

BETWEEN

FLETCHER MERCHANTS
LIMITED trading as
MANUKAU TIMBER
TRADEBASE, a duly
incorporated company
having its registered
office at Auckland,
Builders Suppliers

First Plaintiff

AND

WINSTONE TRADING
LIMITED a duly
incorporated company
having its registered
office at Auckland,
Builders Suppliers

Second Plaintiff

AND

SPECK of
Mt
Roskill, Builder

Defendant

Hearing: 20th September, 1990.

Counsel: J. Long for the Plaintiff
G.M. Illingworth for the Defendant

Date of Judgment: 16 OCT 1990

RESERVED DECISION OF MASTER HANSEN

By consent Judgment was entered against the Defendant at the hearing, on the first cause of action in the sum of \$3,600, together with interest and costs.

In the second cause of action the Plaintiffs claim

\$48,468.80, together interest and costs. The Plaintiffs rely on a guarantee dated the 14th November, 1986. I am satisfied that the Plaintiff has failed to establish good consideration for that guarantee and that the application for Summary Judgment on the second cause of action must be dismissed.

It is quite clear that the document relied on cannot be a deed. Although the witness adds his calling, his address does not appear in the document. This is contrary to the provisions of Section 4 of the Property Law Act 1952, and the decision in Heatherington v Sampson (1878) 4 NZJur (NS)84. This decision has recently been cited with approval and followed in Kerr & Conklin v Meates (Christchurch A136/78, unreported decision of Eichelbaum C.J. 24/5/90).

Given that it is not a deed, it is necessary for the Plaintiff to establish consideration for the contract of guarantee. The document itself recites as consideration "forebearance to sue". Forebearance to sue is, clearly, good consideration. (See Miles v New Zealand Alford Estate Company (1886) 32 CHD 266; Oldershaw v King (1857) 2 H & N 517; 157 E.R.213). However, it is equally clear that for forbearance to sue to be valid consideration at the time the contract was signed, there must be a justified suit or threat of suit. (See Couch v Branch Investments (1969) Limited [1980] 2 NZLR 314; and Kerr & Another v Meates (supra).

One is bound to say that the factual basis for the defence advanced by counsel for the Defendant is normally dealt with by way of Affidavit in Reply. In this particular case, no affidavit was filed and I am bound to deal with the matter on the evidence before me. The Affidavit in Support merely records the Second Plaintiff opened a trading account with a company known as Commercial Bricklayers Limited on the 3rd September, 1986. It then goes on to record that the Defendant signed a guarantee in respect of any liability of

that company. It goes further and states that the Defendant acknowledged liability to the Second Plaintiff in the sum claimed. However, the letter relied on for this latter point cannot amount to acknowledgement of a personal debt. In it the Defendant states:-

" I Ian Bruce Speck of Commercial Bricklayers Limited acknowledge the debt of \$48,468.80 outstanding at Winstone Trading Limited. "

It goes on then to deal with a proposed method of repayment. In my view, that is no more than an acknowledgement by Mr Speck in his capacity as an officer of Commercial Bricklayers Limited that a sum is due. It is, therefore, necessary to consider the circumstances of the signing of the guarantee.

The document was signed on the 14th November 1986. It records that:

" In consideration of your foreberance to sue for the balance on an account of \$37602 now due to you by Commercial Bricklayers Limited....."

The Defendant personally guaranteed due payment of all monies now due, or at any future date due. However, Mr Speck's evidence is that at the time in question the guarantee form was brought to him at a building site for signature. The crucial paragraphs of his affidavit can be found at 9 and 10:-

" 9. IN the month of October 1986 my account with Winstones Trading Ltd was running at about a level of \$37,000 and this account was paid by me on the 23rd November. The cheque stub recording payment is annexed hereto and marked with the letter "A". I had in fact until the 30th November to pay the account but I always paid my account early.

10. DURING this time I had a very good trading relationship with the second plaintiff and was on good terms with them as I always paid my account in advance and my company Commercial Bricklayers Limited was very

strong financially. At no time did I ever receive any advice from Winstones that my account was in arrears and that if I did not pay they would sue me. "

If the account of Commercial Bricklayers was not in arrears, and the Defendant's evidence that he had until the 30th November to pay the account is correct, then there was no grounds for the second Plaintiff to bring suit. If that was the case, there was nothing for them to forebear from. Given that the Defendant's evidence in this regard is unchallenged, and given the absence of any statements that show his account was in arrears at the time the guarantee was signed, I am bound to find there is an arguable defence, based on there being no valid consideration for the guarantee. I note the application for credit requires payments by the 20th of the month. However, if the sum mentioned in the guarantee related to the October account, it was still not due on the 14th of November when the guarantee was signed. Accordingly, the Summary Judgment application must be dismissed.

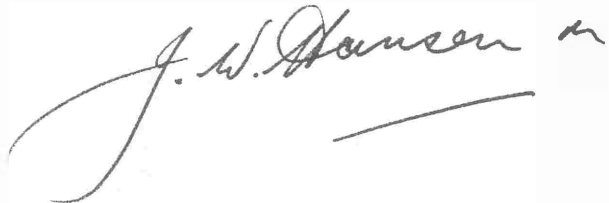
In view of that finding, it is unnecessary to consider the further defences advanced of non est factum and unconscionable bargain. However, it may assist the parties if I indicate that, in my view, the evidence falls far short, even for Summary Judgment proceedings, of establishing either of those defences.

The issue between the parties is relatively small, and there will be the following strict time table order:-

1. The Statement of Defence is to be filed within 7 days of the handing down of this Judgment.
2. Lists of documents, to be verified by affidavit, to be served and filed 14 days thereafter.

3. Inspection to be completed 7 days thereafter.
4. Any further interlocutory applications to be made 7 days thereafter.
5. Praecipe to be filed 7 days thereafter.

Costs will be reserved, but for the benefit of the trial judge they are fixed at \$1,500, plus disbursements as fixed by the Registrar.

A handwritten signature in black ink, appearing to read "J. W. Hansen" with a flourish underneath.

Solicitors for the Plaintiffs: Grove Darlow & Partners,
Auckland

Solicitors for the Defendant: Skeates & Simpson, Auckland.