IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-000608

BETWEEN	UDC FINANCE LIMITED Plaintiff
AND	KEVIN JOHN WHITLEY Defendant

Hearing: 1 May 2009

Counsel: N R Hall for plaintiff
R B Hucker and L F Yakub for defendant

Judgment: 17 December 2009 at 4:30pm

JUDGEMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 17 December 2009 at 4:30pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Simpson Grierson, Private Bag 92518, Auckland 1141 for plaintiff
Hucker & Associates, PO Box 3843, Auckland 1140 for defendant

[1] The plaintiff, UDC Finance Limited (UDC) has applied for summary judgment against the defendant Mr Whitley, for the sum of $479,541.61 together with interest and costs. UDC makes its claim under a guarantee of a loan made by UDC to Kevair (Mr Whitley is sole director and shareholder of Kevair).

[2] The loan was used by Kevair to purchase an aircraft from Air National Corporate Limited (Air National). Kevair also entered into an agreement with Air National for Air National to manage the aircraft for it (in effect the aircraft was to remain part of Air National's fleet when it was not required by Kevair for its own use).

[3] Kevair expected that the revenue from hire or charter would be sufficient to meet all costs under the management agreement and Kevair's obligations to UDC. That turned out not to be the case. Mr Whitley informed UDC that Kevair was unable to meet its obligations and invited UDC to repossess the aircraft. UDC has not done so. Air National still has possession, and has claimed a possessory lien for substantial sums which it says are due to it under the management agreement, including approximately $326,000 incurred in maintenance costs. Air National continues to operate the aircraft and claims to be using revenue received from that use in reduction of the sums due to it.

[4] UDC contends that it has an unanswerable claim against Mr Whitley under his guarantee and an associated indemnity. Mr Whitley opposes summary judgment on the grounds that he is only a surety for the debt, and that his guarantee has been discharged by UDC having failed to take possession of the aircraft and to perfect its security interest (by registration), thereby allowing Air National to claim its lien. He disputes UDC's claim that he contracted out of any right he might otherwise have had to challenge the enforceability of the guarantee. He also says that UDC agreed to repossess the aircraft and is estopped from enforcing the guarantee.

[5] For the reasons I now give I find that Mr Whitley does not have any arguable defence.

Background

[6] Mr Whitley is an accountant and company director. In 2003 he was chief executive officer of a group of companies known as Emerald Group. He was approached by members of Gisborne City Football Club Inc, seeking Emerald Group's support. Emerald Group agreed to provide support. Travel was identified as one of the club's significant costs. Air National had been providing charter aircraft for the club's away travel. Air National put a proposal to Mr Whitley for an investment in an aircraft that Air National would supply. The proposal involved the club having the free use of the aircraft as needed through the playing season, but Air National otherwise continuing to use it as part of its fleet.

[7] Kevair Limited was incorporated to purchase the aircraft. Mr Whitley was sole director and shareholder, but it appears that there was an underlying arrangement for Emerald Group to provide financial support. On 27 February 2006 Kevair entered into two agreements with Air National, first for the sale and purchase of the aircraft and secondly for its management and use (which I will refer to simply as the management agreement). The purchase price was US$580,000 (approximately NZ$883,000) plus GST. The purchase price was funded by a loan of $540,000 from UDC and money provided by Emerald Group or its investors (the evidence on this is not clear, but it is not material).

[8] In the management agreement the parties agreed that Air National would have care and custody of the aircraft, and responsibility for maintaining and operating it. Air National was entitled to hire or charter the aircraft to third parties provided that did not conflict with times that Kevair wished to use it. Mr Whitley says that the management agreement was intended to generate an income stream that would meet Kevair's payments under the loan from UDC.

[9] Under the management agreement, Kevair agreed to pay Air National for the costs of management, which were estimated to be in the order of $284,000 per annum. Air National was entitled to 15% of all revenue received from hire or charter and was required to account to Kevair for the balance and for the costs of managing the aircraft. Kevair was also responsible for payment of maintenance costs, and Air

National had the right to call on Kevair for funding for any significant repairs, maintenance or upgrades of equipment. It agreed to do so only where the costs could not be funded from the day to day trading account. It also had a right to deduct from revenue any monies due to Air National at any time.

[10] On 28 February 2006 Kevair and Mr Whitley signed a loan agreement with UDC for a five year term loan of $540,000. The loan agreement (comprising documents headed Loan Schedule, Additional Loan Schedule Terms Regarding Guarantors and Schedule of Loan Conditions) recorded both Kevair and Mr Whitley as borrower and Mr Whitley as guarantor. The security for the loan was a security agreement under which Kevair (and Mr Whitley) gave UDC a security interest in the aircraft, and Mr Whitley's guarantee.

[11] Unfortunately, apart from the first month of operation, the aircraft failed to produce the projected cash surplus. Emerald Group supported the repayments to UDC for a time, but that ended when Mr Whitley parted company with the other investors and the Emerald Group broke up. As part of the break-up Mr Whitley entered into a deed of settlement with the other investors under which he was required to repay US$204,000 advanced by the other investors to fund the purchase of the aircraft. Kevair defaulted on loan instalments due to UDC in June and September 2007.

[12] In late 2007 Mr Whitley advised UDC that he could no longer support the loan repayments and invited it to repossess and sell the aircraft. About the same time he met with Air National to discuss concerns he had as to the operation of the management agreement and the failure to achieve the original objective of acquiring the aircraft, namely to provide cost free travel for Gisborne City Football Club. Mr Whitley says that he proposed to Air National that they resolve matters by Air National taking over the aircraft for a consideration equal to the outstanding UDC loan. He agreed to Air National speaking to UDC about a possible sale.

[13] On 21 December 2007 UDC made demand both on Kevair and on Mr Whitley for $479,541.61, being the amount due to UDC as at 19 December 2007. Mr Whitley says that he did not receive that demand until sometime in January 2008.

He also says that at that time he became aware that Air National was claiming a lien over the aircraft, and that UDC had not registered its security interest.

[14] UDC filed this proceeding and its application for summary judgment on 11 February 2008.

[15] On 5 May 2008 Air National wrote to Kevair setting out the basis for its claim to a common law possessory lien. It claimed that Kevair owed it $663,791.50 as at 29 February 2008, a substantial portion of which represented significant maintenance work undertaken after August 2007 (in the order of $326,000). Air National advised that it would not provide Kevair with access to the aircraft until all monies were paid, and intended to continue the operation of the aircraft under the management agreement to generate revenue to apply against the outstanding amounts.

[16] UDC now seeks summary judgment after the parties' attempts to settle the matter have proved unsuccessful.

Principles for summary judgment

[17] The principles that the Court applies in determining an application for summary judgment are well established, and can be found in the leading cases *Pemberton v Chappell* [1987] 1 NZLR 1, *Bilbie Dymock Corp. v Patel* (1987) 1 PRNZ 84 (CA), and more recently *Jowada Holdings Limited v Cullen Investments Limited* CA248/02 5 June 2003. The following are relevant to the present application:

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

b) Although the onus stays with the plaintiff, a defendant must put forward a factual basis for any defence being raised: summary judgment will not be avoided by raising a hypothetical defence;

c) The Court will not hesitate to decide questions of law, including difficult legal issues, where appropriate;

d) The Court will not attempt to resolve disputes over facts, or to assess the credibility of statements made in affidavits, that are essential to elements of the defence. However, the Court is not required to accept uncritically, as raising a dispute, unsupported assertions of fact, particularly where such assertions are contrary to incontrovertible fact or inconsistent with clear contemporaneous documents;

e) When called for by the facts of a case, the Court must balance the need for a robust and realistic attitude against the need to ensure that there is no prejudice to a defendant.

Preliminary matter

[18] Counsel for UDC raised issues at the commencement of the hearing in relation to the admission of three affidavits filed by Mr Whitley, and late filing of its synopsis of argument. Mr Whitley had previously been given leave to file updating affidavits. The affidavits filed clearly go beyond that. Counsel for UDC also objected to the hearsay nature of some of the evidence. Counsel for Mr Whitley accepted that his synopsis of argument was later than had been directed.

[19] UDC has had opportunity to respond to the affidavits, even if they have gone beyond what was anticipated. Although hearsay evidence can be given on an interlocutory application, a stricter approach is usually taken on an application for summary judgment as a substantive determination can be made on these applications. If a party fails to comply with the rules of evidence in that respect, it runs the risk that the Court will decline to receive the evidence: *Ports of Auckland Limited v The Ship "Raumanga"* (1998) PRNZ 84. The Court has a discretion which can be exercised by deciding what weight to give to particular evidence. Counsel for UDC was given leave to raise objection to any particular hearsay evidence during the hearing. Counsel for UDC opted not to seek an adjournment by reason of the late submissions, on the basis that any prejudice arising from the delay

would be taken into account. Counsel did not raise any particular prejudice during the course of the hearing.

The competing arguments

UDC's arguments

[20] UDC says that Mr Whitley personally guaranteed Kevair's loan and agreed to indemnify UDC in respect of any loss, and that the terms of the guarantee and indemnity clearly allow their enforcement irrespective of steps taken in relation to other security. It relies on *China and South Sea Bank v Tan* [1990] 1 AC 536 for the propositions that a creditor does not owe a duty (in tort) to a guarantor to realise security assets before seeking to enforce a guarantee, and that if a guarantor is concerned about the failure of a creditor to act or to realise the security it is open to the guarantor to make payment of the principal debtor's obligations to the creditor and then realise the security as it sees best to recover its payment (particularly at 545).

[21] UDC further contends that, in any event, the conduct by a creditor that will discharge a guarantee is limited, and there has to be more than negligence by the creditor towards a guarantor, or a failure by the creditor to be prudent in the preservation of the creditor's own interests: *Westpac Securities v Dickie* [1991] 1 NZLR 657 at 665. It says that it had no obligation to register (and so perfect) its security or to take possession of the aircraft (but in any event it did register its security).

[22] Further, it says that even if it is arguable generally that it has such obligations, the parties agreed in the terms of guarantee to exclude any right that Mr Whitley would otherwise have had to treat the guarantee as discharged.

[23] It also says that Mr Whitley cannot avail himself of the rights of a surety as he has given UDC an indemnity for any losses, as a principal debtor.

Mr Whitley's arguments

[24] Mr Whitley submits that the deed of guarantee created a secondary obligation only (in other words, he is not liable as a primary debtor). He says that he has an arguable case for the intervention of equity to protect his position as guarantor on the ground that UDC had an obligation to preserve its security interest in the aircraft for him but has failed to do so. He says that as a consequence Air National has been able to advance claims to his prejudice as surety:

a) The security agreement created a security interest in the aircraft (clauses 1.1 and 2.1) and in Kevair's right to (surplus) operating revenue under the management contract (clause 6.2(f)) and under s45 of the Personal Property Securities Act (the PPSA).

b) The security interest was both for UDC's benefit and, by subrogation, for his benefit.

c) UDC has improperly allowed the aircraft to remain in Air National's possession and has not secured the operating revenue from its use.

d) UDC was required to perfect its security interest (clause 2.13 of the security agreement) but did not do so (by registration under the PPSA) prior to Air National claiming a possessory lien.

e) If UDC had repossessed the aircraft, the surplus operating revenue would have been applied in reduction of the principal debt and thereby in reduction of his obligations as guarantor, such that Air National would not have incurred the maintenance costs and thereby would not have had a claim to a common law possessory lien.

f) If UDC had perfected its security interest (by registration) it was arguable that Air National would not have been able to claim priority of its possessory lien (under s 93 of the PPSA). He/Kevair have a legitimate claim against Air National for misrepresentation as to the revenue achievable under the

management agreement and as to the maintenance requirements for the aircraft which would offset Air National's claims.

[25] Mr Whitley contends that the effect of UDC's failure to take possession of the aircraft and to perfect its security interest is to discharge his guarantee: *Wulff v Jay* (1872) LR 7 QB 756, 765 and *China and South Sea Bank*. He also says that the terms of the guarantee, properly construed, do not exclude discharge for failure to protect the security for him. Further he says, that the indemnity clause does not assist UDC's case as, again properly construed, it does not make him a principal debtor for all purposes, but only in respect of any sum that cannot be recovered from Kevair, so that the protections for a surety in equity still apply.

[26] Finally, Mr Whitley contends that UDC agreed to repossess the aircraft in a telephone discussion in November 2008 and he has relied on that promise to his detriment, giving rise to an estoppel.

Issues

[27] These competing contentions give rise to the following issues for determination:

a) Is it arguable that UDC had an obligation to take possession of the aircraft or register its security interest in order to preserve the security interest in the aircraft for Mr Whitley as guarantor? This involves consideration of what obligations UDC had in the circumstances, and whether it can be said that the security interest has been prejudiced by failure to take either step.

b) Do the terms of the guarantee exclude any right that Mr Whitley would otherwise have to treat the guarantee as discharged? This requires consideration of the construction of the terms of the guarantee.

c) Is it arguable that UDC has made a promise to Mr Whitley or Kevair to take possession of the aircraft, and that that estops UDC from enforcing its claim under the guarantee?

The extent of UDC's obligations

[28] It is settled law that a guarantor's obligation under a contract of guarantee is subject to the intervention of equity to protect a surety in appropriate cases: *China and South Sea Bank* at 543-4. Thus equity will act to discharge a guarantee where the person guaranteed acts in such a way as to harm the security or the guarantor's rights in relation to it. In *Watts v Shuttleworth* (1860) 5 H&N 235 a surety was released where the creditor had covenanted to insure mortgaged goods and had failed to do so. Pollock CB said (at 247-248):

> The substantial question in the case is, whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged ... the rights of a surety depend rather on principles of equity than upon the actual contract.

[29] It is apparent from this passage (applied by the Privy Council in *China and South Sea Bank*) that equity will intervene where the creditor commits an act which is injurious to the surety or inconsistent with his rights, or **where the creditor fails to do something that he has a duty to do** (my emphasis).

[30] Counsel for Mr Whitley submitted that UDC had an obligation to perfect its security by registering its security interest, and to preserve the security by taking possession, so that it remained available for Mr Whitley when he met his obligations to UDC under the guarantee. He argued that the present case was distinguishable from the finding in *China and South Sea Bank* that a creditor was not obliged to realise its security, and hence was not responsible for decline in its value.

[31] Counsel relied in particular on *Wulff v Jay*, the facts of which have some similarity to the present case. There the plaintiffs lent money to a partnership on the security of an assignment of plant and stock in trade of the partnership and a guarantee by the defendant. The deed recording the loan and security arrangement was referred to in the judgment as a mortgage by bill of sale. The borrowers placed themselves into bankruptcy. The plant and stock in trade were then still in the

possession of the borrowers. The trustee in bankruptcy took possession, sold them, and applied the proceeds of sale in payment of the partnership's creditors generally. The plaintiffs had the right to register the bill of sale, in which case any fixtures would have been protected, but did not do so. They also had the power, in the event of default, to take possession of the mortgaged property and effect a sale but had allowed the borrowers to remain in possession of all property following default. Cockburn CJ took the view that this was a conscious decision, taken with knowledge of the impending bankruptcies, to allow the assets to fall into the bankrupts' estate as the plaintiffs were also unsecured creditors for other debts, and believed they could rely on the security of the defendant's guarantee for this debt.

[32] The following passage from the judgment of Cockburn CJ (also cited in *China and South Sea Bank*) contains the reasoning relevant to the present case (at 762-763):

> I think, looking at all the circumstances, it is not impossible to say that the plaintiffs did what they ought to have done to realize the security they possessed. Cases have been cited and authorities have been referred to in Story's *Equity Jurisprudence*, which abundantly establish that which is a common and well-known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay. That is now a well-known proposition. Here, by registering the bill of sale, and by afterwards availing themselves of the power which they possessed to take possession, the plaintiffs might have secured the payment of the debt to themselves, or by protecting the securities and holding them in their hands they could have made them over to the surety when the surety was willing, or was called on, to pay: but by omitting to do what was necessary in order to place themselves in that position, and by allowing bankruptcy to supervene so as to enable the trustee under the bankruptcy to take possession of these goods adversely, it is clear that they have placed the surety in a position very detrimental and prejudicial to the surety; and for that the surety ought to have, according to the general doctrine, a remedy. I think the creditors have clearly been guilty of laches in not protecting themselves, and in not availing themselves of these securities.

[33] The other two judges similarly found that the guarantee was discharged because the creditors were no longer in a position to hand over the security.

[34] Counsel for UDC argued, relying on *China and South Sea Bank*, that UDC was not obliged to do anything. She contended that Mr Whitley (as sole director and shareholder of Kevair) had been in a position to have Kevair take possession of the aircraft (for breach of the management agreement), but had not done so, and could not expect UDC to be responsible for an omission to do something that was open to him/Kevair. There is some merit to this argument, but I do not regard it as a complete answer.

[35] Mr Whitley's strongest case is that UDC omitted to act in a way that it was obliged to do, rather than that it did a particular act that was injurious to him or was inconsistent with his rights: *China and South Sea Bank* at 545. Although he contends that UDC made an active decision to allow the aircraft to remain in the possession of Air National, UDC has given evidence that it has not entered into any agreement with Air National. Mr Whitley invites the Court to draw an inference to this effect from the discussion between himself and UDC's manager in November 2007 in which Mr Whitley agreed that UDC should speak to Air National about a possible sale of the aircraft. I do not accept that this provides a sufficient evidential basis for the inference, particularly in light of the unequivocal contrary evidence for UDC.

[36] There is more merit to the claim that UDC omitted to take steps to preserve the security for Mr Whitley. On the authority of *Wulff v Jay* it must be arguable that if UDC intended to pursue a claim under the guarantee against Mr Whitley it has an obligation to take such steps as were open to it to preserve the security in the aircraft (and possibly the revenue gained from operating the aircraft) for Mr Whitley's benefit. However, there is a further distinction to be made between ensuring that the security is not lost (the position in *Wulff v Jay*) and requiring a creditor to take steps to maintain its value (it being clear from *China and South Sea Bank* that there is no obligation to act to prevent decline in value of the asset). I do not consider there to be any case for holding UDC liable for loss in value of the security. There is no evidence to support a finding that UDC has caused any decline.

[37] Turning to the facts of the present case the central issue is whether the security has been lost or impaired through either of the matters alleged, namely a

failure by UDC to register its security interest, or a failure to take possession of the security (the aircraft or revenue generated from it).

[38] There is no express contractual obligation on UDC to take steps to register its security. The security agreement places obligations only on Kevair and Mr Whitley to take steps to enable UDC to register. Counsel for Mr Whitley did not advance any other basis for contending that there was such an obligation. However, the absence of a contractual obligation or a duty of care does not necessarily mean that equity will not intervene where the creditor knows that the security is potentially at risk, has the ability to take steps to avoid those risks, chooses not to do so, and the security is lost to the surety: *Wulff v Jay*.

[39] I am not persuaded, however, either that UDC has in fact failed to register its security interest, or that any failure has in fact impaired the security. The factual basis for Mr Whitley's allegation that the security interest has not been registered is advice from UDC in April 2008, which suggests that it was not registered until 7 April 2008. It is a document generated by UDC. Its provenance is not clear. It simply says that there was a registration on 7 April 2008, rather than that that was the first registration. The better evidence of first registration was an extract from the Personal Property Securities Register produced by counsel for UDC at the hearing. This showed registration in February 2006.

[40] Counsel for UDC also argued that *Wulff v Jay* was distinguishable on the basis that UDC still has its security in the aircraft. She said that UDC (and indeed Kevair) retained the ability to obtain possession by paying the maintenance costs, and in that event it would also be able to recover the maintenance costs from Kevair and Mr Whitley. She submitted that the security has in fact been improved rather than impaired by the maintenance work which has given rise to Air National's lien. She argued that Mr Whitley had to show more than that UDC's conduct was prejudicial to Mr Whitley: *Westpac Securities Ltd v Dickie* [1991] 1 NZLR 657 (CA), applying *Bank of India v Patel* [1983] 2 Lloyds LR 298, 301-2.

[41] I accept that this case can be distinguished from *Wulff v Jay*. UDC retains its security interest, and is able to provide it to Mr Whitley upon payment under the

guarantee (even if it first has to clear Air National's lien). I also accept that the security interest will have been improved by the maintenance work. Moreover, if Mr Whitley wished to, it was open to him to have taken steps himself to preserve his position under the security (as distinct from *Wulff v Jay* where the surety had no knowledge of the defaults). Even if I was to accept a need for further investigation at that point, s 93 of the PPSA provides that a lien will have priority over a perfected security interest.

[42] The second question is whether UDC had an obligation to take possession of the security. Counsel for Mr Whitley submitted that UDC had "improperly" left the aircraft in Air National's possession. However, the only evidence is that UDC elected not to exercise its right to possession. It had no contractual obligation to do so. On the authority of *China and South Sea Bank* it had no duty to take any steps to protect value in the security (as distinct from ensuring that security interest could be made available to Mr Whitley). As I have already said, given the need for maintenance it is more likely that leaving it with Air National has at least maintained its value by ensuring its airworthiness. It was also open to Mr Whitley to take steps himself (through Kevair). Most significantly, however, the security is still available (albeit upon payment of the maintenance costs).

[43] In summary, I am not persuaded there is an arguable case for discharge of the guarantee on the grounds of failing to preserve the security interest for Mr Whitley as surety. I have reached this decision on the basis of the view I have taken of the principles in *China and South Sea Bank*, and the application of *Watts v Shuttleworth*. However, in case I am wrong in that view so that an omission which merely impairs (rather than loses) a surety's interest in a security can operate to discharge a guarantee, I will also address the second issue, namely whether the parties agreed to exclude Mr Whitley's rights as surety.

The terms of the guarantee

[44] Counsel for UDC argued that in any event by the terms of the guarantee the parties excluded any entitlement that Mr Whitley might otherwise have had to claim discharge of the guarantee.

[45] Parties to a guarantee can agree to terms which limit or exclude matters which would otherwise release the guarantor: *Pogoni v R & W H Symington & Co (New Zealand) Limite*d [1991] 1 NZLR 82.

[46] In the case of ambiguity, such clauses will be construed in favour of the surety. They are, in effect, exclusion clauses. As such, it is for the party seeking exclusion to bring itself clearly within the terms of the clause: *Credit Lyonnais Australia Limited v Darling* (1991) 5 ACSR 703 at 708; O'Donovan and Phillips, *The Modern Contract of Guarantee* Eng ed. (2003), particularly at 451 and 453.

[47] The terms of the guarantee read:

> The Guarantor(s) named below hereby:
>
> 1. Guarantees (jointly and severally if more than one) repayment to UDC of all amounts payable by the Borrower pursuant to the attached Loan Schedule, and the performance of all of the Borrower's obligations under the Securities referred to in the Loan Schedule.
>
> 2. Acknowledges that UDC has entered into the attached Loan Schedule with the Borrower at the request of the Guarantor, that UDC might not have done so without the Guarantor's guarantee, and that UDC advancing the Principal Sum to the Borrower is a benefit to the Guarantor.
>
> 3. Agrees that if the Borrower does not pay any amount, or perform any obligation, under the Loan Schedule or the Securities, the Guarantor will do so on demand.
>
> 4. Agrees that if for any reason any amounts payable by the Borrower under the Loan Schedule are not recoverable by UDC, whether as a matter of law or as a matter of fact, the Guarantor will indemnify UDC against any resulting loss, and will pay the amount of any such loss to UDC as a principal debtor and on demand.
>
> 5. Agrees that their obligations as a Guarantor are absolute and unconditional, and will not be released or in any way affected by:
>
> (a) the Loan Schedule or any Securities being unenforceable or otherwise defective; or
> (b) any variation or release of the Loan Schedule, the Securities or any other Guarantor; or
> (c) any concessions by UDC to the Borrower or to any other Guarantor; or
> (d) the insolvency, bankruptcy or liquidation (as appropriate) of the Borrower or any other Guarantor; or
> (e) any other act, omission, or rule of law which would, were it not for this clause, release a guarantor or indemnifier;

and irrevocably waives any rule of law to a different effect.

6. Acknowledges that execution by UDC of any release of any Securities will not also release the Guarantor, unless UDC expressly agrees in writing that it does.

7. Acknowledges that the Guarantor is not a "Debtor" for the Purposes of the Personal Property Securities Act 1999 ("PPSA") and, to the extent permissible by law, waives any notices or rights of the Debtor under PPSA to the extent inconsistent with these terms.

8. Acknowledges that the Guarantor has either had independent legal advice prior to executing these terms or, if that has not occurred, that is solely the Guarantor's own choice freely made, and as a result the Guarantor irrevocably waives any rights which the lack of that independent advice might otherwise have given the Guarantor.

[48] UDC says that the terms of guarantee and indemnity are clear, and wide enough to exclude any failure to take possession of the aircraft or register the security interest. Counsel submitted that they would both be enforceable even if UDC had varied or released its security interest.

[49] Counsel for Mr Whitley sought to persuade me that clauses 5 and 6 were not clear or comprehensive enough to have excluded a release for failure to preserve the security. He argued that the clause did not expressly allow UDC to deal with the security at the expense of the surety. He argued that express words were needed to achieve that and referred to the clause in *Credit Lyonnais Australia Limited v Darling* which expressly provided for exclusion of rights arising out of the omission by the creditor to complete the collateral security.

[50] I do not accept that the failure to provide expressly for the case of lack of registration of failure to take possession of the security puts such events outside the ambit of the clause. The guarantee was given in context of a loan to a company that had just been incorporated. It is not unusual that the sole director and shareholder was required to provide a personal guarantee. The guarantee was an integral part of the loan agreement and Mr Whitley's signature was witnessed by a solicitor. Although the Court will construe such clauses strictly, it must nevertheless give effect to the agreement of the parties as expressed in the guarantee document, read in context: *Credit Lyonnais Australia Limited v Darling* at 708.

[51] The words of clause 5 are clear and emphatic. Mr Whitley's obligations are "absolute and unconditional", and "will not be released or [be in] any way affected by" the four broad circumstances set out in sub paras (a) to (d) nor by "any other act, omission, or rule of law which would, were it not for this clause, release a guarantor or indemnifier". The clear intention of the parties, at that time, can only have been that Mr Whitley's guarantee was to be preserved notwithstanding any omission to register its security interest or to take possession of the aircraft and the income stream derived from its operation.

[52] I do not have to decide whether Mr Whitley also had a primary obligation to indemnify UDC (under clause 4 of the guarantee) given the view that I have come to as to the scope of clause 5.

Is there basis for an estoppel?

[53] The third ground advanced from Mr Whitley was that UDC was estopped by what counsel described was "an unambiguous promise" to repossess the aircraft, relying on the decision of the Court of Appeal in *Krukziener v Hanover Finance* [2008] NZCA 187 (at paras [37] and [38]) for the proposition that equity will intervene to avoid detriment resulting from a promise which creates or encourages an assumption which the recipient relied upon:

> [37] Promissory estoppel was traditionally concerned with promises to refrain from exercising pre-existing contractual rights: *Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC). The promise had to be clear and unequivocal: *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 1 AC 741 at 768 (HL). The legal rights were suspended, and might be resumed on giving notice, so long as the promisee could resume its former position: *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391 at 399 (HL).
>
> [38] Following the decisions of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, promissory estoppel is no longer confined to promises affecting pre-existing rights. However, the departure from a voluntary promise is not unconscionable in itself, even if detriment results. Rather, equity responds to the defendant creating or encouraging an assumption in the plaintiff, and its knowledge that the plaintiff will rely on the assumption to its detriment. The plaintiff must have been led to believe that the promise would affect or result in legal relations; thus a promise made in negotiations that are subject to contract

> will not lead to an estoppel: *Waltons Stores* at 406 and 422. Lastly, equity does not intervene to satisfy the promise, but to avoid the detriment. These requirements in the current authorities, as the High Court recognised, are seen as necessary to preserve the law of contract as the principal mechanism for the enforcement of promises.

[54] Counsel for Mr Whitley submitted that even if the guarantee was not discharged, UDC had led him to believe that it would exercise its rights to possession of the aircraft, and that he was detrimentally affected by its failure to do so.

[55] There are two difficulties for Mr Whitley with this argument. First, there is no evidence of a clear and unequivocal promise. Mr Whitley refers to a telephone discussion with UDC's Mr Sunderland (apparently in September 2007) when he invited UDC to repossess the aircraft. An accountant working with Mr Whitley in the Emerald Group, Mr Blyth, says that he attended a meeting with a Mr Lawrence from UDC in late 2007 in which Mr Whitley "advised UDC to repossess the aircraft" and was also present when Mr Lawrence spoke to Mr Whitley by telephone and Mr Whitley authorised him to negotiate direct with Air National contemporaneously about repossession (curiously Mr Whitley does not refer directly to those conversations). Lastly Mr Whitley's wife gives evidence that she was present when Mr Lawrence came to Mr Whitley's office and says that her understanding from the conversation she heard was that UDC "would immediately repossess the aircraft" as well as negotiate a price for it with Air National. Leaving aside UDC's concerns about hearsay in the evidence of Mr Blyth concerning the telephone discussions between Mr Whitley and UDC, it is difficult to see this evidence as anything more than a discussion between the parties as to a possible course that was open. It is certainly no evidence of a clear and unequivocal promise.

[56] More significantly, however, Mr Whitley does not give any evidence which can support his claim that he acted in reliance on this alleged promise, to his detriment. He does not say what he could and would have done were it not for his belief that UDC was to take possession. There is nothing to indicate that he changed his position in any way to his detriment. In the circumstances I can see no basis for an arguable defence based on estoppel.

Decision

[57] I find that Mr Whitley does not have an arguable defence that his guarantee has been discharged by a failure on the part of UDC to register its security interest or take possession of the aircraft, and that even if UDC would otherwise have been under such an obligation the parties agreed by the terms of the guarantee that any surety failure would not discharge the guarantee. I further find that there is no evidence of an estoppel operating against UDC by reason of a "promise" by UDC to take possession. Lastly, I find that there are no disputes of material fact on these issues, nor a need for any further background evidence to assist in the construction of the terms of the guarantee, so as to make the matter unsuitable for summary judgment.

[58] I enter summary judgment for UDC for $479,541.61 and interest as sought in its statement of claim.

[59] Counsel did not address me on costs. I see no reason to depart from the normal course of awarding costs to the successful party. Similarly I see no reason to award costs other than on a 2B basis. If UDC seeks costs on any other basis, counsel is to file and serve a memorandum by 22 January 2010, and counsel for Mr Whitley is to file and serve any memorandum in opposition by 5 February 2010. Failing that UDC is entitled to costs on a 2B basis together with disbursements as fixed by the Registrar.

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Associate Judge Abbott