IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-8587

	BETWEEN	MATRIX CUSTODIAN LIMITED Plaintiff
	AND	KEVIN JOHN WHITLEY Defendant

Hearing: 16 June 2009

Appearances: Mr Pascariu for Plaintiff
Mr Hucker and Ms Yakob for Defendant

Judgment: 26 June 2009 at at 4.30 p.m

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***26.06.09 at 4.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..…

Counsel:
MinterEllisonRuddWatts, P O Box 3798, Auckland
Mr Hucker & Associates, P O Box 3843, Shortland Street, Auckland

Introduction

[1] Mr Whitley, the defendant, was the principal of a company called Advantage Bayview Limited ("Advantage"). On 19 July 2007 the plaintiff entered into an agreement to advance money with Advantage as borrower and Mr Whitley as guarantor. Mr Whitley guaranteed the loan. He agreed to be a principal debtor and to provide an indemnity to the plaintiff against any default on the part of Advantage. Advantage defaulted under the loan and the plaintiff took enforcement steps. The following is a chronology of material facts taken from the plaintiff's submissions, which I regard as being accurate.

Date	Event	Evidence
19/07/2007	Loan agreement entered into by Matrix and Advantage (**Loan**)	**BD p 14**
19/07/2007	Guarantee provided by Mr Whitley to Matrix (**Guarantee**)	**BD p 42**
24/12/2007	Advantage defaulted under the Loan	Paragraph 10, **BD p 6**
09/01/2008	Demands were made on Advantage and Mr Whitley as guarantor	**BD p 58**
24/01/2008	Property Law Act 2007 (**PLA**) notices issued under ss 119 and 122	**BD pp 60-62**
10/07/2008	Advantage sold Unit 10, Bayview Apartments	**BD p 64**
12/09/2008	Proceeds of sale applied to the loan	**BD p 73**
07/11/2008	Demand made on Mr Whitley as guarantor	**BD p 74**
09/06/2008 – 12/12/2008	Negotiations between the parties regarding refinancing of the Loan	**BD pp 254, 246, 259-266**

[2] The loan amount was $940,000, which was to be repaid 12 months from the drawdown date. The loan carried an interest rate of 12.25% with default interest rate of 17.25%. As the chronology notes, Advantage defaulted under the loan on our about 24 December 2007 by failing to make payment of the interest then due. Demand was made under the loan and in due course the plaintiff, which had a security over properties at Gisborne for the loan, issued notices under ss 119 and 122 of the Property Law Act 2007. In due course one of the apartments over which the loan was secured was sold leaving a shortfall of $787,998.13. By November 2008 the balance owing under the loan was $809,462.97 and it was in respect of this amount that demand was made. The defendant failed to pay on demand being made.

The plaintiff now seeks summary judgment for the sum of $809,462.97 together with default interest at 17.25% per annum from 7 November 2008.

[3] The defendant filed a Notice of Opposition asserting:

a) That the plaintiff had agreed to vary the terms of the arrangements with the defendant;

b) The plaintiff was estopped in exercising its powers under the loan contract as a result of representations made by Mr Peter Murray, an employee of the plaintiff. It was further stated in the Notice of Opposition that the defendant had acted to his detriment in relying on the assurance of Mr Murray.

c) The notice of opposition also alleged that the representations that were made by Mr Murray were in contravention of the Fair Trading Act 1986 in that they were misleading and deceptive.

[4] The defendant does not dispute the making of the loan, his execution as guarantor, the default by Advantage and his refusal to meet the plaintiff's demand for payment.

[5] The defendant's evidence is that in June 2008 he arranged to meet with Mr Peter Murray who was the duly authorised agent of the plaintiff (the fact of authority is not denied by the plaintiff).

[6] The meeting duly took place. The defendant and Mr Murray were the only persons present. All this is agreed to by the plaintiff.

[7] Mr Whitley says that before the meeting he provided a letter to Mr Murray. The terms of the letter were as follows:

> You have received an offer for Unit 10 which is well below the Fire Sale Valuation you obtained from Telfer Young. You have enquired as to whether I will sign this as director. There are GST implications and as a consequence financial advantages to you if I am agreeable to doing this.

> I have provided my financial position details to you which clearly demonstrate that I am unable to support my guarantee. This has come about through the current malaise in the financial markets and the depressed nature in the residential property market as well as the difficulties I have encountered with some of my previous Russian partners and their subsequent obdurate behaviour in getting to a resolution.
>
> During the course of my association with Matrix Custodians through various entities over the past 7 years we have paid close to $1.0m in fees and interest. Before the current situation we have always met out obligations on time and have conducted our repayments in a manner that has seen all borrowings and full costs paid.
>
> This also includes the recent sale of the Gas Works Land in Gisborne.
>
> I believe the only satisfactory way to maximise the return to you is for me to be able to work with you in a manner going forward which is advantageous to me as well as you.
>
> I have an ability to earn a reasonably good income going forward but I am unable to do this if I am bankrupted.
>
> I therefore propose as follows: -
>
> 1 I sign the offer for $300k
>
> 2 The residual debt is reset to $580k and interest is paid at 10%
>
> 3 The unlet Apartment is rented as soon as possible
>
> 4 We wait out the current depressed market and sell these Apartments so that the debt is expunged.
>
> This is a level that I can meet and will enable us to both make the best we can out of what is an unsatisfactory position that we both find ourselves in.
>
> I hope that you will view this proposal in the spirit in which I have put it.
>
> This will enable me to service the Loan going forward and get an income to you and contain the losses to the absolute minimum. Once the Gisborne proletariat realise that there are no bargains are here (sic) it will be better for both of us enabling us to receive normal market returns.
>
> I remain available to discuss this further or clarify any matters.

[8] The defendant said he went through a financial statement and cashflow forecast ‘on a line by line basis with Rob’ at the end of which, the defendant deposes, Mr Murray agreed with the approach that had been set out and confirmed the proposal was acceptable to Matrix, except that the interest rate in respect of the residual debt was to be at the interest rate for current lending of this type being at the commercial rates at the time being charged by Matrix.

[9] The defendant further swore in his affidavit that subsequent to this meeting, he was surprised to be invited to a further meeting from Matrix by a Mr Leon Herselman. He was surprised because he thought settlement had been implemented, although he had received no loan documents from Matrix in the interim (that is, between the meeting of June 2008 and the next contact from Mr Herselman).

[10] It would appear that a further meeting took place at the end of September or early October 2008. After the meeting, Mr Herselman on 10 October sent an email to the defendant setting out quite a different proposal from that which was contained in the defendant's letter which I have set out at paragraph [7]. Amongst other things, the plaintiff's officers made it clear that the amount of the loan - about $800,000 – would have to be paid. The plaintiff send a follow-up email on 21 October and on 23 October Mr Whitley responded as follows:

> I am waiting for some information and an outcome that will materially affect my decision. I expect to have that by Friday of this week. I have to say I was bitterly disappointed that you were unable to give some interest relief on this especially after my having given consideration on that last sale. Difficult situations require compromising and I feel the only one doing that is me.

[11] The plaintiff attached considerable significance to this chain of emails, saying that they are quite inconsistent with any arrangement of the kind that the defendant proposes in terms of whatever liability he had being met some years in the future when market conditions had stabilised – this being the arrangement that he said was entered into at the June 2008 meeting.

[12] The issues that I am required to consider centres on the question of whether the plaintiff is able to demonstrate that the defendant does not have an arguable defence. That question resolves itself into an enquiry into whether it is it arguable that the discussions of 30 June 08:

a) gave rise to a binding contractual variation

b) establish a promissory estoppel which prevents the plaintiff from enforcing its debt;

c) provide the defendant with a claim under the Fair Trading Act

The plaintiff's affidavit in reply

[13] The defendant has objected to my reading certain annexures to an affidavit in reply filed by Mr Murray on behalf of the plaintiff.

[14] The plaintiff justifies the inclusion in the evidence of the emails in question on the following broad grounds. For the plaintiff, Mr Pascariu said that it filed summary judgment proceedings suing on the guarantee Mr Whitley gave of the loan obligations that Advantage Bayview Limited ("Advantage") entered into on 19 July 2007. On receipt of the notice of opposition and affidavit, it became apparent that the defence relied upon was that the parties in 30 June 2008 entered into an agreement whereby the guarantor agreed with the plaintiff that his obligation would be varied or replaced by different loan arrangement. Further, the defendant alleged the new arrangement did not fix a date by which the liability was to be repaid.

[15] The plaintiff's counsel says that once they understood that this was the defence, the plaintiff took steps to place before the Court in evidence in reply, evidence of emails that were exchanged subsequent to 30 June 2008. These emails were inconsistent with Mr Whitley's claim of a varied arrangement or a replacement arrangement allegedly entered into 30 June 2008. Those emails, essentially, disclose that the parties were engaged in negotiations for the repayment of the loan. The evidential value of the exchange, from the plaintiff's perspective, is that continuing the process of negotiation would be inherently unlikely if the parties had already reached a concluded agreement back in June.

[16] Mr Hucker, for the defendant, says that it is unfair to the defendant to permit the emails to be read in evidence. He says that because the emails were produced by way of an annexure to the plaintiff's affidavit in reply, the defendant has not had an opportunity to rebut their contents or to produce evidence explaining them. Mr Hucker said that there may be an explanation available to the defendant such as the emails were never actually being sent and received; or that there are still further emails which put a different gloss on what appears from those annexed emails. Mr

Hucker submitted that the appropriate way to remedy any unfairness is for the Court to decline to read the additional emails.

[17] In my judgment no procedural unfairness would result from the Court reading the additional emails. I accept that the plaintiff could not have been expected to foresee the need for the email exchange to be put in evidence before it knew the nature of Mr Whitley's defence. Once that defence was revealed the plaintiff filed the affidavit in reply that contains the emails about which the defendant complains. That occurred on 7 May 2009. There was plenty of time between that date and now, if the defendant had wished, to seek leave to produce evidence of the kind that Mr Hucker said might have been of assistance to the defendant's case. The defendant could, had he wished produced a draft deposition annexing any other emails that placing in context those annexed to the affidavit in reply. But the defendant did not take this step. Rather he waited until the date of the fixture and sought to "knock out" any reference to the emails from the evidence. My conclusion is that the emails should be read.

Summary judgment principles

[18] The principles which apply to an application for summary judgment have been clearly established through decisions of the Court of Appeal such as *Pemberton v Chappell* [1987] 1 NZLR 1.

[19] In his judgment in *Pemberton v Chappell* at page 3, Somers J said:

> If a defence is not evident on the plaintiff's pleading I am of 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.
>
> At the end of the day r 136 requires that the plaintiff "satisfies the Court that a defendant has no defence". 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. See e.g. *Wallingford v Mutual Society* (1880) 5 App Cas 685, 693; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99*; Orme v De Boyette* [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive

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

[20] I therefore propose to apply the following general principles, which apply to all applications for summary judgment:

a) The Plaintiff must satisfy the Court that The Defendant has no arguable defence to the claims brought against it.

b) It is generally not possible to determine disputed issues of fact based on affidavit evidence alone, particularly when issues of credibility arise.

c) Although the Court should adopt a robust approach, nevertheless summary judgment may be inappropriate where the ultimate determination turns on a judgment which can only properly be reached after a full hearing of all the evidence.

[21] I intend to be guided by this statement of principle.

Was the alleged arrangement of June 2008 contractually enforceable?

[22] The approach I intend to take is to first consider whether the defendant's evidence establishes an arguable defence arising out of the agreement he asserts was made at the meeting in June 2008 and was legally enforceable. Mr Pascariu for the plaintiff said that it was not. He pointed to the fact that no date was fixed by which the loan would be repaid. I interpolate that that seems to be a necessary consequence of the arrangements as Mr Whitley deposed to them. This is because he proposed in numbered paragraph 4 of his letter, 30 June 2008, that the parties wait out the current depressed market and sell the apartments when the market improved. Mr Pascariu said that obviously the date when the plaintiff would be repaid was an essential term of any contract arrangements and any proposal that lacked such an element would

lack a necessary and fundamental strand of agreement so that the arrangement could not be enforceable as a contract.

[23] Mr Hucker, on the other hand, referred me to the well known decision of the Court of Appeal in *Electricity Corporation of New Zealand v Fletcher Challenge Energy* [2002] 2 NZLR 433:

> [50] The question whether negotiating parties intended the product of their negotiation to be immediately binding upon them, either conditionally or unconditionally, cannot sensibly be divorced from a consideration of the terms expressed or implicit in that product. They may have embarked upon their negotiation with every intention on both sides that a contract will result, yet have failed to attain that objective because of an inability to agree on particular terms and on the bargain as a whole. In other cases, which are much less common, the intention may remain but somehow the parties fail to reach agreement on a term or terms without which there is insufficient structure to create a binding contract. This latter situation is uncommon because normally negotiating parties will have an appreciation of what basic terms they need to reach agreement upon in order to form a contract of the particular type which they are negotiating. It is comparatively rare that, having an intention to contract immediately, not only do they fail to deal expressly with an essential or fundamental term but it also proves impossible for the Court to determine the contractual intent in that regard by implication of a term or by reference to what was reasonable in the particular circumstances or to some other objective standard.

[24] In my view the current arrangements fall into the second category described in paragraph [50] of the Court of Appeal judgment. This must be one of the 'comparatively rare' cases to which the Court of Appeal was referring. The defendant's account of matters is that the parties agreed to wait until the housing market recovered before repayment would be required. Presumably, the delay until that point was intended to make it possible for the mortgagee/plaintiff to realise more from the sale of the properties to repay its debt and it would need to look to the defendant for a lesser amount – if any. It is impossible in my view for the Court to determine what was a reasonable point of time at which the debt would become due and owing. The very fact that the recovery of the market is a future event which cannot be predicted by either of the parties, or by the Court, rules out the possibility of the Court by a process of implication or in some other way supplying a vital deficiency in the contract. Mr Hucker made extensive reference to the *Electricity Coorporaton of New Zealand* decision but he did not tell me at any stage by what means the Court could rectify the deficiency that was in the parties arrangements.

Even if all that Mr Whitley says is correct I cannot see that a binding contract came into effect. Therefore, in my assessment, there is no arguable defence available to the defendant arising out of the meeting which took place on or about 30 June 2008.

Promissory estoppel

[25] Even if Mr Murray assented to the proposal that Mr Whitley made to him (and thereby represented that the plaintiff would go along with the proposal that there should be a deferral of the sale of the properties until the market was in better shape) there are other elements that need to be established before the Court could conclude that there was a defence of equitable estoppel available to the defendant.

The representation

[26] An estoppel prevents the party estopped from acting contrary to his or her representation. Before one can come to a conclusion as to what the representor is estopped from, there has to be a clear and unequivocal statement made which is the basis for a promissory estoppel. In the context of this case, that means that the representation that the representor made about what it was going to do is clear. The statement about waiting for the market to recover does not conform to this requirement. Therefore, I do not consider this element of estoppel is made out on the facts of this case.

Detrimental reliance on plaintiff's statements

[27] The authorities make it clear that the defendant would have to prove that he would suffer detriment if the belief or expectation were departed from. The position is stated accurately in my view in the following passage in *Equity and Trusts in New Zealand*, (Butler General Editor 2003) at paragraph 16.2.3:

> The relevant detriment is that which the representee *would suffer* if the representor is permitted to resile from his belief or expectation.

[28] When I asked Mr Hucker abut the matter of detriment he told me that the detriment was that the defendant was not going to get what he was entitled to in terms of the agreement that the parties reached. This is not a type of qualifying

detriment, as is made clear in where the following passage appears at *Equity and Trusts in New Zealand* at paragraph 16.2.3.:

> Mere disappointment from an unfulfilled promise is not a sufficient detriment to raise an estoppel. The representee must have acted or abstained from acting in such a way that he or she will suffer harm over and above this disappointed expectation.

[29] I accept that is a correct statement of the law, the authority cited for which is *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 429 per Brennan J.

[30] I consider that there is weakness in the defendant's approach because of the need to show detrimental reliance on the representation made.

[31] I also consider that, in general, as determined by the New Zealand High Court in *McDonald v Attorney-General* (CP13-86, HC Invercargill, 20/6/91, Holland J) the correct basis upon which to calculate compensation is by adopting a reliance based approach.

[32] In his affidavit Mr Whitley also said:

> 27. The commercial financing market, from my experience as an accountant was collapsing throughout 2008, making refinancing it a difficult task.

[33] The defendant also speaks of getting other investors in who would, presumably, provide an alternative source of funding when it became necessary to repay the plaintiff. No detail is provided of who the investors were or, more importantly, on what terms he would have got them to participate. The defendant says in his evidence:

> 26. In the interim, I had ceased all attempt to raise any further funding to refinance the matrix mortgage through a broker and had also advised several possible investors for whom I undertake accounting work that the investment opportunity was no longer available as a result of the deal with Rob Murray. I am currently seeking those investors consent in order that I can disclose their interest and have Affidavits filed on their behalf.

[34] No further affidavits have been filed.

[35] To return to the case under discussion, it is necessary to isolate, if possible, the harm or detriment that the defendant will suffer if the plaintiff is not held to its representation. Essentially, that involves comparing the effect on the defendant of having to perform his obligations now rather than later. Just how much later is unclear. But, if the defendant were to be believed, it would be a matter of years and not months.

[36] In assessing the issue of detriment, the position of Advantage needs to taken into account. While the defendant and Advantage are separate legal entities, Advantage is under the control of the defendant. One of the three units owned by Advantage, Unit 10 has been sold but on the basis of the evidence before me I conclude that Unit 3 and Unit 4 have not. What happens to those properties will affect the position of both the plaintiff and the defendant. The defendant will, no doubt, control that process and do so in a way that serves his best interests and those of the company. I assume for the purposes of this judgment that their interests are likely to be identical.

[37] It is essential to an understanding of the defendant's position to appreciate that even on his telling of it, the plaintiff did not promise to dispense entirely with the need for the defendant to comply with his obligations under the contract. At most, what the plaintiff promised was a deferral of the point of time at which the defendant would have to repay the money. He does not allege that in the meantime, interest would not run. Indeed, he says that the agreement was otherwise in force and that interest would continue to amount at the interest rate for usually imposed by Matrix for commercial lending of this type.

[38] The Court has to take a practical approach to determining the issue of detriment. It is clear that even before June 2008 the investment could not keep its head above water on the terms of the loan the developer company had received from the plaintiff. The defendant assumes that there will be a favourable outcome from his perspective if the development continues in an unsold state for an indefinite period. But if the only change proposed was that the loan repayment date was deferred – and that seems to be what the defendant alleges - finance charges are going to continue to accrue and accumulate.

[39] If the parties were to now resume their contractual positions, the probable result would the sale of the properties in the near-term. It is the consequences of that occurrence which must be compared with those which would stem from the representation being adhered to.

[40] If, on the other hand, the loan was permitted to roll on for a year or more, the defendant would only suffer from relevant detriment if it were to be expected that the properly would appreciate in value over the extended loan period at a rate that exceeded the accumulation of interest. But that cannot be assumed. The parties have not addressed the factual basis for this enquiry. If the defendant is obliged, though, to pay current market rates, then it is sufficiently close for our purposes to look at what the actual rate was that was charged under the loan arrangement. It was 12.5% pa - assuming that the ordinary and not the penalty rate is applicable. Further, the lender is entitled to capitalise interest and add it to the loan: clause 4 of the loan agreement. If the plaintiff determined to do so, that additional sum would itself carry interest. Viewed in this light, I would not regard it as arguably a sound investment option for the defendant to continue the loan arrangements – even on the modified basis that he says the plaintiff agreed to.

[41] As to the introduction of alternative investors, the defendant has had the right throughout to do this – but has not done so. The plaintiff could not have refused to accept a repayment of its loan and discharge of the mortgages.

[42] In my judgment, a sale now and consequential repayment of, or at least reduction of, the loan might very well be the best solution for the proprietor company and the defendant.

[43] My overall conclusion is that even if the defendant established all the other criteria for an equitable estoppel, there is no proper basis for the Court concluding that he can show detrimental reliance. At most, his case demonstrates that such reliance is a theoretical possibility. It is not one that has a firm, if arguable, basis in evidence. I do not consider that the defendant has laid an adequate foundation for asserting that he has an arguable case that he suffered detriment in reliance upon the statements.

Fair Trading Act

[44] The defendant says that the representations made by the plaintiff at the meeting in June 2008 gave rise to a cause of action under the above Act. In my view, the plaintiff was correct in submitting that any right of action that accrued to the defendant under the Fair Trading Act does not give rise to an equitable set off. Any rights that the plaintiff may have arising from what Mr Murray told him can only be brought by way of a counter-claim that may give rise in due course to a set-off. That is enough to dispose of the relevance of the Fair Trading Act ground. If I was wrong about that, then I also consider there would be difficulties in the defendants way because of the 'no set-off' provision contained in the loan agreement between the parties.

Summary

[45] I do not consider that the defendant has a reasonably arguable defence to the plaintiff's claims. There will be judgment for the plaintiff in terms of the prayer for relief contained in the statement of claim. That is, I enter judgment against the defendant in the sum of $809,462.97. I am not clear about the period for which interest is claimed in paragraph "(b)" of the prayer for relief that calculates interest from 7 November 2008. The plaintiff may wish to file and serve a memorandum as to the form of the judgment. I expect the parties to resolve the issue of costs between themselves and if not, I will hear them at 9 a.m. one morning on a suitable date.

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J.P. Doogue
Associate Judge