IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008 409 1785

	BETWEEN	BUSHNELL BUILDERS LIMITED Plaintiff
	AND	KEVIN FRANCIS MCGOVERNE Defendant

Hearing: 18 June 2009

Appearances: S Caradus for Plaintiff
R P Harley for Defendant

Judgment: 16 December 2009 at 10.00am

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

Background

[1] The plaintiff – Bushnell – has a simple story to tell. It was the contractor for the construction of a commercial building at 1 Riccarton Road, to be known as "Parkview on Hagley". One Riccarton Road Limited (ORRL) was the employer. Mr McGoverne guaranteed payment of ORRL's indebtedness. Bushnell completed the building. Bushnell did not receive full payment from ORRL. Mr McGoverne has not paid Bushnell pursuant to his guarantee. Bushnell seeks summary judgment.

[2] In his notice of opposition Mr McGoverne does not deny the existence of the debt as between ORRL and Bushnell. Rather, he opposes summary judgment by reference to two arrangements involving the plaintiff and other parties. He also states generalised grounds such as that the defendant has arguable defences and that all defences ought to be explored. A key proposition from Mr McGoverne is that

one John Patrick Gerard Egden ought to be joined as third party before the Bushnell claim is dealt with.

[3] The application of summary judgment principles to this case is straightforward. The court also needs to consider three specific areas of opposition raised by Mr McGoverne. Once those areas are considered, it becomes apparent that Mr McGoverne does not have an arguable defence.

The contractual arrangements

Construction Contract

[4] In August 2006 Bushnell entered a contract under the General Conditions of Contract NZS 3910:1998 to build a new development at 1 Riccarton Road, Christchurch. Mr McGoverne signed the contract for ORRL as principal. The contract incorporated a Bushnell letter dated 29 July 2006 which required that Messrs McGoverne and Egden personally guarantee the ORRL obligations to Bushnell under the contract in terms of a Deed of Guarantee and Indemnity to be prepared by Rhodes and Co. Mr Bushnell was reciprocally guaranteeing the contractor's obligations.

The McGoverne/Egden guarantee

[5] Messrs McGoverne and Egden entered into a Deed of Guarantee and Indemnity in favour of Bushnell on 10 August 2006. Mr McGoverne admits the existence and terms of the guarantee. The material terms were:

> 1.1 "Default interest rate" means 16% per annum.
>
> 1.3 If there is more than one Guarantor each Guarantor's liability under this document is joint and several.
>
> 2.4 The Guarantor hereby indemnifies, and will at all times keep indemnified, the Creditor against all costs, claims, losses, expenses, demands and liabilities incurred or suffered at any time by the Creditor that directly or indirectly result from:
>
> (a) Any default by the Guarantor of its obligations under or arising out of this document; or

(b) The failure of the Debtor to make any payment or perform any obligation to the Creditor at any time; or

(c) The obligations of the Debtor in respect of the guaranteed money or guaranteed obligations being or become:

(i) Irrecoverable from the Debtor; or

(ii) Void, voidable, defective or unenforceable.

6.1 The Guarantor must pay to the Creditor on demand all costs and expenses (including legal costs on a solicitor and own client basis) sustained or incurred by the Creditor in respect of the negotiation, preparation and execution of this document and in obtaining or attempting to obtain payment of all or part of the guaranteed money or performance or observation of the guaranteed obligations.

7.3 The default interest rate under clause 7.2 will be calculated on a daily basis and on the basis of a 365 day year. The Creditor may charge default interest before as well as after judgment.

8. **Evidence of Debt**

8.1 The Creditor may maintain an account recording the indebtedness of the Debtor or the Guarantor to it.

8.2 A written statement prepared by the Creditor setting out the amount in an account maintained under clause 8.1 as conclusive evidence for all purposes (including legal proceedings) of the amount of the indebtedness, unless the settlement contains a manifest error.

8.3 A statement by the Creditor that the Debtor has failed to pay any guaranteed money (or other money payable under this document) is conclusive in all respects.

Deed of assignment of 2006

[6] In late 2006 a deed was entered into between ORRL, Bushnell and Dorchester Finance Limited. Dorchester had agreed to provide finance to ORRL to enable ORRL to complete the development. A condition of the provision of finance was that ORRL assigned to Dorchester all ORRL's rights under and by virtue of the construction contract. The assignment was not immediate – cl 2.1 provided that ORRL assigned to Dorchester all ORRL's rights in the construction contract in the case of an "Event of Default" (as defined in the deed) which resulted in Dorchester being a mortgagee in possession. The "Effective Date" of assignment was defined to mean the date when Dorchester elected to take effective control of the property as mortgagee in possession. By cl 2.4 of the deed Bushnell consented to the

assignment on the terms contained in the deed, but without prejudice to Bushnell's rights, powers and remedies under the construction contract.

Agreement 22 February 2007 for sale of McGoverne/Reinke shares to Egden

[7] Messrs Egden and McGoverne entered into an agreement with Todd Raymond Reinke on 22 February 2007 for the sale to Mr Egden of 150 ORRL shares (50% of the ORRL shares). Mr Egden was to pay a $100,000.00 deposit within 10 days. Mr Egden was also to immediately attend to the payment of an outstanding sum of $91,500.00 which ORRL owed to another party. The settlement date of the share sale was 1 April 2007. The purchase price was $1,000,000.00 but subject to an adjustment to take into account Mr Egden's advances to ORRL.

Heads of Agreement 27 June 2008

[8] Bushnell's final payment claim was presented to ORRL and became due for payment in March 2008. It was not disputed. However, ORRL did not settle the debt.

[9] The undisputed final payment claim was for $359,860.15 plus GST (total of $404,793.16. Mr Bushnell's evidence which includes the agreed calculations is that in June 2008 ORRL and Bushnell agreed upon a slightly reduced, revised figure for the final payment (including GST) of $396,762.68. It was that agreed final payment figure which subsequently became the sum sought by way of judgment in this proceeding.

[10] A Heads of Agreement was signed by Bushnell, ORRL and Mr Egden on 27 June 2008. While entitled a "Heads of Agreement", the nature of the document is clearly contractual. The parties acknowledged that the amount owing at 4 June 2008 was $444,156.80, including interest accrued to that date and that ORRL was not in a position to pay the amount owing. ORRL and Mr Egden agreed to enter a loan agreement, involving other companies of Mr Egden as covenantors, and for a term expiring on 31 December 2008.

[11] Bushnell seeks to recover by summary judgment the sum of $396,762.68, together with interest at the default rate (16% per annum). After the proceeding was issued Mr McGovern paid Bushnell $10,000.00.

Summary judgment – the principles

[12] The starting point for a plaintiff's summary judgment application is r 12.2 High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[13] Before turning to some particular issues which arise in relation to this case, I summarise the general principles which I adopt in relation to the application:

(a) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.

(b) The Court will not hesitate to decide questions of law where appropriate.

(c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on

certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(f) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

Summary judgment – what the plaintiff has proved

[14] The evidence filed clearly establishes that –

(a) The defendant guaranteed the debt of ORRL to Bushnell under the construction contract.

(b) As at 17 March 2008 ORRL owed Bushnell no less than $396,762.68 in relation to the construction contract.

(c) That debt was not subsequently reduced except to the extent of $10,000.00 paid by Mr McGoverne in September 2008.

(d) Interest has accrued and continues to accrue on the debt at 16% per annum: cl 1.1 of the deed.

(e) As guarantor Mr McGoverne is liable to pay all costs and expenses, including legal costs on a solicitor and own client basis, incurred by Bushnell in obtaining payment of the guaranteed money.

Mr McGoverne's grounds of opposition

The Heads of Agreement and loan agreement of Bushnell/ORRL/Egden

[15] Mr McGoverne says that Bushnell by entering into the heads of agreement and loan agreement of June 2008 caused Mr McGoverne's guarantee liability to come to an end. For Mr McGoverne, Ms Harley says that the termination of guarantee liability came about in one or more of four ways:

(a) The guarantee was discharged because the principal obligation was discharged by performance.

(b) Mr McGoverne's liability constituted a minor security or cause of action which merged in a higher security which was taken in June 2006.

(c) By entering into a contract to give ORRL as principal debtor time to pay without reserving rights against Mr McGoverne as guarantor discharged the guarantee.

(d) Where the principal contract is varied without the consent of the guarantor, they may be an implied release of the guarantor.

[16] There is overlap in some of these propositions but I will examine each in turn. First, however, I consider briefly the nature of a guarantee.

Contracts of guarantee

[17] The general principles relating to the formation of contracts apply to the formation of contracts of guarantee. It is the parties to the contract of guarantee who determine the terms on which they contract. In the absence of express terms, the common law provides a range of applicable principles.

[18] I adopt as a summary of the general position the following passage in *Laws of New Zealand, Guarantees and Indemnities* para 76:

> **76. Terms of contract may modify usual incidents.** The general principles governing the rights and obligations of the parties to a contract of guarantee may in many instances be modified or negative by the express of implied terms of the particular contract. Standard

> form guarantees drafted for institutional lenders are typically drafted to ensure that may of the protections which would otherwise be afforded a guarantor are removed. Each contract of guarantee should be construed according to its own terms.

[19] It follows that the court must give effect to the intention of the contracting parties as expressed in the guarantee document. I adopt as a correct summary of the law the following additional passage from *Laws of New Zealand* Guarantees and Indemnities para 77:

> **77. Principles of construction.** …Wide clauses in the guarantee will be given full effect, even if they will negate defences which would otherwise be available to the guarantor. Nor will the Court strain for a meaning of the words of the guarantee so as to enable the guarantor to escape liability, for instance upon the principal debtor being adjudicated bankrupt or being wound up. It is purely a question of construction as to whether the guarantor's right to treat the guarantee as discharged has been effectively excluded.

[20] Accordingly, in this case, (where time was extended to ORRL for payment) as in the case of the guarantee under consideration in *Pogoni v R & Symington & Co (N.Z.) Ltd* [1991] 1 NZLR 82 (CA) at 85:

> …the question is purely one of construction to determine whether the surety's right to treat the guarantee as discharged has been effectively excluded

Discharge by performance

[21] Ms Harley for Mr McGoverne relied on the principle that if a principal obligation is discharged by performance, the guarantee is also thereby discharged.

[22] That is a well settled principle at common law: see for example *The Modern Contract of Guarantee* J O'Donovan and J Phillips, English Edition, 2003 at 312,para 6-01.

[23] The basis of this principle is that the purpose of the guarantee has been fulfilled: see for example *The Law of Guarantee* K P McGuinness 2nd ed. 1996 at 363, para 6.75. It is a question of fact in each case whether the purpose of the guarantee has been fulfilled.

[24] Ms Harley cited two authorities on the topic of discharge by performance.

[25] *Lichfield Union Guardians v Greene* (1857) 1 H & N 884,156 ER 1459 (Ex) involved a payment made in bank notes and drafts issued by a bank which were shortly thereafter dishonoured by reason of liquidation. The decision turns on the fact that the payment in question was accepted unconditionally by the creditor. The fact that the payment subsequently proved to be valueless did not result in a revival of the surety's liability.

[26] *M'Lure v Fraser* (1840) 9 LJQB 60 was cited by Ms Harley as authority for the proposition that if a creditor accepts a promissory note which by its terms constitutes a full discharge of the guaranteed debt, that is a good payment discharging the guarantor from the debt. (The case is also frequently cited for the proposition that where a guaranteed debt is compromised by the debtor and the creditor, the guarantor is entitled to the benefit of the compromise). In *M'Lure v Fraser* the creditor expressly undertook to accept a promissory note in full and final discharge of the guaranteed liability. The compromise therefore expressly constituted a satisfaction of the principal obligation.

[27] Ms Harley submitted against the background of these authorities that the loan agreement "effected payment of the balance of the account current between ORRL and Bushnell". The guarantee was therefore to be treated as discharged by performance.

[28] Ms Harley's submission cannot be sustained when the loan agreement is read. The recital, which records:

> The Borrower [ORRL] is indebted to the Lender [Bushnell] as a result of failing to make payments on due date under a certain Building Contract entered into on or about 29 July 2006.
>
> In consideration of the Lender forebearing at the request of the Covenantor (which is hereby acknowledged), for one day from suing the Borrower for payment of the money owing, the parties have agreed repayment arrangements and the Borrower and the Covenantor agree to be bound by the terms and conditions set out in the within agreement.

[29] Recital 11 to the associated Heads of Agreement reflects the acknowledgment in the loan agreement that Bushnell was forbearing from action –

> 11. A condition of the agreement with DFL [Dorchester] is for BBL [Bushnell] to suspend any action against ORR or JPGE [John Egden] until the earlier of 31 December 2008 or until DFL and NZGT are fully repaid, provided other creditors and mortgagees do no exercise their enforcement remedies.

[30] The loan agreement clearly indicates that what the parties were agreeing to was not a discharge of the original contract by performance but rather a forbearance from suing on the original contract while repayment arrangements were put into effect.

[31] The facts of this case, rather than being close to those in the cases relied upon by Ms Harley, bear closer resemblance to the facts in *National Bank of New Zealand v Mee* (1885) 3 NZLR 188 (CA). In that case the guarantee secured advances by the bank to "Messrs John King & Co (John King, sole Partner)". When the customer opened a new account in the name of John King, he drew a cheque against the new account for the amount owing under the existing account and thereby placed the new account in debit for the amount of the cheque. The Attorney-General, appearing for the defendants, argued that the guarantee had come to an end because the debt had been satisfied. They Court of Appeal rejected the guarantor's argument. The primary finding (at 196) was that the cheque payment was a purely formal transaction, the entries mere book-keeping entries, and the principal (King) had not been released by the transaction.

[32] In the present case, the arrangements entered into to satisfy Dorchester's requirements were more than "purely formal" but as between Bushnell and ORRL there was clearly no intention to release Bushnell from its existing contractual liability.

[33] Accordingly, on the common law principles, Mr McGoverne has no sustainable argument as to a discharge of the guarantee by performance.

[34] Even had such argument been available as a matter of common law principles because of an absence of express terms in the contract of guarantee, the express terms of this contract are also a complete answer to Ms Harley's submission.

[35] The terms of the Deed of Guarantee and Indemnity provide:

> 3.3 The guarantee and indemnity contained in this document:
>
> (a) Is a continuing guarantee and indemnity and remains in full force and effect until:
>
> (i) The whole of the Guaranteed Money and all other money payable under this document has been paid or satisfied in full; and
>
> (ii) The Guaranteed Obligations have been observed and performed; and
>
> (iii) A discharge is given in accordance with this document; and
>
> (b) Will not be wholly or partially satisfied, discharged or affected by an intermediate payment or settlement of account.
>
> …
>
> 5.1 The Guarantor is to remain liable under this document until the Creditor signs a discharge of all the Guarantor's obligations in respect of the Guaranteed Money and Guaranteed Obligations.

[36] Furthermore, under the heading "Principal Obligations", the contract provides:

> 3.1 The liability of the Guarantor under this document is one of a principal debtor and not of a surety. The liability of the Guarantor is not dependent or conditional upon any default by the Debtor and is not affected or discharged by:
>
> (a) The Creditor granting to the Debtor, the Guarantor or to any other person (including any other guarantor) of any time, forbearance, or any other indulgence or concession; or
>
> (b) The Creditor advancing any money to the Debtor or otherwise permitting the amount of the Guaranteed Money to increase or the Guaranteed Obligations to change; or
>
> …
>
> (d) Any negotiations, proceedings or other steps taken by the Debtor, the Guarantor, the Creditor or any other person with a view to a readjustment, rescheduling or deferral of

payment of the Guaranteed Money or a change to the Guaranteed Obligations; or

(e) Any agreement or proposal for any assignment of property, compounding, arrangement or composition with or for the benefit of:

(i) The Creditor; or

(ii) Any creditor of the Debtor or Guarantor; or

(iii) Any surety of the Debtor or the Guarantor; or

(f) Any liability of any person ceasing for any cause whatsoever (including a release or discharge by the Creditor); or

…

(n) The total or partial release of any document relating to the Guaranteed Money or Guaranteed Obligations or of the Debtor, the Guarantor or any other person from this document or any document; or

(o) The enforcement of, or failure to enforce, this document or any other document or security; or

…

(r) Any other act, omission, dealing or thing which may abrogate, prejudice or affect the Creditor's rights under this document.

[37] Several of the provisions of cl 3.1 are of themselves a sufficient answer to Mr McGoverne's argument as to discharge by performance. The opening words are applicable – the guarantor is constituted a principal debtor and not a surety. Sub-clauses (a) and (e) are specifically applicable. Even if they were not, the catch-all subclause (r) is clearly intended to exclude the operation of common law principles which "abrogate, prejudice or affect the creditor's rights", of the very kind relied upon by Ms Harley.

[38] Accordingly, Ms Harley's argument fails both in terms of common law principles and the express contractual provisions.

Merger

[39] As a second limb of her submissions, Ms Harley invoked the "general principle" that where a creditor takes from his debtor a security of a higher nature than that which he already possesses (such as if he takes a bond of covenant made by deed), then the creditor's remedies on the minor security or cause of action are normally merged in the higher remedy by operation of law. Ms Harley cited for this principle the case of *Owen v Homan* (1851) 43 Mac & G 378 at 407, 42 ER 307 at 318; affd (1853) 4 HL Cas 997. .

[40] The exact quotation from the Lord Chancellor's judgment in *Owen v Homan* is in fact this:

> It is a general rule of law, that a party by taking or acquiring a security of a higher nature in legal operation than the one he already possesses, merges and extinguishes his legal remedies upon the minor security or cause of action, that is to say, the taking a bond or covenant for the acquiring a judgment for a simple – contract debt merges and extinguishes the simple contract.

[41] One recognises in the last example of merger given by the Lord Chancellor a merger still experienced occasionally nowadays when a debt merges in judgment. The judgment debt is superior to the contract debt.

[42] The general rule recognised in *Owen v Homan* continues to represent the law: see *Halsburys Laws of England* 4th ed. 2005 reissue Vol.32, Mortgage, at para 887. However, immediately after citing *Owen v Homan* for the general rule, the editors of *Halburys* note this:

> For this purpose, however, the superior security must be co-extensive with the inferior security and between the same parties.

[43] The decision in *Holmes v Bell* (1841) 3 Man & G 213, 133 E. R 1120 is cited (correctly) for that proposition. For an example of a case turning on the non-identity of parties, see *Coleman v Brown* (1890) 9 NZLR 186

[44] The general rule as to merger relied upon by Ms Harley therefore does not apply in this case. The Heads of Agreement was between Bushnell, ORRL and Mr

Egden. The construction contract was between Busnell and ORRL with Messrs McGoverne and Egden as guarantors.

[45] Furthermore, as with other rules of this nature, merger may be prevented by an express or implied intention to the contrary: see *Halsburys Laws of England, Mortgage* at 889. Clause 3 of the Deed of Guarantee and Indemnity precludes in this case any argument that a later agreement would act as an extinguishment of the Deed of Guarantee. Equally, the loan agreement by referring to Bushnell's forbearance excludes on the facts an extinguishment by merger.

Discharge by conduct of creditor in granting time to principal debtor for payment

[46] The third limb of Ms Harley's submissions was that a guarantor is discharged if the creditor, without the guarantor's consent, either releases the principal debtor or enters into a binding arrangement with him to give him time without reserving rights against the guarantor. This proposition, in various formulations, is a well recognised basis of discharge at common law: see for instance O'Donovan and Phillips *The Modern Contract of Guarantee* at paras 7/59 to 7/92.

[47] The general rule is subject to a number of limitations. I adopt the following passage from O'Donovan and Phillips *The Modern Contract of Guarantee*, at 7/62:

> One situation in which it is established that the guarantor will not be released is when he no longer remains in the capacity of a guarantor when time is given. Hence a guarantor who has assumed a primary liability will not be discharged if the creditor gives time to the principal.

[48] The opening words of cl 3.1 of the deed provide:

> The liability of the Guarantor under this document is one of a principal debtor and not of a surety.

[49] This provision and several of the other sub-clauses contained in cl 3.1 are a bar to Ms Harley's submission. The contracting parties could not have expressed more clearly their intention that the "extension of time" rule was not to apply to this contract than they did in cl 3.1.

[50] Mr McGoverne has no sustainable argument that his guarantee was discharged through the extension of time granted to ORRL.

Implied release – granting time to co-guarantor for payment

[51] The fourth limb of Ms Harley's submissions was that a guarantor is discharged from liability where the release of the principal debtor is not express but results as a legal consequence from some transaction. Based on the decision in *Vyner v Hopkins* (1842) 6 Jur 889, Ms Harley submitted that where there are two co-guarantors and the creditor, after granting a further loan to the principal debtor and taking a new security from him for that and the former loan, gives further time to him and one of the guarantors only without specially reserving remedy against the other guarantor, that guarantor is discharged.

[52] This submission is a reformulation of the "extended time" submission. It fails on the contractual provisions of the deed in this case for the same reason as Ms Harley's third ground above at [46] – [50].

Deed of assignment to Dorchester

[53] I have referred at [6] above to the Deed of Assignment entered into between ORRL, Bushnell and Dorchester in late 2006.

[54] Ms Harley submitted that by consenting or ORRL's assignment of rights under the construction contract to Dorchester, Bushnell surrendered its rights under the Deed of Guarantee. Mr Caradus submitted that there was nothing to this argument and I agree.

[55] The recitals to the Deed of Assignment make it clear that the Deed of Assignment forms part of the security provided by Dorchester as a condition of finance. I have referred above at [6] to cl 2.1 and to the definition provisions of the deed which make it clear that the effective date of assignment was to be the date when Dorchester elected to take effective control of the property as mortgagee in

possession. There is no evidence that Dorchester became a mortgagee in possession. The argument fails on the facts at that level.

[56] Clause 2.4, above at [6] is also an answer – in consenting to the assignment Bushnell's rights, powers and remedies under the contract were preserved.

Mr Egden as third party

[57] Mr McGoverne finally opposes summary judgment upon the basis that even if he is liable on his guarantee he should be indemnified by Mr Egden, as the person who purchased Mr McGoverne's shares in ORRL in February 2007. He therefore applies for leave to join Mr Egden as a third party. He says that the litigation should be resolved with Mr Egden as a third party because he (Mr McGoverne) was not a party to the subsequent Heads of Agreement and Loan Agreement entered into between ORRL and Bushnell. Ms Harley suggests that Mr Egden's presence before the Court is necessary to enable Mr McGoverne to properly defend the Bushnell claim particularly by reason of the 2008 arrangements to which he was not a party.

Discussion

[58] A third party application in response to a summary judgment application requires leave.

[59] There is nothing in the facts of this case which warrants the plaintiff's application for summary judgment based on clear contractual arrangements and on an established debt to be deferred while the defendant seeks indemnity or contribution from another party. Mr McGoverne accepted liability as a principal. He should have met the demand made upon him at the time that it was made. On the clear facts of this case justice requires that if either the plaintiff or the defendant is to from this point bear the cash flow loss, it should be the defendant.

[60] There is no evidence before the Court to suggest that even if Mr Egden were pursued as third party there would be any recovery from him. In that event, the

further delay while Mr McGoverne pursued Mr Egden is only likely to exacerbate the plaintiff's recovery prospects.

[61] The factors which weight with me particularly in this case are very similar to those upon which the Court refused leave in *BNZ v Mulholland* 919910 3 NZBLC 101,970. In that case Master Williams QC took into account that:

(a) Time would be involved in the defendant seeking contribution and indemnity; and

(b) The plaintiff was entitled to the fruits of its judgment; and

(c) The entry of judgment did not prevent the defendant commencing a proceeding against the co-guarantor; and

(d) There was no evidence as to the ability of the co-guarantors to contribute to the judgment.

[62] I therefore refuse to adjourn the summary judgment proceeding to enable a third party application to proceed. I decline the application for leave to issue a third party proceeding.

Order as to summary judgment

[63] I order:

(a) There is judgment for the plaintiff against the defendant in the sum of $396,762.68, together with interest at 16% per annum on that sum from 1 April 2008 to the date of this judgment.

(b) The defendant is to pay to the plaintiff the costs and disbursements of this proceeding on a reasonable solicitor and own client basis.

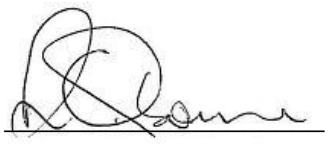
[64] In the event counsel are not able to agree the reasonable solicitor and client costs and disbursements, I reserve leave to the parties to file submissions (limited to five pages each plus any attachments such as invoices).

Orders on application for leave to join third party

[65] I order:

(a) The application for leave to join a third party is dismissed.

(b) The application is to be treated as an interlocutory aspect of the proceeding as a whole and the costs in relation to it are covered by the order at [63](b) above.



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