IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV2008-404-423

BETWEEN	THE OAKS LAW CENTRE SOLICITORS NOMINEE COMPANY LIMITED Plaintiff
AND	PATRICK JOSEPH MCCORMICK First Defendant
AND	PAUL PERCY CHAPMAN Second Defendant

Hearing: 3 November 2008

Counsel: M Broad for Plaintiff
First Defendant in person

Judgment: 27 February 2009 at 4.30 pm

SUMMARY JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by Associate Judge Sargisson on 27 February 2009 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date .....

Solicitors:
Kensington Swan, Private Bag 92101, Auckland 1142

Post:
P J McCormick, Ocean Reef Trust, PO Box 11-679, Ellerslie, Auckland

[1] The plaintiff, The Oaks Law Centre Solicitors Nominee Company Ltd, is as its name suggests, a solicitor's nominee company carrying on business as a financier. It advanced substantial sums of money by way of five term loans to two companies associated with the first and second defendants for property development purposes. Those companies are Queenstown Alpine Limited and Hotel Palmerston North Limited. The Nominee Company also agreed to extend the duration of the terms of the loans on condition that guarantees will be provided. The advances fell into default. The borrower companies were unable to remedy the default and have been placed into liquidation. The Nominee Company has looked to the two defendants, Mr McCormick and Mr Chapman to make good under the guarantees they gave as security for the loans and filed this proceeding for that purpose. The Nominee Company has already obtained orders by way of summary judgment on an undefended basis against Mr Chapman. It now seeks similar orders by way of summary judgment against Mr McCormick.

[2] The basic facts are not in dispute. The companies are in default and the loans are well overdue for repayment. There is also no dispute that Mr McCormick did provide a guarantee for the various advances when the nominee company agreed to extend the term of the advances, or that the duration of the extension was 12 weeks. The advances amounted to $12,100,000 plus penalty interest and collection commission as per the loan agreement. However, the parties are entirely at odds over the question whether the Nominee Company is entitled to call on Mr McCormick under his guarantee.

[3] Mr McCormick says not and opposes the application. In his documents in opposition he raised a number of grounds. However at the hearing he limited the grounds he relies on. Essentially, he relies on two grounds relating to the basis on which he gave the guarantee. He says the guarantee was given on a limited or conditional basis, and that:

a) The first condition was that his liability would be limited to the assets of the borrower companies;

b) The second condition was that he would be indemnified by the Nominee Company and by Mr Chapman against any liability he might face under the guarantee.

[4] The net effect of the conditions he alleges is that the creditor's recourse is limited to the assets of the borrower companies under the loan agreements.

[5] Mr McCormick says he insisted on these limits because the extension of the term for which the monies were advanced was 12 weeks and it was absurd to require him to guarantee potential liabilities of some millions of dollars for 12 weeks.

[6] The Nominee Company's position is that it is entitled to summary judgment, because, having established a *prima facie* case on the documentation, the defences raised by Mr McCormick are not genuinely arguable.

[7] The key question for determination is therefore whether the Nominee Company has discharged the onus of showing that the defences Mr McCormick has raised are not genuinely arguable. If they are not then the Nominee Company is entitled to summary judgment on its claim and ought not to be put to the cost and delay associated with the trial. There would be no useful purposes served by requiring the claim to go to trial.

Legal Principles – Summary Judgment

[8] At the time of the hearing the former r 136 applied and it continues to govern this application in accordance with the transitional rules set out under s 9 of the Judicature (High Court Rules) Amendment Act 2008. It is essentially the same as the new rule 12.2, which was introduced as part of the new High Court Rules from 1 February 2009.

Rule 136 states:

> **[136 Judgment where there is no defence or where no cause of action can succeed**
>
> (1) The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of

claim or to a particular part of any such claim.

(2) The Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.]

[9] For present purposes I adopt the following statement of the legal principles. They remain apposite.

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).
>
> Under r 141A the defendant need not file a statement of defence. The onus remains on the plaintiff, and summary judgment will be denied if on the hearing of the application it appears that there is an issue worthy of trial.

Discussion

[10] There is no real dispute that the Nominee Company has made out a prima facie case in its claim as set out in its statement of claim. All five loans were advanced to the companies Mr McCormick was guaranteeing; the loans have come due and have not been repaid. As a result of the companies' failure to repay the loans, the plaintiff is entitled to call on Mr McCormick under the guarantee.

[11] I also accept that the Nominee Company's affidavit evidence is sufficient to verify the essential elements of its claim.

[12] In *Auckett v Falvey* 20/8/86, Eichelbaum J, HC Wellington CP296/86, the Court observed that while the onus was on the plaintiff to show that there was no arguable defence, in some cases there were circumstances which may cause the

evidential onus to shift to the defendant. In *Auckett* the plaintiffs were in fact able to pass the evidential onus onto the defendant by exhibiting the written contract which on its face entitled them to the remedy sought. The same applies in the present case, where the Nominee Company's documentary evidence is sufficient to pass an evidential onus to Mr McCormick, placing him in a position of having to demonstrate a tenable or genuinely arguable defence.

[13] That leaves for consideration whether the two grounds Mr McCormick has raised in support of his contention that he is not liable under the guarantee are genuinely arguable. I deal with each in turn.

Is it arguable that Mr McCormick's guarantee was subject to a condition that his liability would be limited?

[14] The short answer is no.

[15] Notwithstanding his acknowledgement that he gave the guarantee in respect of each of the loan advances, Mr McCormick contends he is not liable under the guarantee.

[16] Mr McCormick claims as his first ground that he signed the guarantee on the condition that his exposure under the guarantee would be limited to the company's assets.

[17] I assume what Mr McCormick means that his exposure would be limited to the value of his interest in the company so that the lender would have access to his shares in the company for guarantee purposes but to no other assets. In other words it was a guarantee in name only, devoid of substance.

[18] A difficulty with Mr McCormick's assertions is that he signed a guarantee that is clear in its terms. The guarantee extends to the entire amount of the loan advances. It is not subject to limits of the kind described by Mr McCormick. Mr McCormick signed the guarantee for the purpose of the commercial entities he was closely associated with. He has produced nothing of substance to indicate that he did

not understand the terms of the document he signed, or that the document recorded incorrectly or imperfectly what he and the Nominee Company had agreed to. There is no evidence that is sufficient to suggest that Mr McCormick's agreement with the Nominee Company was not as recorded accurately in the document he signed. There is only his bare assertion. Against his assertion is the Nominee Company's categorical denial that it agreed to limit Mr McCormick's exposure under the guarantee to the assets of the company, or to his interest in the company. Mr Luxford deposes in that regard:

> At no time did Mr McCormick or Mr Chapman ever convey to me that Mr McCormick's guarantees would be limited in any way. Mr Chapman has never advised me that he would indemnify Mr McCormick for any liability under the guarantee (see: Affidavit of John Richard Luxford in Reply, Paragraph 13).

[19] I asked Mr McCormick why he did not insist that the document he signed be changed to reflect the conditions he claims he insisted upon. He was frank and straightforward in his answer. He said that he had to accept that he had been foolish.

[20] The harsh reality of commercial life is such that people in business are held to their bargains. A lack of foresight, or an expectation that a guarantee will not be called upon on its terms will not relieve the guarantor of his obligations under the guarantee in the event of the principal debtor's default. This position was affirmed by the Court of Appeal in *Andrew Mark Krukziener v Hanover Finance Ltd* CA198/07 [2008] NZCA 187. Also relevant are the comments of Thomas J in *Taylor v Westpac Banking Corporation* (1996) TCLR 177 (CA) which reflect the harsh reality of a mortgagor's entitlement to enforce its contractual rights:

> Yet, it must at all times be borne in mind that the mortgagee is exercising….a contractual right. Its exercise will almost inevitably cause consequences which may appear harsh to the mortgagor. He or she cannot complain about them. They are an integral part of the exercise of the power of sale conferred on the mortgage by the contract.

[21] The result, notwithstanding the conflict of evidence on the point of whether or not the guarantee was to be subject to limits of the kind Mr McCormick describes, is that this is not a case where the defendant's version of the situation calls for other than a robust approach in determining whether it gives rise to an arguable defence.

[22] That brings me to the defendant's second ground relating to the two alleged indemnities.

Is it arguable that the Nominee Company and/or Mr Chapman agreed to provide Mr McCormick with an indemnity?

[23] According to *Halsbury's Laws of England* (4th ed, 2004, vol. 20(1)), a contract of indemnity is a contract by one party to keep the other harmless against loss. A legal right to indemnity can arise in a number of ways, this includes through contractual agreement, by deed, by statute or by implication from some principle of law (see: *McGechan on Procedure,* HR4.4.02).

[24] In the present case the first indemnity was, according to Mr McCormick, to be provided by the Nominee Company itself. What this effectively means is that Mr McCormick was a guarantor in name only and what he offered the Nominee Company was merely a 'Clayton's' guarantee.

[25] In response to my question regarding the alleged indemnity, Mr McCormick acknowledged no indemnity had actually been provided in this case. What he relies on is a promise to provide one. The unfortunate fact is that there is no evidence of such a promise.

[26] The promise, which the Nominee Company denies making, amounts to the bare assertion that fails to meet most basic test of plausibility. No feasible reason has been advanced to explain why the Nominee Company would insist on a guarantee while at the same time agreeing to provide an indemnity against the risk that the guarantee would be called up. On the other hand, the Nominee Company's denial that it agreed to give any such indemnity is supported by the marked absence of any documentary evidence to suggest that there ever was an indemnity. There is no written contract, deed, or the like that gives rise to an indemnity. The only evidence that Mr McCormick is able to produce is a file note he himself made of a conversation he had with a Mr Roberton in relation to the indemnity. Mr McCormick claims that Mr Roberton, who was the solicitor for Queenstown Alpine Limited, was to have organised the indemnity from the Nominee Company and Mr Chapman. The

file note refers in bare terms to back to back guarantees from Mr Chapman, but says nothing about such guarantees from the Nominee Company. Realistically, if there had been an indemnity by contract or agreement with the Nominee Company, one would have expected Mr McCormick to produce at the least an affidavit or some other documentary evidence, or to at least point to some principle that gives rise to indemnity. There is however nothing apart from Mr McCormick's own assertion.

[27] That brings me to the alleged indemnity that Mr McCormick says he required from Mr Chapman. He said he required the indemnity because Mr Chapman was the main driver behind the commercial arrangements that gave rise to the need for a guarantee. Again, I asked Mr McCormick why he did not insist that the indemnity be documented and signed, before he signed guarantees. He said he trusted Mr Chapman and Mr Roberton to ensure that the indemnity was prepared and signed. Whether or not that is so, a key difficulty for Mr McCormick is, quite apart from question of plausibility, that an indemnity between himself and Mr Chapman would not limit the guarantee he gave in favour of the Nominee Company. Nor would it provide a defence to the Nominee Company's claim on the guarantee. Any such indemnity, if indeed intended, would be a matter strictly between Mr Chapman and Mr McCormick, and Mr McCormick would have to look to Mr Chapman and not the Nominee Company to indemnify him. It certainly does not amount to a defence against the Nominee Company's summary judgement application.

Quantum

[28] The Nominee Company submits and I accept, that the evidence shows total outstanding advances of $12,100,000.00, and that the contractual terms are clear and provide for the interest that is claimed in the statement of claim on the outstanding advances, together with the collection fees and penalty interest claimed in the statement of claim. These have also been set out clearly in the memorandum filed by counsel, and no issue has been taken with their calculation.

Result

[29] I am satisfied for reasons discussed above that the Nominee Company has established a *prima facie* entitlement to summary judgment to which there is no plausible defence. Mr McCormick has failed to raise an arguable case. The net result is that the Nominee Company has discharged the onus placed on it to establish that there is no defence.

[30] There will be an **order** for summary judgement against Mr McCormick as follows:

Queenstown Alpine Limited Mortgages

1. In respect of the first *Queenstown Alpine Limited* Mortgage:

   (a) Judgement against the defendants jointly and severally in the sum of **$7,682,500.00** as at 10 January 2008

   (b) Interest at the contractual penalty rate of 18% per annum from 11 January 2008 until the date of payment; and

   (c) Collection commission at the contractual rate of 1.5% per annum from 11 January 2008 until the date of payment; and

2. In respect of the second *Queenstown Alpine Limited* Mortgage:

   (d) Judgment against the defendants jointly and severally in the sum of **$2,530,000.00** as at 10 January 2008;

   (e) Interest at the contractual penalty rate of 22% per annum from 11 January 2008 until the date of payment; and

   (f) Collection commission at the contractual rate of 2% per annum from 11 January 2008 until the date of payment; and

3. In respect of the third *Queenstown Alpine Limited* Mortgage:

(g) Judgment against the defendants jointly an severally in the sum of **$417,333.34** as at 10 January 2008;

(h) Interest at the contractual penalty rate of 24% per annum from 11 January 2008 until the date of payment; and

(i) Collection commission at the contractual rate of 2% per annum from 11 January 2008 until the date of payment; and

Hotel Palmerston North Mortgages

4. In respect of the first *Hotel Palmerston North* Mortgage:

(j) Judgment the first defendant in the sum of **$4,133,333.00** as at 2 January 2008;

(k) Interest at the contractual penalty rate of 18.5% per annum from 11 January 2008 until the date of payment; and

(l) Collection commission at the contractual rate of 1.5% per annum from 11 January 2008 until the date of payment; and

5. In the respect of the second *Hotel Palmerston North* Mortgage:

(m) Judgment against the first defendant in the sum of **$1,144,916.66** as at 2 January 2008;

(n) Interest at the contractual penalty rate of 22.5% per annum from 11 January 2008 until the date of payment; and

(o) Collection commission at the contractual rate of 2% per annum from 11 January 2008 until the date of payment; and

Costs

[31] There will also be an order for costs against Mr McCormick in favour of the Nominee Company on a 2B basis under the High Court Rules, plus disbursements to be fixed by the Registrar.

[32] The costs are awarded on a joint and several basis under r 14.14 High Court Rules 2008, (formerly r 50), with the intent that any sum recovered from one defendant shall not be in addition to any sum recovered from the other.

_____

Associate Judge Sargisson