IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2008-419-1805

BETWEEN	ASL MORTGAGES LIMITED Plaintiff
AND	IDA VALLEY HOLDINGS LIMITED First Defendant
AND	PETER MARTYN ROBERTS Second Defendant

Hearing: 11 June 2009

Counsel: KA Lomas for plaintiff
D Hayes for defendants

Judgment: 12 June 2009

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment]

This judgment was delivered by me on 12 June 2009 at ……
Pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Harkness Henry & Co, Private Bag 3077, Hamilton for plaintiff
D Hayes, Box 9323, Hamilton for defendants

[1] The plaintiff seeks summary judgment against the first defendant as principal borrower and the second defendant as guarantor in respect of a loan agreement entered into on 13 June 2008.

[2] The terms of the loan agreement, in summary, provided as follows:

a) An advance to the first defendant of $435,000 as the principal sum.

b) A loan term of twelve months from the date of the advance.

c) Interest on the principal sum at the ordinary rate of 17.5%, paid monthly.

d) Default interest at a rate of 10% over and above the ordinary interest rate.

e) Payment by the borrower of all the plaintiff's losses, costs and expenses in connection with enforcing or attempting to enforce the agreement.

f) A requirement that the first defendant gave a first ranking mortgage over a property owned by it at McIntosh Road, Ida Valley, Central Otago, together with a first registered general security agreement in respect of the present and after acquired property of the first defendant, together with a guarantee and indemnity from the second defendant and another party, and the assignment of a life insurance policy.

[3] The plaintiff advanced $435,000 to the first defendant on 30 June 2008.

[4] The first defendant failed to make interest payments due on 21 August 2008 and 21 September 2008.

[5] Property Law Act notices have been served on the first and second defendant. They have not been complied with.

[6] The plaintiff now claims, as a result of the filing of further evidence, judgment for:

> $561,689.56, inclusive of costs and interest as at the date of hearing, 11 June 2009, together with interest on the sum of $452,817.79, at the rate of 27.45% per annum, calculated from 11 June 2009 to the date of payment.

The calculation of the amount due was provided in an affidavit of the plaintiff's lending manager, tendered to the Court on the day of the hearing. An opportunity was given to Mr Hayes to check the calculations. He advised that no issue was taken with the specific calculations contained in that affidavit. Having regard to that position, I proceed accordingly.

[7] The defendants allege that they were misled by an agent of the plaintiff, a Mr Sebastian Stapleton. They claim that because of his misrepresentation they entered into the loan and guarantee contracts. They allege that the misrepresentation concerned a property owned by Ida Valley Holdings Ltd, the first defendant. It is alleged that Mr Stapleton represented that that property had water springs on it, and that it was worth $570,000 and therefore more than its actual market value.

[8] Because this is an application for summary judgment, I shortly summarise the Court's approach. That general approach does not seem to have been altered by the change in wording which has been introduced with r 12.2 of the High Court Rules. Rule 12.2, as did its predecessor r 136, requires that a plaintiff satisfy the Court that the defendant has no defence.

[9] In *Pemberton v Chappell* [1987] 1 NZLR1 at 3 the Court of Appeal said as follows:

> In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.

[10] The Court added at 4:

> Satisfaction here indicates that the Court is confidence, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.
>
> …

[11] And further at 4:

> Where the only arguable defence is a question of law which is clear cut and does not require findings of disputed facts or the ascertainment of further facts, the Court should normally decide it on the application of summary judgment, just as it will do on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence

[12] The Court also commented on the position where a defence is not evident on a plaintiff's pleading and said at 3:

> If a defence is not evident on the plaintiff's pleading I am of the opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.

[13] That position was further reinforced in *Australian Guarantee Corporation (NZ) Ltd v McBeth* at 59 where the Court said:

> Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.
>
> "No defence means 'no bona fide defence, no reasonable ground for defence and no fairly arguable defence'."

[14] Hypothetical possibilities in vague terms, unsupported by any positive assertion or corroborative documents advanced by defendants will not frustrate the obligation on a plaintiff to discharge the onus of proof: *SH Lock (NZ) Ltd v Oremland* HC AK CP641/86 19 August 1986.

[15] The Court of Appeal in *Tilialo v Contractors Bonding Limited* CA50/93 15 April 1994 at 7 raised a caution and said.

> The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[16] A Court is not required to accept uncritically any or every disputed fact: *Eng Mee Yong v Letchumanan* [1980] AC331 at 341. However the Court will not reject even dubious affidavit evidence, even though there must be suspicion as to the good faith of the deponent, if there is an essential core of complaint that supports a defence. In essence, the inquiry is whether or not the person's assertion passes the threshold of credibility: *Pemberton v Chappell; Orrell v Midas Interior Designs* (1991) 4 PRNZ 608 at 613. The Court of Appeal in *New Zealand Trustee Services Ltd v AJ McPherson & Associates Ltd* [2008] NZCA 113 at 35 restated the position as follows:

> While a Judge is not usually justified in resolving material conflicts of evidence on the affidavits in a summary judgment proceeding, the authorities are clear that the Judge is not bound to accept the evidence uncritically. Where there are material inconsistencies of such significance as to warrant the rejection of the evidence of a witness, the Judge is entitled to act accordingly. A Judge may, for example, feel sufficiently confident to reject the evidence of a witness where it is in material conflict with contemporaneous documents, or where there is other written material from which unmistakable inferences can be drawn.

[17] In *Tilialo v Contractors Bonding Limited* the Court of Appeal at 8 observed:

> Drawing the line between mere assertions of possible defences and material which sufficiently raises an arguable defence so that the defendant should not be denied the opportunity to employ interlocutory procedures and have a trial is a matter of judgment. Views may well differ.

[18] I review the background facts. The first defendant was incorporated on 13 September 2007. At that time its sole director was Mr Sebastian Stapleton. The company acquired the property at Ida Valley in Central Otago. Although there is no

precise detail in the affidavits, counsel acknowledged that the first defendant had borrowed funds from the plaintiff for the acquisition of this property. The borrowing was guaranteed by Mr Sebastian Stapleton.

[19] In approximately April 2008 Mr Stapleton approached a Mr Robb, with a view to Mr Stapleton selling his interest in the first defendant, and more particularly the property at Ida Valley. There is a lack of precise evidence as to what the deal involving Mr Stapleton on the one hand, and Mr Robb and the second defendant on the other hand, was. What is clear is that the plaintiff's lending manager says that the plaintiff had nothing to do with the negotiations between the outgoing director of the first defendant, that is Mr Stapleton, and the incoming directors and shareholders, Mr Robb and the second defendant.

[20] A letter was faxed by a company of which the second defendant was the sole director, to the plaintiff on 22 April 2008. The letter identified the subject of the correspondence being "Ida Valley Holdings Ltd". The letter then provided:

> We confirm that a change of ownership of Ida Valley Holdings Limited is in progress.
>
> There are several elements to the change:
>
> (a) The shares are to be transferred to Jason Robb.
>
> (b) The director will be Jason Robb instead of Sebastian Stapleton.
>
> (c) The first mortgage on the property has Sebastian Stapleton as guarantor and as part of this change the parties request Advanced Securities Limited to release him and accept Jason Robb and Peter Roberts in his place (confirmation of new guarantors included herein).
>
> (d) The second mortgage on the property is to be discharged.
>
> The company will offer the property for sale or exchange in part or whole.
>
> Please confirm that such a change would be acceptable to Advanced Securities Limited and advise documentation required.

[21] On 23 April 2008 the plaintiff's managing director sent a written communication to the second defendant. It is addressed to the second defendant's company for the second defendant's attention. It provides as follows:

> Hello Peter,
>
> Thank you for your fax dated 22 April. To enable us to consider your request can you and Mr Robb (individually) complete the attached application form. We will also need to complete a current 'credit check' on you both.
>
> As discussed, the loan is currently in arrears by two payments totalling $12,190.13, plus default interest totalling $10,948.51. These amounts must be paid in full immediately to enable us to put the proposal to our board.
>
> Regards, Terrence

[22] On 1 May the second defendant supplied the plaintiff with the requested loan application form.

[23] On 9 May the plaintiff's managing director e-mailed Mr Stapleton as follows:

> Hi Sebastian,
>
> I confirm that we will agree to transfer this loan with the change of shareholding.
>
> This is subject to the loan being redocumented to our entire satisfaction with the provision of additional information from Mr Robb and/or Mr Roberts.
>
> Terence McHardy
> Managing Director

[24] That e-mail was forwarded on by Mr Stapleton to the second defendant.

[25] On 20 May 2008 the lending manager of the plaintiff sent to Mr Stapleton by fax a letter of offer. It is addressed to the Director, Ida Valley Holdings Ltd.

[26] On 13 June 2008 Mr Roberts and Mr Robb were appointed directors of the first defendant company. Mr Stapleton resigned as a director of the first defendant company. The loan agreement, which is the subject of this proceeding, was also signed by the second defendant and Mr Robb as directors of the first defendant, and also in their personal capacities as guarantors.

[27] The defence to the summary judgment application, that is that the defendants were induced to enter into the loan contract by a misrepresentation made on behalf of an agent of the plaintiff, is one of those defences not evident on the plaintiff's pleadings. It therefore falls within that category of case where, on the authorities that I have referred to (although the onus remains on the plaintiff throughout) there is nevertheless a need for the defendants to provide some evidential foundation for the defence which is raised. There is a need, in fact, to give reasonable particulars of the matters which the defendant claims ought to be put in issue. That being the case, what is required is a consideration of the background facts which I have set out to determine whether there is a sufficient evidential foundation to justify the refusal of summary judgment in this case. That is particularly so because, but for the claim of misrepresentation by an agent of the plaintiff, the plaintiff is entitled to judgment.

[28] I pass, then, to consider whether there is any foundation for the proposition that Mr Stapleton was acting as the agent of the plaintiff in arranging the loan. In short, is there any basis for the proposition that Mr Stapleton had apparent authority to effect the loan transaction? My conclusion is that there is no such basis for that conclusion.

[29] There is no evidence that the plaintiff expressly appointed Mr Stapleton as its agent in relation to the loan contract.

[30] The next question, then, is whether there is any evidence which might found a reasonable basis for inferring that Mr Stapleton was authorised to act as the plaintiff's agent in relation to the loan contract.

[31] No evidence has been led as to any oral communication between Mr Stapleton and Mr Roberts and Mr Robb which might support such an inference.

[32] I next consider the documentation. The request for the loan offer came from Mr Roberts' company. That provides no basis. The first response from the plaintiff is to Mr Roberts. That then provides no basis. The supporting information for the request for a loan offer is returned to the plaintiff by Mr Roberts. That then can provide no basis.

[33] The next set of communications disclosed nothing more than that Mr Stapleton was the recipient or conduit of documentation which ultimately had to be considered by Mr Roberts and Mr Robb. On their face, they are received in the recipients' capacity as directors of the first defendant. I cannot find in this correspondence anything that remotely suggests that Mr Stapleton had any authority to act on behalf of the plaintiff in relation to the loan transaction.

[34] Standing back and looking at all the evidence before me, I am not satisfied that it raises an arguable basis for the defence put forward. Nor does it suggest to me that such a defence might be assisted by further interlocutory steps such as discovery or interrogatories. There is nothing to suggest that the defendant might benefit from such steps.

[35] It seems to me that the second defendant is confusing the position that Mr Stapleton adopts in relation to the sale of shares, which is a separate transaction, with his position in relation to the loan contract, which was nothing more than the vehicle, no doubt, which enabled the purchasers to fund the purchase of the shares. That is a separate transaction. Any rights or liabilities which arise out of that particular transaction are quite separate from the matters relating to the loan contract itself.

[36] Accordingly, I conclude that the defendant has provided no evidential foundation for a defence which could be said to answer the plaintiff's verification that there is no defence to this claim. Having reached that conclusion, it is appropriate that summary judgment be entered.

[37] I referred earlier in this judgment to the fact that there was no dispute on the numbers. Accordingly, I enter judgment for the plaintiff against both defendants for $561,689.56, including costs and disbursements and interest, to 11 June 2009,

together with interest at the rate of 27.45% per annum on $452,817.17 from 11 June 2009 to the date of payment.

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J.A. Faire
Associate Judge

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