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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1535

PC No 174/89

BETWEEN EAST COAST PERMANENT TRUSTEES LIMITED

Plaintiff

A N D HYDROX CORPORATION LIMITED (In liquidation)

First Defendant

A N D PEERS CAPITAL CORPORATION INCORPORATED

Second Defendant

Hearing: 6 September 1989

Counsel: S J Brown for Plaintiff
No appearance for First Defendant
P A Craighead for Second Defendant

Judgment: 16th October 1989.

JUDGMENT OF MASTER J H WILLIAMS, QC

East Coast Permanent Trustees Limited (ECT) is the owner of the factory and warehouse building with associated offices and other facilities at 2 Parkway Drive, Mairangi Bay, Auckland. That property is administered on its behalf by Brierley Cromwell Property Ltd (Brierley Cromwell).

Up until March 1987 ECT's property had been tenanted by a company called Crosby Energy Systems Ltd (Crosby) which was involved in the development and manufacture of equipment to

generate gases for welding and other purposes.

On 2 March 1987 Hydrox Corporation Ltd (Hydrox) was incorporated and purchased Crosby's assets, took over its staff and assumed occupation of ECT's premises. However, Hydrox's business did not prosper and towards the end of 1988 its business was put on the market for sale. Although there were negotiations with prospective purchasers, no sale eventuated and as a result Hydrox decided to shift its operations to another part of the country and try and find a new tenant for ECT's premises.

A new tenant, a company called Litho Works Limited (Litho) was found and meetings were held in February 1989 with representatives of Hydrox, Litho and Brierley Cromwell present to finalize details of the arrangement for Litho to take over ECT's premises from the end of March. Before this could occur, however, Hydrox's equipment and furniture was removed from the premises on 6 March by agents acting for Brierley Cromwell saying they were distraining for rent.

Hydrox went into liquidation of 15 March 1989.

The principal events with which this application for summary judgment is concerned, however, occurred somewhat earlier. On 20 March 1987 a firm of solicitors in Auckland called Duthie Whyte & Co wrote to ECT's solicitors asking for the landlord's consent for the lease between ECT and Crosby to be transferred to Hydrox. The letter does not say on whose behalf Duthie Whyte & Co were writing although it is reasonably clear that they were acting for Hydrox. They may have been acting for

Crosby as well. The letter encloses a company search for Hydrox and notes that the major shareholder in that company was an American company then called Peers & Co and now called Peers Capital Corporation Inc (Peers). The letter says that Peers is a substantial American corporation and that "the Bank of New Zealand at Takapuna has been more than satisfied as to that body's ability to guarantee financial commitments many times in excess of the rental obligations...". The letter does not say whether or not Duthie Whyte & Co were also acting for Peers in this matter but it was finally conceded by counsel for Peers at the hearing of this application that at all material times Duthie Whyte & Co were acting for both Hydrox and Peers. The letter concludes by suggesting that instead of an assignment of the lease to Hydrox "the simplest procedure is in fact to re-engross the lease".

There then ensued a course of correspondence between the solicitors down to 11 October 1988 but of the 13 letters in that course of correspondence only three come from Duthie Whyte & Co. This is of importance in the context of this matter since the plaintiff alleges that in all the circumstances there is a sufficient note or memorandum of the lease to satisfy the requirements of the Contracts Enforcement Act 1956 and thus to entitle ECT to summary judgment against Peers pursuant to the guarantee provisions in the re-engrossed lease.

The only references in the course of correspondence to Peers and the guarantee are as follows:

(a) When ECT's solicitors wrote to Duthie Whyte & Co on 10 June 1987 they asked that the financial information given to the BNZ Takapuna be made available to another party, not ECT or Brierley Cromwell, so that they might be satisfied as to the financial standing "in respect of the proposed guarantors of the lease".

(b) On 8 June 1987 Duthie Whyte & Co largely repeated the terms of the letter of 10 June and said that Hydrox was happy for ECT's solicitors to discuss the matter with the BNZ at Takapuna. That letter concluded by saying that "the guarantor will in fact be Peers Capital Corp which will be a subsidiary of Peers & Co which has now changed its name to Peers Holdings Inc". A copy of that letter was sent to Hydrox but not to Peers.

(c) On 23 July 1987 ECT's solicitors said that Brierley Cromwell had approved a leasing arrangement "subject to the availability of a guarantee from Pears (sic) Capital Corp".

(d) On 22 October 1987 ECT's solicitors sent a new lease to Duthie Whyte & Co asking them to arrange for their client, presumably Hydrox, to execute the document "together with Peers Capital Corp Inc the nominated guarantor".

(e) On 1 March 1988 ECT's solicitors wrote to Duthie Whyte & Co recording that Brierley Cromwell had advised them that Hydrox had executed the lease and asking for its return.

(f) On 18 April 1988 Duthie Whyte & Co wrote to Brierley

Cromwell, not to ECT's solicitors, enclosing the lease executed by Hydrox on the basis that four amendments - to which reference will be made later in this judgment - would be made and saying "we shall arrange to send the documents to Peers on return".

(g) On 17 May 1988 ECT's solicitors wrote to Duthie Whyte & Co enclosing the lease by then executed by ECT so as "to enable the execution of Peers Capital Corporation Inc as guarantors". That letter agreed to two of the proposed changes, declined to agree to the third and omitted all reference to the fourth. That letter was followed by other letters from ECT's solicitors on 24 June and 29 July 1988 to Duthie Whyte & Co each seeking the return of the executed lease and commenting on the supposed execution of the same by Peers.

The lease has never been returned to ECT. According to an affidavit sworn by a Mr Valenti, the treasurer of Peers in New York:

> "...The company did not execute a guarantee of deed of lease between East Coast Permanent Trustees Ltd and Hydrox Corporation Ltd in respect of premises at 2 Parkway Dr, Mairangi Bay or elsewhere. Also no instructions were given to the company's solicitors or agents that it would enter into such a guarantee before having the opportunity to peruse the terms and then determining whether to enter into the guarantee. I can find no record of having such a lease referred to the company".

Mr Barter, the partner in Duthie Whyte & Co who conducted the negotiations with ECT's solicitors says that his instructions from Peers were:

> "...To refer the final form of a lease which was to be negotiated between Hydrox and the plaintiff to Peers for its approval and decision as to whether to guarantee it. I was not instructed by Peers and did not at any time advise the solicitor for the plaintiff that I had authority from Peers to commit it to unconditionally guaranteeing any form of contract".

He claims that, in any event, there was no agreement concluded between ECT and Hydrox.

Dealing first with the question as to whether an agreement was ever concluded between ECT and Hydrox, there is no evidence of any discussions between those parties or their solicitors as to the terms of the lease until ECT's solicitors sent the new lease to Duthie Whyte & Co on 22 October 1987. Although that lease is in fairly conventional form, there is no evidence as to the source of ECT's solicitor's instructions on which that draft was based. There is not even any evidence as to how the parties agreed on the term of nine years from 1 September 1985 with one renewal of five years nor on the quantum of rental, rental review dates, permitted uses and the other basic information which one would normally expect to have been discussed between landlord and tenant. If those details were merely a reproduction of the details of those topics in the Crosby lease or if the details were negotiated by Brierley Cromwell with ECT and Hydrox then there is no evidence of it. It therefore follows that ECT's solicitors in forwarding the lease on 22 October 1987 must have been intending that in the usual way it would be perused by Duthie Whyte & Co. And when that firm returned it to Brierley Cromwell six months later on 18 April 1988 although it had been signed by Hydrox it was clearly

forwarded on the basis of amendments which were to be made to four of the clauses. Indeed, the letter implies that those amendments had been previously agreed to.

The proposed amendments were not insubstantial.

Clause 3(a) of the lease obligated the lessee to maintain the interior and exterior of the building in the condition in which they were at the commencement of the term and to yield up the premises in that state of repair at the end of the lease. That clause was subject only to exceptions for "fire, tempest, earthquake, flood, subsidence of the soil or inevitable accident" and Duthie Whyte & Co sought the inclusion in that clause of deterioration through fair wear and tear.

Similarly, Clause 4 obligated the lessee to maintain the parking, storage and service areas and sinks and drains in the same condition in which they were at the inception of the lease subject only to damage by flood, tempest, earthquake or inevitable accident. Again, an exception for fair wear and tear (but not for subsidence of the soil) was requested. Both these amendments were agreed to.

Duthie Whyte & Co also sought an amendment so that Clause 3(a) did not apply to structural repair. Just what they intended by this requested amendment is unclear but presumably they were trying to draw the distinction between the lessee's obligation to maintain the interior and exterior of the building which was accepted and an obligation to carry out structural

repairs either as superadded to the maintenance obligation or following damage by the exceptions set out in the clause. In any event, that requested amendment was not agreed to. A liability for structural repair to the interior or exterior of the building may well be regarded by a lessee or a guarantor as a potentially onerous obligation. Clause 15 debarred the lessee from engaging in noisome or offensive occupation of the premises and from creating a nuisance to ECT or neighbors. Duthie Whyte & Co suggested that that clause excluded the present use, defined by the lease as a "office warehousing and light manufacturing" no doubt in relation to Crosby and Hydrox's business as previously described, but the letter then goes on to say that "the definition of light manufacturing also includes the present use". Again, it is difficult to discern exactly what amendment Duthie Whyte & Co were seeking to Clause 15 or to the definition of the permitted use but clearly it was a matter which needed to be agreed so that Hydrox could continue to carry on its occupation in the premises. ECT's solicitors made no mention of the usage objection in their letter of 17 May 1988.

As a result, the conclusion is that ECT and Hydrox were not ad idem on the terms of the lease as to the liability for structural repair and the permitted usage in the permises. The execution by Hydrox and the forwarding of the lease to Brierley Cromwell on 18 April 1988 was clearly conditional on the four objections being agreed. That letter and the accompanying lease clearly constituted a counter-offer to the terms of the lease as originally proposed. That counter-offer was not accepted. In

effect, ECT's solicitor's letter of 17 May 1988 amounted to a further counter-offer. There was no response to that further counter-offer from Hydrox or from Peers or their solicitors before Hydrox vacated the premises and went into liquidation. It follows that there was never any concluded agreement on the terms of the lease between ECT as landlord on the one hand and Hydrox as tenant and Peers as proposed guarantor on the other.

That finding would be sufficient to dispose of the application for summary judgment but, lest that finding be in error, I turn now to consider whether the application for summary judgment against Peers may have succeeded on the ground that the Contracts Enforcement Act 1956 had been satisfied.

The Contracts Enforcement Act 1956 s 2(1)(d)(2) requires contracts for guarantees or some memorandum or note thereof to be in writing and to be signed by the party to be charged therewith or some other person lawfully authorized by it.

There is no contract signed by Peers in this matter as far as is known. Counsel for ECT urged the Court to draw the inference from the course of correspondence to which reference has been made and what he said were the "evasive" statements by Messrs Barter and Valenti that in fact Peers had executed the guarantee of the lease previously executed by ECT and Hydrox but it is the Court's view that no such inference can be safely drawn in this matter. To do so, would be wholly to reject the sworn statements made in that behalf, particularly by Mr Valenti, and those statements are not so inherently improbable as to be

capable of rejection in proceedings solely based on affidavit evidence (Eng Mee Yong v Letchumanan [1980] AC 331, 341; Attorney General v Rakiura Holdings Ltd (1986) 1 PRNZ 12, 14).

The real question on this aspect of the matter is, therefore, whether the correspondence from Duthie Whyte & Co together with the forwarding of the executed lease on 18 April 1988 amounts to a memorandum or note of the contract signed by Mr Barter as lawfully authorized by Peers.

It has already been held that there was no concluded contract between ECT and Hydrox so there could be no memorandum or note of the contract. The letters from Duthie Whyte & Co of 20 March and 8 June 1987 ante-date the drafting of the lease and are clearly part of the negotiations leading up to its being drafted. Although those letters speak of a guarantee and of Peers being the guarantor, in the context of this matter they cannot be regarded as an unequivocal assurance that Peers will enter into the lease as guarantor when the terms of the lease and of the guarantee are settled. Duthie Whyte & Co's letter of 18 April 1988 included the lease but in view of the fact that it was conditional on amendments being agreed to, it could not amount to a memorandum or note of the contract. So far as its client, Peers, is concerned, it does no more than indicate that the lease will be forwarded to Peers if the amendments are incorporated. It does not commit Peers to executing the guarantee. If it had, it would have been contrary to Mr Barter's instructions. As Peers' agent, all that Mr Barter was doing was representing that he had authority to forward the lease to Peers provided the

amendments were agreed to. Mr Barter nowhere represents that he has ostensible authority to bind Peers to execute the guarantee.

In those circumstances, the Contracts Enforcement Act 1956 has not been complied with as far as Peers is concerned and the application for summary judgment against Peers must be dismissed on that ground as well.

ECT raised two other matters which it said entitled it to summary judgment.

In the first, ECT sought to invoke the authenticated signature fiction. That long-established doctrine, almost as long overlooked, underwent a brief renascence in New Zealand following the decision in Bilsland v Terry [1972] NZLR 43. The proper limits of the doctrine are as set out in Sturt v McInnes [1974] 1 NZLR 729, 733-4 per Wilson J (followed and applied in Van der Veeken v Watsons Farm (Pukepoto) Ltd [1974] 2 NZLR 146) in the following terms:

> "(1) The contract, or the memorandum containing the terms of contract, must have been prepared by the party sought to be charged, or by his duly authorised agent in that behalf, and must have that party's name written or printed on it.
>
> "(2) It must be handed or sent by that party, or his authorised agent, to the other party, for that other party to sign.
>
> "(3) It must be shown, either from the form of the document or from the surrounding circumstances, that it [is] not intended to be signed by anyone other than the party to whom it is sent and that, when signed by him, it shall contitute a complete and binding contract between the parties."

The mere recital of those requirements suffices to

demonstrate that it is not available to ECT in this case because the contract was not concluded, it was not prepared by Peers or its solicitor, the parties sought to be charged, and, because of the lack of consensus, could not have been a complete and binding contract when it was returned to Duthie Whyte & Co on 17 May 1988.

ECT also sought to invoke the Doctrine of estoppel claiming that Peers was estopped from denying its execution of the guarantee and also claiming that it had relied on ECT's representations in allowing Hydrox to take possession of the premises and had suffered detriment by the loss of bargain and the loss of opportunity to gain a solvent tenant. This allegation fails on the facts. Hydrox was probably in possession of ECT's premises before Duthie Whyte & Co wrote to ECT's solicitors on 20 March 1987 and was certainly in possession before their reply on 10 June so that there was no question of Peers making any representation which induced ECT to permit Hydrox to take possession of ECT's building. Secondly, there is nothing to suggest that Hydrox's impecuniosity in late 1988 and its liquidation on 15 March 1989 were in any way affected by actions of Peers. There is thus no evidence of detriment to ECT which may in any way be attributable to Peers.

This plea fails on the law as well. The estoppel relied upon by ECT is estoppel by representation which is authoritatively defined in Spencer Bower and Turner Estoppel by Representation (3rd ed para 3 p 4). For the purposes of this

application, however, it is more convenient to repeat the dictum from Maclaine v Gatty [1921] 1 AC 376, 386, also repeated in Spencer Bower and Turner (op cit), where the doctrine is stated in the following words:

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time".

There is no representation made by Peers in this matter other than by implication that it may be prepared to act as guarantor of any lease once the same is negotiated. Similarly, there is no proof, as has been noted, that ECT acted to its prejudice in reliance on that representation.

In those circumstances, ECT has failed to satisfy the Court that Peers has no defence to the application for summary judgment on the issue of liability as required by R 136 and the application for summary judgment is therefore dismissed.

In the event that it reached that conclusion, the Court was invited to make timetable orders by consent and orders are made in the following terms:

(a) Each of the parties is to file and serve a verified list of documents within 14 days of the date of delivery of this judgment and inspection is to be complete within 10 days after service by provision of photocopies.

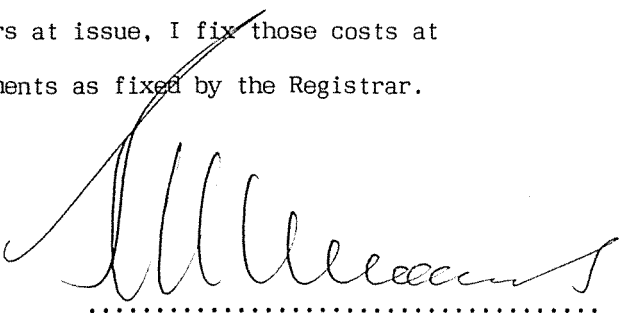
(b) Any further interlocutory applications are to be filed and served within 30 days of the date of delivery of

this judgment.

(c) There will be leave on three days notice for either party to apply to strike out the other party's pleadings for failure to comply with any interlocutory notice or application or for a judicial conference or for directions.

Hydrox took no part in the proceeding and is in liquidation. At the invitation of counsel for ECT, the application for summary judgment in respect of Hydrox is also dismissed but it remains as a party to the proceeding.

This is a matter where Peers is entitled to the costs of this application. Having regard to the length of the hearing (2 hours) and the matters at issue, I fix those costs at $1,000.00 plus disbursements as fixed by the Registrar.



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Master J H Williams, QC

Solicitors: Perry Castle, Wellington, for Plaintiff
No appearance for First Defendant
Duthie Whyte & Co, Auckland, for Second Defendant