IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-3191

BETWEEN	ALAN GRAHAM TOWERS Plaintiff
AND	TIMOTHY JOHN BRUNTON WILLIAMS Defendant

Hearing: 25 November 2009

Appearances: Ms Darlow for plaintiff
Mr Chisholm for defendant

Judgment: 18 December 2009 at 10 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on ***18.12.09 at 10 a.m.****, pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date……………

Counsel:
Lee Salmon Long, P O Box 2026, Auckland: by email: Fran.Darlow@lsl.co.nz
David J Chisholm, Barrister, Auckland: by email: david@dchisholm.co.nz

Background

[1] The plaintiff seeks summary judgment against the defendant for the sum of $215,969.37 plus costs, on the basis that the defendant has breached his obligations under a loan agreement to repay an advance made by the plaintiff to the defendant.

[2] On 11 April 2006, the plaintiff entered into a Memorandum of Understanding (MOU) with the defendant and GN Networks Limited (GNN) whereby the plaintiff would advance $220,000 to the defendant, with the money to be provided to GNN. Clause 2.4 of the MOU provided for the plaintiff and defendant to enter into an agreement (the Option Agreement) whereby the plaintiff would have an option to purchase shares in GNN. Clause 5 of the MOU provided that, in the event the plaintiff did not elect to take up the option, the defendant was liable to repay the advance to the plaintiff. The plaintiff advanced $215,969.37 to GNN on 11 April 2006 (the Advance).

[3] The plaintiff and defendant did not enter into the Option Agreement and the plaintiff elected not to take up the option. The plaintiff made demand on the defendant for repayment of the Advance on 28 February 2008. The defendant has failed to make repayment of the Advance to the plaintiff.

[4] The defendant contends in the papers in opposition that he is not liable to repay the Advance to the plaintiff under the MOU because:

a) The plaintiff intended to make, and made, the loan to GNN as opposed to the defendant;

b) The other arrangements contemplated by the MOU were never implemented as a matter of fact between the parties;

c) The plaintiff is estopped from claiming the defendant is personally liable on the following basis:

i) At all material times the plaintiff represented that GNN was liable to repay the advances under the MOU.

ii) In reliance on the plaintiff's representations and/or his failure to take any action personally against the defendant, the defendant took no steps to protect his personal position or procure repayment of the advance that might have been owing by GNN to the defendant.

iii) The defendant did not personally seek to participate as a creditor in a rescue plan for the benefit of GNN's creditors.

d) The defendant at all times held his shares in GNN as a bare trustee and it was the objective intention of the parties that he was to have no personal liability beyond the value of the shares held on trust;

e) If the defendant had any personal liability pursuant to the terms of the MOU as recorded by the parties, and if the terms of the MOU were implemented (both claims are denied by the defendant), clause 6 of the MOU should be rectified to record the common interest of the parties by adding the words "and the shareholders liability is limited to the assets of the trust".

Transaction different from what contract envisaged

[5] Mr Chisholm's summary of his submissions for the defendant under this was:

> The arrangements contemplated by the MOU were never put in place as a matter of fact and/or the parties varied the contemplated arrangements by their conduct. At all material times, the company recorded the advance as an advance direct from Mr Towers (Mr Towers was aware of this as a member of the company's advisory board). In turn, Mr Towers looked to the company for repayment. The parties never proceeded to complete an option

agreement in accordance with the MOU. Rather, Mr Towers negotiated an extension of the option period independently of Mr Williams.

[6] Before considering this matter further I note to matters that I accept as facts:

a) On 3 April 2007, Mr Towers made formal demand on the company for repayment of $345,969.37, being the advance now claimed together with an additional $30,000 (advanced earlier on 27/04/05) and an additional $100,000 (advanced subsequently on 5/05/06)). No demand was made on Mr Williams at this time.

b) Mr Tower's first made a claim on Mr Williams 22 February 2008

[7] The plaintiff accepts that the money advanced was paid to GNN and not to the defendant personally. However, Ms Darlow submitted that the terms of the MOU made it clear that upon receipt the money became a loan by the plaintiff to the defendant. She said the fact that the funds which were part of the loan were paid to GNN (or more accurately to a creditor of GNN at the request of GNN) has no bearing on the liability of the defendant under clause 5 of the MOU. Ms Darlow said the only way that the making of the loan to GNN could be relevant as to the defendant's liability is if his liability to repay the advance under clause 5 of the MOU was conditional on the advance being made to the defendant in the exact way set out in the MOU; and that because there had been a departure from that expectation the defendant was released from his obligations under the contract. She said that there was nothing in the terms of neither the MOU, nor the defendant's opposition or evidence which suggests that was a sustainable interpretation of the document.

[8] I do not consider the defendant has a substantial defence under this head. The agreement that the parties entered into made it clear that the ultimate destination of the funds was always going to be GNN. That follows from the fact that the 'background' to the agreement was that:

> '(a) GNN needs to purchase stock and requires funds to do so.'

[9] Further, paragraph 1 of the agreement stated that the plaintiff agreed to loan monies:

> being $220,000 to GNN which will be used in part to fund payment commitment made to Greenhouse USA.

[10] My view is that the overall terms of the agreement provided that the borrower was to be the defendant but that the funds raised by the loan he agreed with the plaintiff would ultimately be destined to GNN. This is exactly what happened.

Variation of contract?

[11] The scheme of the arrangement was that:

a) The plaintiff would advance money to the defendant on the understanding that the actual recipient of the funds would be GNN;

b) If the defendant and the plaintiff ended up executing an option then it was implicit in the arrangements that the transfer of shares by the defendant to the plaintiff would be substituted for the need for the defendant to repay the loan.

[12] It is necessary to ask what happened, which might be evidence of an agreement to vary the original contract so that the defendant was released from liability and GNN substituted for him. The defendant relies upon a number of events which he says point to such a conclusion. The first is a negative occurrence, namely the omission for the structure of the loan arrangement as implemented to include an advance from *the defendant* to the company. Mr Chisholm said this would have been expected if the transaction involved Mr Williams as the borrower of the funds. I consider that that is to attach unwarranted significance to that event. What seems more probable is that the

structure is a faithful reflection of the way the contracting parties contemplated the transaction would work with Mr Williams being the borrower but the ultimate recipient of the funds being the company.

[13] Mr Chisholm also considered that it was of significance that the plaintiff negotiated extensions of the option to acquire shares in the company not with the defendant, as the agreement contemplated, but with Messrs Hill and Ranchhod (the beneficial owners of the shares in GNN). Again, I do not agree that this is a significant occurrence and I certainly do not understand how that occurring suggests that there must have been a substitution of the company for the defendant as debtor. The other two matters can be dealt with together. They are that the plaintiff as an accountant and member of an advisory board to the defendant would have noticed that the accounts were drawn in such a way to show that the company had a direct liability to him. In my view this does not assist the defendant. The fact is that the parties' written agreement has to be accepted as embodying their terms they agreed. Mr Towers never had authority from the company which empowered him to contractually bind it. Even if he knew of the treatment of the loan in the company's accounts, his failure to obtain a correction of the situation cannot be vivid as evidence that he agreed that the company was now substituted as debtor in the place of the defendant. Indeed, Mr Chisholm at one point signalled an intention on the part of the defendant to apply for rectification of the contract. That, I was advised at the hearing, is not to be proceeded with. In terms of the contract the defendant was indebted to the plaintiff.

[14] In my view, it is noteworthy that the defendant does not argue that there was an agreement that would vary the original arrangements by leaving the plaintiff with no debtor from whom he might recover. What is in effect suggested is that an agreement can be inferred that three parties, the plaintiff, GNN and the defendant agreed that the liability of GNN would be substituted for that of the defendant as debtor. I do not believe that the account which showed the liability under the loan being owed by the company to the plaintiff can bear the weight that the defendant attributes to it, even on a summary judgment basis. No doubt the important thing from the point of view of the

parties was that there be a statement of account to show what the current liability was, including elements of principal and interest. The fact that that statement apparently showed GNN as owing the money does not in my view give rise to an inference that the three parties had come to the agreement to substitute GNN for the defendant. One would have expected that if that was their agreement, there would some evidence on the point. In the context of the purpose of the preparation of the current account I am not prepared to accept that references to GNN as apparent debtor rather than defendant even give rise to a faint inference that a agreement of the kind I have just been discussing was reached between the parties.

[15] Then there is the fact that the plaintiff made a demand on GNN rather than on the defendant personally for repayment of the loan amount. This action can only have significance if it evidences a contractual variation or, again, if it amounts to a representation that was capable of giving rise to an estoppel. On its own, I consider the fact that the demand was made on the wrong person is insufficient. It may be explained by confusion rather as evidence of a variation to the contract.

[16] Further the plaintiff must have understood that the business for which the money was advanced was carried on by the company and that it seemed logical to ask the company for the money back. But I think it is important not to lose sight of the fact that the plaintiff is a businessman and not a lawyer. It is unlikely that the difference between the individuals involved in the company itself had for him the same significance it might have for a lawyer. It would not be surprising if there were confusion because the terms of the contract are not very clear.

[17] If there had been some forthright evidence from the defendant that the parties came to an agreement varying the contract in the way I have just been describing, then the making of demand on that party might be seen as corroborative evidence. But on its own it is too slight. It is the defendant who would have to propound an agreement varying the contract. On the state of the

evidence that I have seen, it is not reasonably arguable that the defendant could succeed in establishing such an agreement at trial.

Estoppel

[18] The next alternative advanced by Mr Chisholm for the defendant was the estoppel point.

[19] The elements of modern equitable estoppel are summarised in paragraph 19.2 of Butler, *Equity and Trusts in New Zealand* (Wellington, Brookers 2009). A party alleging estoppel must show that:

> A belief or expectation has been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
>
> - The belief or expectation has been reasonably relied on by the party alleging the estoppel;
> - Detriment will be suffered if the belief or expectation is departed from; and
> - It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

[20] The elements of estoppel were also discussed by the Court of Appeal in *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80, at p 86:

> The judgments in *Gillies v Keogh* (supra) disclose a tendency to depart from strict criteria and to direct attention to overall unconscionable behaviour. It nevertheless remains clear that before judgment can be given against a defendant on the grounds of estoppel, some action, or representation, or omission to act, must have been carried out by, or on behalf of, that defendant causing the plaintiff to have acted in a manner causing loss.

[21] The critical issue here, it seems to me, is whether the defendant can escape the consequences of the contract he entered into because the plaintiff, by his conduct, gave the defendant cause to understand that he, the plaintiff, did not intend to enforce his strict legal rights; that the defendant relied upon that assurance and as a result suffered detriment so that in all the circumstances it would be unconscionable for the plaintiff to resume his previous position.

[22] In his evidence the defendant describes how in May 2007 GNN was having severe financial difficulties. The defendant made a proposal to the beneficial owners of the shares in GNN which involved interests associated with the plaintiff acquiring the business for nominal consideration, and as well taking over the bank debt of the company. The arrangement also contemplated GNN continuing as the operating entity for the business. I understand that the proposal involved parties who had previously contracted with the company to make supplies continuing to make those supplies to the company. For its part, GNN would receive a fee based upon the profitability of the company and such income as it earned would be used to pay GNN's creditors. Apparently it was also hoped that at some point Messers Hill and Ranchhod, as the beneficial owners of GNN, might derive some income from that source. Exactly how much the creditors, other than the bank, were owed, and what the expected production of income was, is not particularised in the defendant's papers.

[23] GNN went into receivership in February 2009 and liquidators were appointed on 8 April 2009. However, as I have recorded, the company had been in severe financial difficulty since May 2007. Obviously some entity had a charge over the company's undertaking given the appointment of receivers at the end of 2008.

[24] The defendant refers to a number of communications between the plaintiff and Mr Hill and Mr Ranchhod (the beneficial owners of the shares in the company) during 2006 and early 2007, with the last being on 3 April 2007. The last communication was a letter to GNN which in the defendant's evidence is described as having the effect that it:

> again confirmed the arrangements in place between the parties whereby GNN was liable to repay the loan. The plaintiff never sought to demand payment from me at that time.

[25] But none of the communications between the parties in the period from October 2006 to April 2007, concerning who was responsible for the Towers loan appear to have involved the defendant. This is of importance in deciding just what representations the plaintiff is supposed to have made to the defendant which the defendant acted upon to his detriment.

[26] The defendant attached significance to the fact that in April 2007 Mr Towers demanded repayment *from the company* and not Mr Williams and never asserted that Mr Williams was liable to him for the advance. It was submitted for the defendant that he had relied upon Mr Towers 'representation/conduct/acquiescence to his detriment' in that he never sought to recover from the company from about April 2007; that he would have:

> clarified the arrangements if he had known that Mr Towers was looking to him for payment and further that the company's financial circumstances continued to deteriorate and thus delay in taking action by Mr Williams must have been prejudicial.

[27] Mr Williams does not say in his affidavit:

a) At what point he discovered that the plaintiff was holding the company, and not him, liable for the debt; while the defendant describes when various steps were taken by the plaintiff he does not say when he found out about them;

b) What detailed steps he would have taken at that point had it not been for 'a)'; and

c) What benefits he realistically could have expected to obtain from those steps which he could have, but did not, take. This would be a measure of the detriment that he suffered through taking the representations at their face value.

[28] He has not done this. Instead he has left it to his counsel to submit that he must have suffered detriment.

[29] In my view, Mr Williams has not done enough to establish that he has a substantial defence available to him based on estoppel. In particular I do not accept that a creditor in the position of the plaintiff loses his rights by not making a demand at an earlier rather than a later date as the defendant appears to suggest.

[30] I am further unclear as to when he formed the view that he could safely assume that the debt would now be recovered from the company and not from him.

Limitation of liability to assets of Trust

[31] The key provision of the agreement that the defendant relies upon is clause 6 which read:

> The Parties acknowledge that the Shareholder holds the shares in Trust on behalf of Rajendra Bhai Ranchhod.

[32] Mr Chisholm made the following comment on Ms Darlow's submission as to what the correct approach is when determining the extent of a trustee's liability under a contract which he/she signs as trustee:

> 6.1. The claim in paragraph 37 of Mr Towers' counsel's submission to the effect, in reliance on *Lumsden v Buchanan* (1865) 4 Macq 950, that a trustee is personally liable on an unlimited basis on the contracts into which he or she enters, unless personal liability is excluded by an express stipulation, is too extreme.
>
> 6.2. The correct position is as stated by the House of Lords in *Muir v City of Glasgow Bank* (1879) 4 App Cas 337,355, namely that it is:
>
> "a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject matter on which it was to operate, and the capacity and duty of the parties to make the contract in theone form or in the other."

[33] Mr Chisholm also referred to *Helvetic Investment Corporation Ptd Ltd v Knight* (1982) 7 ACLR 225 (Supreme Court NSW); (1984) 9 ACLR 773 (Supreme Court NSW CA). Rather than deal with that case in detail at this point, I shall confine my comments to noting that there is recent New Zealand judgment - *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506 on this topic. In that case Baragwanath J said:

> [39] In the Court of Appeal of New South Wales in Helvetic Investment Corporation Pty Ltd v Knight (1984) 9 ACLR 773 both Gleeson QC and Meagher QC for the competing parties accepted (at 774) the following propositions:

> 1. A trustee who enters into a contract will normally incur unlimited personal liability unless by appropriate language or express stipulation such liability is restricted.
>
> 2. A mere description of the capacity in which he contracts as that of trustee is insufficient to exclude full personal liability.
>
> [40] The former proposition is difficult to reconcile with Lord Cairns' statement of principle in Muir which does not contain a presumption, even though he acknowledged that "the English Courts have leaned against a construction which would not result in a judgment de bonis propriis" (affecting the defendant's own property). There is no particular reason in 21 st century New Zealand to found a presumption on such a relict. But Lord Blackburn who gave the final speech in Muir at p388-9 placed his decision on the wider basis of the precedent effect he attributed to an earlier House of Lords decision in Lumsden v Buchanan 4 Macq 950; Court of Sess. Cases, 31-d Series, vol ii p695 which he summarised:
>
>> ...if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear.
>
> [41] [The preceding] statement of principle was applied by the Court of Appeal in *Hunt Bros v Colwell* [l9391 4 All ER 406, where the defendant trustee of a deed of arrangement ordered certain materials to be supplied for dwelling-houses forming part of the debtor's estate. The orders described the defendant as trustee but were not expressed to limit his liability in any other way. Slesser LJ, delivering the leading judgment, after citing the foregoing passages from the speeches Lord Cairns and Lord Blackburn, stated at p408:
>
>> It is clear now beyond dispute that the mere addition of the word "trustee" by itself will not be sufficient to operate as a limitation of the liability which would otherwise arise on a person who, under a contract such as this, makes himself liable for the supply of material.
>
> So in New Zealand law; and in that of England and of New South Wales, in the absence of more limiting language the description of a contracting party simply as "trustee" renders that party personally liable. There is a presumption in favour of personal liability which must be refuted if a person contracting as "trustee" is to be relieved of liability beyond the extent of the trust assets.

[34] Further on in his judgment, Baragwanath J, after referring to further arguments by the trustee's counsel said:

> [46] The difficulty with that argument is two-fold. First, unlike a company and its director, a trust is not a legal person distinct from its trustee. Secondly, there is no evidence of any attempt by the author of the document to narrow liability. The emphasis is wholly the other way. Clause [5] , for instance, says that signatories "except

> independent trustees [as defined]" shall "remain personally liable for all obligations of the persons on whose behalf they have signed." That either is, or is close to, *an allusion to the ordinary law that trustees are personally liable unless they have contracted to exclude such liability*. (emphasis added)

[35] Mr Chisholm submitted that as a matter of construction in the present case, there is no reason for the inclusion of the acknowledgement in clause 6 of the MOU other than to limit personal liability. In the present case the deed at clause 6 acknowledged that the shareholder held the shares in trust on behalf of Mr Ranchhod. But as Baragwanath J's judgment makes clear, reference on its own to the fact that the party's involvement in a transaction was as trustee is not on its own sufficient to exclude personnel liability.

[36] Mr Chisholm submitted that for the purpose of summary judgment there was sufficient uncertainty surrounding the objective interpretation of clause 6 as to require the Court to have regard to the surrounding circumstances/factual matrix. I do not agree. First, it does not progress the defendant's position to make an unspecified reference to elements of the 'factual matrix' which might be called in aid. As Baragwanath J pointed out in *NZHB Holdings Limited* the presumptive liability is cast upon the trustee by settled authority: paragraph [47]. Baragwanath J said that as far as possible contractual documents such as guarantees should be construed by the Courts consistently with the precedents. I respectfully agree. If the precedents provide guidance and if the precedents apply then that is an end of the matter and the result must be that unless the defendant can point to some explicit or at least persuasive implicit statement of attention to limit liability to the extent of the trust assets, he has to accept that he has full personal liability. In those circumstances there is no need to cast about for surrounding circumstances or the contractual matrix which might assist the Court.

Conclusion

[37] My conclusion is that the defendant has no substantial defence to the plaintiff's claim. The parties should confer on the question of quantum of

judgment and costs. If they are unable to resolve either of these matters then I will make time to hear them at 9.30 a.m. on a suitable date.

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J.P. Doogue

Associate Judge