IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2009-488-000048

BETWEEN	DAVOR ANTUNOVICH Plaintiff
AND	WILLIAM DAVID ERNEST SPANHAKE Defendant

Hearing: 29 June 2009

Appearances: P R Cogswell for Plaintiff
C Patterson for Defendant

Judgment: 30 July 2009 at 10 am

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 30 July 2009 at 10 am pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Date: ……..

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[1] The plaintiff and the defendant are directors of Houhora Bay Marine Farms Limited (HBMF). The plaintiff's company, Westpac Mussels Distributors Limited, is a shareholder in HBMF. The defendant has the remaining shares in HBMF. In 1999, the ANZ National Bank Limited agreed to advance $500,000 to HBMF. At that time, the plaintiff and the defendant entered into a deed with the Bank whereby they guaranteed payment to the Bank of all advances to HBMF.

[2] On 23 December 2008, the Bank made demand upon HBMF, the plaintiff and the defendant for the immediate and full payment of all money then owing by HBMF to the Bank. At that time, the amount owing was $570,082.10, plus interest which was accruing at a daily rate of $174.53.

[3] The plaintiff met the Bank's demand by paying $571,359.13 to the Bank on 24 December 2008. The plaintiff now brings these proceedings against the defendant for summary judgment for $285,679.56, being half of the total sum paid by the plaintiff to the Bank in discharge of the advances by the Bank to HBMF. The plaintiff considers that the defendant should pay one-half of the amount the plaintiff paid to the Bank.

[4] The defendant acknowledges that the Bank made the advances to HBMF and that the plaintiff has discharged the amount owing by HBMF to the Bank. He points out that he ceased to be involved in the running of the company in or about the month of May 2007, although he has continued to be a director of the company. He claims the original debt was raised to build a new barge for the mussel operations of HBMF in the Houhora area. He wishes to view audited accounts of HBMF so that he could be satisfied that the state of the company's finances were not as a result of the plaintiff using the company and its assets to promote his other business interests which lie much further south.

[5] Where as in this case a guarantor has met a common liability, the guarantor is entitled to a contribution from the co-guarantor. As pointed out by Tipping J in *Trotter v Franklin* [1991] 2 NZLR 92 at p 98, the right to contribution is founded in equity.

[6] Pursuant to s 86 of the Judicature Act 1908, the defendant's contribution to the amount paid by the plaintiff is to be a just proportion. Ordinarily, a just proportion will require equal sharing. As stated by Tipping J in *Trotter v Franklin* at p 98, line 10:

> Mr Randerson was inclined to submit initially that this prima facie rule of equal sharing between co-sureties could only be displaced by express agreement to the contrary. However, I do not consider that to be the law. As the right to contribution is founded in equity, the ultimate question is what is a just apportionment between the co-sureties. Ordinarily the justice of the matter will require equality of sharing. Obviously if the parties have expressly provided to the contrary, then justice will require such contrary arrangement to be in force. It seems to me, however, that equity may well require an equal sharing if the Court can discern by clear implication either this is what the parties must have intended or that such unequal sharing is necessary to do justice in the particular case.

[7] The issue I have to decide is whether the defendant can establish an arguable case for unequal sharing applying equitable principles.

[8] The principles of equity that would justify unequal sharing of liability between guarantors was considered by the Court of Appeal in *Lennan and Wylie v Lennan, CML and Questcorp Brokers Ltd* CA141/92 7 April 1993. In that case, one of the guarantors claimed the other guarantor had been in breach of his obligation as a co-guarantor in that he had deliberately diverted the business of the principal debtor for his personal benefit. In coming to the conclusion that such an allegation would provide an arguable defence to an application for summary judgment to enforce equal contribution, the Court of Appeal, at p 10 of its judgment, states:

> Bearing in mind that the true factual position is entirely within the knowledge of Messrs D P Lennan and Wylie and bearing in mind also what we said in *McGregor and Murphy v Westpac Banking Corporation* CA104/9, judgment 19 June 1992 about the absence of candid affidavits in support of summary judgment applications, we take the view that it would be unjust to allow summary judgment against Mr Buxton for equal contribution. He should have the opportunity to investigate fully the circumstances that lie behind the call upon him as guarantor of Questcorp and the conduct of those co-guarantors in control of that company.
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> On the basis of the information presently before the Court we would not rule untenable the allegations of breach of fiduciary duties by Messrs D P Lennan and Wylie. They were in the position akin to partners or joint venturers. They had complete control of the management of Questcorp. They knew that Mr Buxton had withdrawn from all involvement and was entirely dependent upon their management. There is the allegation that they diverted the

> business of the company to their own benefit and to the detriment of Mr Buxton. Such a duty appears to be recognised in the United States: see *Corpus Juris Secundum* vol 72 para 262:
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> > … since the relationship existing between them is one of mutual trust and confidence, there is imposed on each of them a duty to do all in his power to avert or diminish the common liability.
> >
> > The same work also records at para 268:
> >
> > A surety loses his right to contribution, to the extent of the loss suffered by his co-sureties, if the default resulted from his wrongful act or if he participated in the wrongful act of a principal, unless all of the sureties were equally at fault or acquiesced in the wrong.
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> Our law does impose on guarantors duties to co-guarantors: see Phillips & O'Donovan, *The Modern Contract of Guarantee* (2 ed) 545 – 549. Once the facts emerge those and any analogous duties also will require consideration. The deliberate erosion of the business of the principal debtor for the personal benefit of a co-guarantor would seem as strongly to justify release from contribution as does the impairment of securities held by a co-guarantor. On the other hand the Canadian decision of *Manu v Shasha* already cited suggests more than reckless and uncaring conduct may need to be shown. It may also be necessary to determine whether the principle applied in *Bater v Kare* has any application in this case.
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> Much will depend upon the true nature of the arrangement among the co-guarantors and the conduct of the appellants to be disclosed in evidence.
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> Accordingly, the appeal must be dismissed because it has not been shown that Mr Buxton has no arguable defence to the claim. The cross-appeal also must be dismissed because it is similarly unclear whether Mr Buxton can be exonerated from liability. The matter must go to trial.

[9] In the present case, the latest accounts produced by the plaintiff for HBMF are to 30 June 2008. Accounts to 31 June 2009 were not available. The accounts to 30 June 2008 show sales reducing from $295,959 to $138,859. The operating deficit increased during that period from $20,884 for the 2007 year to $136,650 for the 2008 year. The deficit at the end of the year increased from $799,589 to $937,000. These accounts, according to the plaintiff, were considered by the defendant who signed the annual accounts as a director.

[10] The evidence establishes that the overdraft facility and advances were taken out when the defendant was fully involved with the operation of the company. He has been aware of the plaintiff's operation of the company. The defendant has not produced any evidence to establish the plaintiff has been in breach of his obligations

to the defendant arising out of his position as a guarantor. In the case of *Lennan v Wily v Lennan CML & Questcorp*, there was evidence that the guarantor opposing the application requiring him to contribute an equal share to money payable under the guarantee had issued proceedings against the co-guarantors. He also produced evidence that the guarantors endeavouring to enforce equal contribution from him, had incorporated a new company of which they were directors and shareholders. The business of that new company involved similar business to the business of the company in which the guarantors were shareholders, and it was claimed that the new company had gradually assumed the business of the company in which the guarantors were shareholders. The guarantor was being required to pay a contribution towards the loans advanced to the company in which the guarantors all had shares.

[11] There is no evidence in this case of such conduct on the part of the plaintiff. The defendant has not commenced proceedings against the plaintiff for alleged breach of the plaintiff's duty to him as a co-guarantor, nor has the defendant advanced any basis for the bringing of such a claim.

[12] Consequently, I conclude that in the circumstances I have outlined, the equitable rule requiring the defendant to make an equal contribution to the amount paid by the plaintiff in satisfaction of advances by the Bank to HBMF must prevail.

[13] The principal debtor is not a party to these proceedings. At one time it was the common practice to join the principal debtor so that the rights of all the parties can then be determined in the one inquiry - see *The Modern Contract of Guarantee,* O'Donovan and Phillips, 2003, page 726, para 12-183. In *Hay v Carter* [1935] Ch 397 the English Court of Appeal after reviewing a number of authorities concluded that joinder of the principal debtor as a party to the proceedings was not required if there was evidence that no useful purpose would be served by having the principal debtor before the Court by reason of his insolvency. It was also held that such rule was not a condition precedent to proceedings by a company against a surety.

[14] In *Griffiths v Wade* 60 DLR, (2d) 62 at page 67, Johnson JA made the following comments with regard to the need to join the principal debtor in proceedings between co-sureties.

> There can be no doubt of the right of the co-surety to recover from the principal debtor the amount of the contribution he has been compelled to makeL *Lawson v Wright (1786*), 1 Cox 275, 29 E.R. 1164. For many years it was a rule of practice in Chancery that a surety suing his co-surety for contribution had to bring in the principal debtor as defendant or prove that he was insolvent: *Hay v Carter*, [1935] Ch. 397. The purpose of this rule was to assure that all claims, including the co-surety's claim for indemnity, would be dealt with at one time. No doubt the wider rules as to third party procedure would now make that rule unnecessary.

[15] Under the existing High Court Rules the defendant in these proceedings would be entitled to join the principal debtor as a third party as the defendant is entitled to indemnity from the principal debtor (see rule 4.4(1)(a) High Court Rules). Consequently, the rule requiring the principal debtor to be a party to the proceedings is no longer necessary as the defendant can join the principal debtor as a third party. Counsel for the defendant did not raise this issue. Consequently, there is no indication that the defendant wishes to join the principal debtor as a third party.

[16] In any event, there appears to be little point in joining the principal debtor as a third party. Both the plaintiff and the defendant are directors, and either personally or through companies controlled by them, shareholders in the principal debtor. If the defendant wishes to obtain contribution from the company then he could serve a statutory demand under s 289 Companies Act 1993. The defendant does not need to obtain judgment against the principal debtor to justify service of the statutory demand.

[17] Consequently, I conclude that the defendant has no defence to the plaintiff's claim. Accordingly, the plaintiff is entitled to summary judgment for the sum of $285,679.56 being one half of the total amount paid by the plaintiff to the bank.

[18] The plaintiff sought interest thereon at 11.17% per annum being the default interest rate charged by the bank. However, the plaintiff's claim is not brought in contract. Consequently, the plaintiff cannot rely on the contract to justify a claim for interest. However, pursuant to s 87 Judicature Act 1908, the Court can in its

discretion order the defendant to pay interest at the prescribed rate. In the circumstances of this case I can see no good reason why the defendant should not pay an appropriate rate of interest. At present the interest rate fixed by the Judicature Act as at December 2008 was 8.4% per annum. I am satisfied that a rate of interest at 8.4% per annum is appropriate. In the circumstances therefore there will be direction that the plaintiff receive interest from the defendant on the amount of the judgment at 8.4% per annum from 24 December 2008 until the date of judgment with interest continuing thereon at such rate until payment.

[19] As the plaintiff has been successful, the plaintiff is entitled to costs which I assess on a schedule 2B basis with disbursements as fixed by the registrar.

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Associate Judge Robinson