571, 424 D.L.R. (4th) 169, at paras. 43-45, in the context of interpreting an employment contract, where, as described above, the dynamics at play are similar to those in which a personal guarantee is sought:

> It is generally accepted that employment contracts are to be interpreted somewhat differently from other contracts. This is so particularly because employees usually have less bargaining power than employers. Where a termination clause can reasonably be interpreted in more than one way, the interpretation that favours the employee should be preferred.
>
> Furthermore, where an employment contract is prepared by the employer, on a more or less take-it-or-leave-it basis, the ordinary *contra proferentem* rule would require that, in the case of ambiguity, the more favourable interpretation should be given to the non-drafting party.
>
> The *contra proferentem* principle applies only where there is a genuine ambiguity. As stated by Dunphy J. at para. 53, "*Contra proferentem* is not a means of finding the least favourable interpretation to the employee with a view to invalidating the contract in whole or in part." Also see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (LexisNexis Canada: 2016), at p. 80, where the author states:
>
> > Ambiguity means something more than the mere existence of competing interpretations, otherwise parole evidence would be admitted in virtually every case. Thus the question of whether there is ambiguity is to be determined by an objective evaluation of whether there are two or more reasonable interpretations. [Citations omitted.]

[41] In interpreting the meaning of a contract, a court can consider the surrounding circumstances, but those circumstances cannot be used to overwhelm the words of the

agreement. As stated by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57:

> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. [Citations omitted].

Analysis

[42] The evidence clearly shows that Boz purposely created two different accounts to address the different streams of debt accumulated by Kamnik. Boz also drafted the guarantee. At the time the guarantee was signed, both account 627 and 627A were open. The guarantee clearly states that it relates to account 627 and there is no mention of account 627A. To the extent that there is any ambiguity in the document, the *contra proferentem* rule works against the plaintiff and limits the guarantee to account 627. Mr. and Ms. Ulcar are not personally responsible for the debt emanating from account 627A. I say this for the following reasons:

1) At the time that the August 9, 2013 agreement was signed, Kamnik had two open accounts, 627 and 627A, and Ms. Martin purposely kept the two accounts separate. Account 627 was for the old debt and 627A was for the new debt. Both accounts had different amounts owing at the time the agreement was signed. Mr. Vaccher testified that it was impossible to keep the debts straight without the two accounts. Ms. Martin's actions in creating the altered agreement with the 627A (Schedule B), also shows that there was a clear distinction between the two accounts. While I am not prepared to find that Ms. Martin purposely altered the document to assist in the lawsuit, I do believe that she altered it at some point in the past to make it consistent with the new invoices that had the 627A on them. I do not believe that Ms. Ulcar asked for this document. It makes no sense that she would. I accept Ms. Ulcar's evidence that Ms. Martin told her that everything had to have an "A" on it, and it was for this reason that Ms. Martin altered the document[2].

[2] The defendant asserts that Ms. Martin's alteration of the document was a material change and that in and of itself is a reason to not allow the plaintiff to rely on the August 9, 2013 agreement. Given my findings, it is not necessary to deal with this issue. However, while I agree that changing the document from 627 to 627A is a material change, there is no evidence that anyone at Boz sought to rely on the amended document, apart from inserting it by mistake in a court filing after the lawsuit was launched.

2) As mentioned, the guarantee only references account 627. It would have been a very simple thing for Boz, who filled out this portion of the form, to have referenced both account numbers.

3) Page two of the agreement states, "The Guarantor irrevocably and unconditionally guarantees the due and punctual payment of all present and future debts and liabilities of the Debtor to the Creditor in respect of all goods and services supplied by BOZ Electric Supply." The plaintiff asserts that this clearly means that the agreement covered the debts on account 627A as well, since the future debts were only going to be billed to account 627A. While this is one possible interpretation, it is far from the only clear one. A plain reading of this phrase in conjunction with the specific reference to account 627 on page one, seems to mean that the guarantor would be liable to all present and future debts of account 627. In fact, after account 627A was put on hold in 2015, it is admitted that account 627 was used for new cash on demand purchases. To the extent that there is any ambiguity in the document, the *contra proferentem* rule works against the plaintiff and limits the guarantee to account 627.

4) I have also looked at the surrounding circumstances to see if it can "deepen [my] understanding of the mutual and objective intentions of the parties as expressed in the words of the contract", but they do not. At the time of the agreement, Boz was very much concerned about the old debt from account 627 because of the limitation period. The forbearance agreement was created so that Kamnik would acknowledge that debt. Mr. Vaccher testified that the forbearance was for the old debt (627) and the August 9, 2013 agreement was for the new debt. However, there was no personal guarantee set out in the forbearance agreement. The guarantee only stemmed from the August 9, 2013 agreement. The surrounding circumstances can really be viewed in two ways: (1) with Boz being pre-occupied with ensuring that Mr. Ulcar would be personally liable for the old 2008 debt, or (2) for all of the debt.

5) To accede to the plaintiff's request that the guarantee cover both accounts 627 and 627A, despite the contrary indication on the guarantee, would require me to give the plaintiff the most favourable interpretation of the guarantee instead of to the defendant as the law requires.

[43] Given my findings with respect to the guarantee, it is not necessary to deal with the conveyance of Mr. Ulcar's house to Ms. Ulcar. Master Brott's order dated May 10, 2017, is set aside.

Disposition

[44] The plaintiff's claim against the defendant Kamnik is allowed for the amount of $376,392.62 plus pre-judgment and post judgement interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, C. 43. The plaintiff's claim against Mr. Ulcar and Ms. Ulcar, is dismissed. With respect to costs in the event that the parties cannot agree upon the costs, I ask that the parties exchange and file written submissions, limited to three pages. I have

already received each party's cost outline. The submissions shall be filed in accordance with the following schedule:

a. The plaintiff shall file its submissions within ten business days of the release of these Reasons; and
b. The defendants shall file its submissions with ten business days thereafter.

The Honourable Justice H. Leibovich

Released: June 20, 2019

SCHEDULE A

boz ELECTRIC SUPPLY LTD.

DATE OPENED		ACCOUNT #
CREDIT LIMIT		627

112 Newkirk Road, Richmond Hill, ON L4C 3G3
Tel: 905-508-2199 Fax: 905-508-2183

APPLICATION FOR CREDIT

ALL SECTIONS MUST BE COMPLETED – PRINT NEATLY

Legal Company Name: KAMNIK ELECTRIC LIMITED Trading Name_____

Mailing Address P.O. BOX 509

City NOBLETON Postal L0G 1N0

Phone #: 905-856-5699 Fax # 905-859-0723 Cell # 416-580-7827

Name of Owner: ANDY ULCAR / CINDY ULCAR Driver's Licence #:_____

Home Address : 51 RUSSELL SNIDER DRIVE

City NOBLETON Postal L0G 1N0

Date Established_____ Previous Bankruptcies/Dissolutions? **YES NO** P.O.# required? **YES NO** Email & mail invoices? **YES NO**

E-mail Address: kamnik@sympatico.ca Credit Amount Requested_____

BANK REFERENCE

Name_____

Address_____

Account #_____ Branch #_____

Phone#_____ Fax #_____

CREDIT REFERENCES

Name_____

Address_____

Phone#_____ Fax #_____

Name_____

Address_____

Phone#_____ Fax #_____

Name_____

Address_____

Phone#_____ Fax #_____

Applicants will be notified within 3 weeks.

CONDITIONS

THE CONDITIONS OF THIS APPLICATION WILL APPLY TO ALL SALES WHICH SHALL INTERVENE BETWEEN THIS APPLICANT AND BOZ ELECTRIC SUPPLY LTD. THIS AGREEMENT MAY ONLY BE MODIFIED WITH THE WRITTEN CONSENT OF EACH PARTY.

THE APPLICANT AUTHORIZES BOZ ELECTRIC SUPPLY LTD. TO VERIFY THAT THE INFORMATION GIVEN IN THIS CREDIT APPLICATION INCLUDING BANK INFORMATION AND TO COMMUNICATE SAID RESULTS, IN ORDER TO ESTABLISH AN AUTHORIZED LINE OF CREDIT

THE APPLICANT NAMED HEREIN WILL REMAIN RESPONSIBLE FOR THE ACCOUNT AND AGREES TO PAY ALL MONIES WHICH ARE DUE AND PAYABLE NET THE 30th DAY OF THE MONTH FOLLOWING MONTHLY PURCHASES. I/WE AGREE TO PAY INTEREST AT A RATE OF 2% PER MONTH, 24% PER ANNUM ON ANY OVERDUE BALANCE AND ALSO UNDERSTAND THAT RELEASE OF ORDERS WILL BE WITHHELD ON OVERDUE BALANCES. ANY CHANGE IN INDENTIFICATION, DESIGNATION OF STATUS OR CUSTOMER MUST BE SPECIFICALLY COMMUNICATED TO AND APPROVED BY BOZ.

THE UNDERSIGNED/APPLICANT'S REPRESENTATION SET OUT HEREIN IS CORRECT AND TRUE AND THE CUSTOMER CERTIFIES THE CONTENTS OF THIS CREDIT APPLICATION KNOWING SAME IS BEING RELIED UPON BY BOZ ELECTRIC SUPPLY LTD. FOR THE PURPOSES OF GRANTING CREDIT.

Signed in RICHMOND HILL (town/city)

this 9 day of AUG 20 13

Owner X _____ Witness _____

Owner X _____ Witness _____

IN ORDER FOR THIS APPLICATION TO BE PROCESSED THE GENERAL TERMS AND CONDITIONS OF SALE MUST BE READ AND THE PERSONAL GUARANTEE SIGNED AND DATED BY THE OWNER.
ALL COPIES MUST BE RETURNED TO BOZ.

SCHEDULE B

boz ELECTRIC SUPPLY LTD.

112 Newkirk Road, Richmond Hill, ON L4C 3G3
Tel: 905-508-2199 Fax: 905-508-2183

DATE OPENED		ACCOUNT # 19
CREDIT LIMIT		627A

APPLICATION FOR CREDIT

ALL SECTIONS MUST BE COMPLETED – PRINT NEATLY

Legal Company Name: KAMNIK ELECTRIC LIMITED Trading Name_____

Mailing Address P.O. BOX 509

City NOBLETON Postal L0G 1N0

Phone #: 905-856-5699 Fax # 905-859-0723 Cell # 416-580-7827

Name of Owner: ANDY ULCAR / CINDY ULCAR Driver's Licence #:_____

Home Address : 51 RUSSELL SNIDER DRIVE

City NOBLETON Postal L0G 1N0

Date Established_____ Previous Bankruptcies/Dissolutions? YES NO P.O. # required? YES NO Email & mail invoices? YES NO

E-mail Address: kamnik@sympatico.ca Credit Amount Requested_____

BANK REFERENCE

Name_____

Address_____

_____

Account #_____ Branch #_____

Phone#_____ Fax #_____

CREDIT REFERENCES

Name_____

Address_____

_____

Phone#_____ Fax #_____

Name_____

Address_____

_____

Phone#_____ Fax #_____

Name_____

Address_____

_____

Phone#_____ Fax #_____

Applicants will be notified within 3 weeks.

CONDITIONS

THE CONDITIONS OF THIS APPLICATION WILL APPLY TO ALL SALES WHICH SHALL INTERVENE BETWEEN THIS APPLICANT AND BOZ ELECTRIC SUPPLY LTD. THIS AGREEMENT MAY ONLY BE MODIFIED WITH THE WRITTEN CONSENT OF EACH PARTY.

THE APPLICANT AUTHORIZES BOZ ELECTRIC SUPPLY LTD. TO VERIFY THAT THE INFORMATION GIVEN IN THIS CREDIT APPLICATION INCLUDING BANK INFORMATION AND TO COMMUNICATE SAID RESULTS. IN ORDER TO ESTABLISH AN AUTHORIZED LINE OF CREDIT

THE APPLICANT NAMED HEREIN WILL REMAIN RESPONSIBLE FOR THE ACCOUNT AND AGREES TO PAY ALL MONIES WHICH ARE DUE AND PAYABLE NET THE 30th DAY OF THE MONTH FOLLOWING MONTHLY PURCHASES. I/WE AGREE TO PAY INTEREST AT A RATE OF 2% PER MONTH. 24% PER ANNUM ON ANY OVERDUE BALANCE AND ALSO UNDERSTAND THAT RELEASE OF ORDERS WILL BE WITHHELD ON OVERDUE BALANCES. ANY CHANGE IN INDENTIFICATION, DESIGNATION OF STATUS OR CUSTOMER MUST BE SPECIFICALLY COMMUNICATED TO AND APPROVED BY BOZ.

THE UNDERSIGNED/APPLICANT'S REPRESENTATION SET OUT HEREIN IS CORRECT AND TRUE AND THE CUSTOMER CERTIFIES THE CONTENTS OF THIS CREDIT APPLICATION KNOWING SAME IS BEING RELIED UPON BY BOZ ELECTRIC SUPPLY LTD. FOR THE PURPOSES OF GRANTING CREDIT.

Signed in RICHMOND HILL (town/city)

this 9 day of AUG 20 13

Owner X [signature] Witness [signature]

Owner X_____ Witness_____

IN ORDER FOR THIS APPLICATION TO BE PROCESSED THE GENERAL TERMS AND CONDITIONS OF SALE MUST BE READ AND THE PERSONAL GUARANTEE SIGNED AND DATED BY THE OWNER. ALL COPIES MUST BE RETURNED TO BOZ.