

AN INTRODUCTION TO THE CONTRACT OF GUARANTEE AND THE EXTENT OF THE LIABILITY OF A GUARANTOR

1. WHAT IS CONTRACT OF GUARANTEE?

A contract of guarantee can be described as an assurance to a creditor that if the principal debtor fails to pay, the guarantor or surety would repay the debt¹.

The court of appeal in **WEMA BANK PLC. & ANOR v. ALARAN FROZEN FOODS AGENCY NIGERIA LIMITED & ANOR**² relying on Halsbury's Laws of England, 4th Edition Vol. 2, at paragraph 101 defined contract of guarantee thus:

"A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person whose primary liability to the promise must exist or be contemplated."

Under a contract of guarantee, one person contract with another to pay some debt or perform some act or duty owed by a third person who nevertheless remains primarily liable for such payment or performance, i.e. the person giving the guarantee becomes liable only on default of the third person. Thus, without a principal obligation, there can be no accessory of guarantee.³

- **What is a guarantee?**

A guarantee is a written undertaking made by one person to a second person to be responsible if a third person fails to perform a certain duty.⁴ A guarantee can also be defined as the assurance that a contract or legal act will be duly carried out. It is something given or existing as security, such as to fulfill a future engagement or a condition subsequent.

Black's Law Dictionary, 5th Edition at page 634, defines guarantee as a collateral agreement for the performance of another's undertaking. An undertaking or promise that is collateral to the primary or principal obligation and that binds the guarantor to performance in the event of non-performance by the principal obligor. A promise to answer for the payment of debt or performance of an obligation if the person liable in the first instance fails to make the payment or perform the obligation... A promise to answer for the debt, default, or miscarriage of another person.⁵

¹ Gold Link Insurance Company Ltd V. Petroleum (Special) Trust Fund (2008) LPELR-4211(CA)

² (2015) LPELR-25980(CA)

³ The Encyclopedia of forms and precedent - fifth edition 17(2) Gifts, Guarantee and Indemnities, health and safety at work

⁴ Ibid

⁵ Commercial Credit Corp. v. Chisholm Bros Farm Equipment Co. 96 Idaho 194525 p, 2d 976, 978.

A guaranty is both collateral and contingent. It is intended to secure the performance of another contract, the non-performance of which is a condition precedent to the guarantor's liability.⁶

- **Parties to a contract of guarantee**

A contract of guarantee often involves the giver of the guarantee termed the "guarantor". The person receiving the guarantee called "the creditor", and the person primarily liable called "the principal debtor".

A guarantor is a person or a firm that endorses a three-party agreement to guarantee that promises made by the first party (the principal) to the second party (client or lender) will be fulfilled and assumes liability if the principal fails to fulfill them.⁷

In **SENATOR (MRS.) EME UFOT EKAETE v. UNION BANK OF NIGERIA PLC**⁸, the Court of Appeal defined a guarantor as one who makes a guarantee or gives security for a debt.

A guarantor technically is a debtor because where the principal debtor fails to pay a debt or fulfill a certain obligation, the guarantor will be called upon to pay the debt so guaranteed or fulfill the obligation so promised.

2. WHEN DOES THE LIABILITY OF A GUARANTOR CRYSTALLISE?

The liability of a guarantor may arise upon the failure of the principal debtor to fulfill or perform his part of the contract or obligation he owes the creditor.

In **NWANKWO & ANOR V. ECUMENICAL DEVELOPMENT CO-OPERATIVE SOCIETY (EDCS) U.A**⁹ the Supreme Court in answering the above question held as follows:

"It is settled that the liability of a guarantor becomes due and mature immediately the debtor/borrower becomes unable to pay its/his outstanding debt. The guarantor's liability is then said to have crystallized."

IN MCMURRAY V. NOYES¹⁰ it was held as follows:

"fundamental distinction between a guaranty of payment and one of the collection is that in the former, the guarantor undertakes unconditionally that the debtor will pay and the creditor may upon default proceed directly against the guarantor, without taking any step to collect from the principal debtor, and the omission or neglect to proceed against him is

⁶ The Virginia Law Register Vol. 2, No. 2 (Jun., 1896), pp. 78-81 (4 pages) - Liability of a Guarantor - J. Baldwin Ranson

⁷ <http://www.businessdictionary.com/definition/guarantor.html> accessed on 3/8/2020

⁸ (2014) LPELR-23111(CA)

⁹ (2007) LPELR-2108(SC). See also A.I.D.C. V. NIGERIA L.N.G. LTD(2000) 4 NWLR (Pt.653) 494

¹⁰ (N.Y) 28 Am. Rep. 180

not any defense to the guarantor; while in the later, the undertaking is that if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor and a failure to collect of him by those means, are condition precedent to the liability of the guarantor.”

The principle enunciated in the above case is that, where the wordings of the contract state that the liability of the guarantor crystallizes immediately there is a failure by the principal debtor to offset his debt, then the creditor can move against the guarantor without any recourse to getting the debt paid by the principal debtor. In the same vein, where the contract states that the liability of the guarantor shall not crystalize until all effort to recover the entire debt proves abortive, it is only then that the creditor can move against the guarantor. However, where the contract of guarantee is silent, the latter is implied.

- **Can a principal debtor be joined in a proceeding against a guarantor?**

A creditor does not have to commence proceedings against the principal debtor or join a principal debtor as a party, whether criminal or civil before he can commence an action against the guarantor for repayment of the debt or fulfillment of an obligation placed on him. In **KHALED BARAKAT CHAMI V. U.B.A. PLC** (Supra) it was held as follows:

“The contract of guarantee so created can be enforced against the guarantor directly or independently without the necessity of joining the principal debtor in the proceedings to enforce same....In Chitty on Contract, 24th Ed. Vol. 2 paragraph 4831, the law is stated thus:-.....prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor.”

3. EXTENT OF THE LIABILITY OF A GUARANTOR

The extent of liability of a guarantor can only be to the extent of the liability of the principal debtor. However, where the contract of guarantee states otherwise, the guarantor will be held liable to the extent indicated in the contract.

In **GOLDLINK INSURANCE CO. LTD. V. PETROLEUM (SPECIAL) TRUST FUND**¹¹ it was held that a contract of guarantee creates a liability on a third party to the extent of the liability of a party to a transaction.

It needs to be stated that for a guarantor to be liable in a contract of guarantee, the contract must be in writing and signed by the guarantor.

The extent of a guarantor’s liability is a question of intention and it may be varied infinitely. For instance, in some contracts of guarantee, the guarantor may guarantee payment of the debt only when the principal debtor fails to meet his obligation. Thus, in this situation, the guarantor is safe until it is shown by the exhaustion of all remedies known to law, or by the creditor's declaration that the debt cannot be collected from the principal debtor. On the other hand, the guarantor in

¹¹ (2008) LPELR-4211CA

a contract of guarantee may guarantee immediate repayment of a debt. In this case, the guarantor's liability is absolute when the principal fails to pay at maturity and the creditor can proceed against the guarantor immediately.¹²

4. DISCHARGE OF GUARANTOR

The discharge of a guarantor is generally brought about by the conduct of the creditor who by some act or omission, inconsistent with the rights of the guarantor, relieves the later wholly or partially from liability under guarantee.¹³

The Court of Appeal in **F.B.N. PLC V. SONGONUGA**¹⁴ stated the circumstances under which guarantor can be discharged of his liability under the contract of guarantee. Thus:

"A guarantor can only be discharged of his liability under the contract of guarantee in the following circumstances:- (a) where his obligation under the guarantee contract has been satisfied; (b) where the principal debt has been extinguished by an act or acts of the parties; (c) where a court applies a presumption which operates to terminate the contract of guarantee...."

Some of the circumstances in which a guarantor can be discharged are as follows:

1. Performance by the principal debtor of his obligation which in effect discharges him and invariably also discharges the guarantor.
2. Release and novation: - this is a situation where the creditor discharges the principal debtor by a binding legal agreement that also effects the discharge of the guarantor. Also if the creditor enters into a novation as a consequence of which the debtor is discharged in consideration of a new debtor assuming the liability of the debtor, the guarantor under the original agreement is also discharged in the absence of a provision to the contrary.
3. Breach of contract – the commission of a breach of contract by the creditor discharges a guarantor if the principal is also discharged.
4. Discharge by variation of the principal agreement – a variation of the terms of the principal contract without the guarantor's consent, in the absence of any contrary provision in the contract of guarantee, discharges the guarantor.

CONCLUSION.

A contract of guarantee can be a tripartite contract that involves the principal debtor, the creditor and the guarantor and in some situations a two-party contract that involves the principal debtor

¹² The Virginia Law Register Vol. 2, No. 2 (Jun., 1896), pp. 78-81 (4 pages) - Liability of a Guarantor - J. Baldwin Ranson

¹³ The Encyclopedia of forms and precedent - fifth edition 17(2) – Gifts, Guarantee and Indemnities, health and safety at work

¹⁴ (2007) 3 NWLR (Pt. 1021) 230 at 274 Paras. A-C, 274-275 Paras.A-C (CA)

and the guarantor. It is a contract where a third party called the guarantor undertakes to do any act or perform some obligation in the failure of the principal debtor to perform the act or obligation. His liability may arise on the failure of the principal debtor to discharge his obligation and the creditor has exhausted all the available remedy to recover his debt or secure performance from the principal debtor. It may also arise upon failure of the principal debtor to fulfill his obligation, as such the creditor can seek performance directly from the guarantor.