

Overton Holdings Ltd v Owens Properties Ltd 24/10/02, CA114/02

Unsuccessful appeal against decision refusing summary judgment - K entered into lease agreement with third party who OH subsequently purchased property interest off subject to lease with K - OH and K agreed to two changes to insurance provisions which placed burden of insuring property with K, but OP as guarantor was not informed of changes - fire caused substantial damage to premises after K had vacated and it was discovered building was not insured - OH sought to recover costs from K in arbitration, however no appearance was made by K's liquidators and no mention was made to arbitrator of guarantee - OH argued guarantee had not been released despite adverse potential effects of change to insurance clause - OP submitted substantial insurance change was outside contemplation when they entered into agreement with K, therefore they are not liable to OH.

Held, it is settled law that variation of contract between obligor and obligee has effect of discharging guarantee unless patently obvious guarantor not prejudiced, and in this case OP was clearly prejudiced - for guarantee to be preserved in event of variation guarantor must be made expressly aware, and in this case OP was not made aware of variation at any stage, therefore guarantee did not survive variation - if guarantee did survive variation it would not have been enforceable as award would have been contrary to New Zealand public policy and a breach of natural justice - appeal dismissed.