IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-002016
[2013] NZHC 285

BETWEEN	MARAC FINANCE LIMITED Plaintiff
AND	GREGORY JOHN MORRIS Defendant

Hearing: 21 February 2013
(Heard at Christchurch)

Appearances: S E Goodwin for Plaintiff/Applicant
(G J Morris Defendant (in Person) not appearing)

Judgment: 21 February 2013

ORAL JUDGMENT OF ASSOCIATE JUDGE OSBORNE
ON PLAINTIFF'S SUMMARY JUDGMENT APPLICATION

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[1] The plaintiff, Marac, seeks summary judgment on a debt it says was guaranteed by Mr Morris.

[2] Mr Morris (in his notice and his evidence in opposition) accepts or, in his word, "recognises" the written guarantee which he entered into but asserts that he should not be held liable under it.

[3] Mr Morris filed his opposition in person. He is a resident of Queensland, Australia. In the period leading up to the hearing, the Registry endeavoured to establish contact with Mr Morris to ensure that he either sought leave to be excused from appearance at the hearing or confirmed that he would be appearing in some way. Mr Morris did not respond to the Registry and the hearing has proceeded today. He has not appeared.

The grounds of opposition

[4] Mr Morris takes no issue with Marac's evidence as to the existence of an underlying debt or as to its quantum. Rather, Mr Morris by his notice of opposition asserts four grounds. He says:

> (a) Contrary to the statements contained in paragraph 8 of the written guarantee dated 1 March 2011, I did not receive any advice from StockCo that I should obtain independent legal advice before signing the guarantee. In fact, I never had any communications with StockCo at all before signing the guarantee.
>
> (b) I did not get any legal advice before signing the guarantee and I did not read the document before being asked to sign it.
>
> (c) I was never aware of the possibility that StockCo might attempt to assign it's rights under the guarantee to another party. I only gave the guarantee (if it is enforceable) to StockCo, not to anyone else.
>
> (d) I question whether all of the documents relied on by the plaintiff are correctly signed and are enforceable.

Factual background

[5] In the light of the grounds of opposition (as supported by Mr Morris's affidavit in opposition), the following facts as asserted by the plaintiff are not in dispute. I summarise:

(a) Mr Morris was a director of Wedderburn Properties Ltd.

(b) Wedderburn, in 2011, entered into a Livestock Agreement ("the Agreement") with StockCo whereby Wedderburn was to procure, graze and manage stock for StockCo.

(c) Mr Morris, on 1 March 2011, executed a Deed of Guarantee ("the Guarantee") whereby he was deemed a principal debtor and guaranteed Wedderburn's performance of the Agreement including the due and punctual payment of all monies that thereafter were or may become payable by Wedderburn to StockCo.

(d) The Agreement was cancelled by StockCo in August 2011 and proceeds of livestock at that time were applied against the debt owed by Wedderburn to StockCo.

(e) StockCo made demand of Wedderburn and Mr Morris for payment of the debt due ($969,691.65 as at 13 February 2012).

(f) Neither Wedderburn nor Mr Morris made payment of the debt due.

(g) StockCo assigned its interest in the debts under the Agreement to the plaintiff, Marac, with notice of the assignment subsequently given to Mr Morris.

(h) From 29 June 2012 a sum of $1,021,876.42 was owing under the Livestock Agreement and under the Guarantee.

(i) Under the contractual documents, interest continued to accrue at 19 percent per annum from 28 June 2012.

The plaintiff's summary judgment application – the principles

[6] The starting point for a plaintiff's summary judgment application is r 12.2(1) 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.

[7] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required (*Haines v Carter* [2001] 2 NZLR 167, 187).

(b) 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.

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

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

(e) 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.

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation.

(g) 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.

(h) Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.

(i) 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.

The grounds of opposition

The absence of advice to obtain independent legal advice

[8] In the Deed of Guarantee signed by Mr Morris the following is recorded:

> The Guarantor/s acknowledges that StockCo has advised the Guarantor/s to obtain independent legal advice as to the nature, substance, detail and effect of this Guarantee and the said arrangements and acknowledges that this Guarantee is binding and effective in respect of every arrangement and variation/s thereof and acknowledges that the Guarantor/s is fully aware of all present and future liability under the Guarantee.

[9] Mr Morris has deposed that no one from StockCo spoke to him before he was asked to sign the Guarantee and he was never advised by StockCo or by anyone else to get legal advice before signing. He deposes that he did not get such advice. He explains that the document was given to him to sign by a colleague who then witnessed Mr Morris's signature on the Guarantee. Mr Morris deposes that the colleague had introduced him to Wedderburn and he had agreed to become a director of Wedderburn and a guarantor. He said that it was the colleague who had carried out all the negotiations with StockCo. He says that before being asked by the colleague to sign the Guarantee there was no discussion about how the Guarantee might affect Mr Morris if Wedderburn defaulted. Mr Morris deposes that he did not read the Guarantee before signing it and it never entered his mind that he needed to get legal advice first. I note that the documentation shows that Mr Morris signed not only the Guarantee - he was also the sole director who signed the Livestock Agreement itself.

[10] StockCo's finishing finance manager, Jamie Hall, filed an affidavit in reply. Mr Hall deposes that he was personally involved in the Wedderburn transaction. He says that Mr Morris's evidence as to not being advised to obtain legal advice is incorrect. He produces a letter which he sent by email to Mr Morris on 1 March 2011 to which was attached a copy of the Guarantee and all other relevant documents. The letter, addressed to Wedderburn, but copied by email to Mr Morris, contains a number of observations including:

> If you wish to proceed, please read through the documentation thoroughly and if you have any questions that we cannot answer to your satisfaction, please consult your legal representative.
>
> ...
>
> Take all of the documents to your lawyer and then have him/her complete and sign the solicitor's certificate...
>
> Please do not hesitate to contact us if you have any queries on [phone number].

[11] Mr Hall deposes that on the same day, 1 March 2011, he received an email from Mr Morris's colleague. He has produced a copy of the email in which it is stated that the colleague and Mr Morris had engaged a solicitor but that the solicitor would not sign the solicitor's certificate and asked that StockCo accept the signed documents without the solicitor's certificate. The colleague's email has an email attached from the lawyer in question. The lawyer states:

> I am happy with the document that you and Greg have been signed [sic] but [my law firm] is unable to sign the solicitors certificate. There are two main reasons for this...

[12] Neither of the reasons referred to is relevant to this proceeding. Mr Hall completes his affidavit in reply by deposing that although StockCo did not have a solicitor's certificate it was satisfied that Mr Morris had the opportunity to take legal advice and that the loan document and Guarantee were in order.

[13] Mr Morris did not seek leave to file any further evidence in any way contradicting Mr Hall's evidence.

Discussion

[14] Mr Morris's first ground of opposition – that StockCo did not in fact advise him to obtain independent legal advice – must fail on the facts. It is clear beyond argument that Mr Morris (despite now apparently having no recollection of it) was advised by StockCo to obtain legal advice.

[15] In these circumstances it is unnecessary for me to consider this ground of opposition in terms of whether the creditor was under any obligation to advise the

guarantor to obtain independent legal advice. I note that Ms Goodwin referred me to *Bowkett v Action Finance Ltd*[1] for the proposition that there is no obligation on a creditor to advise a guarantor to obtain independent legal advice. Such a submission has force on the facts of the present case where the parties were commercial people under no special disability or disadvantage, but it is unnecessary that I determine this application on that basis.

[16] There may be a third answer to Mr Morris's first ground of opposition, namely that the very words contained in the Guarantee document – that the guarantor had been advised by StockCo to obtain independent legal advice – act as a statement that independent advice should be obtained (whether or not there was an earlier prior oral or written statement to that effect). Given that the Guarantee is in the form of a deed and that the reference to advice to obtain independent legal advice is in the form of an acknowledgement, there may well be an estoppel by deed operating to preclude Mr Morris from asserting that he did not receive advice. As explained by Lord Maugham in *Greer v Kettle*:[2]

> Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between the parties and privies and therefore as not admitting any contradictory proof.

It is unnecessary to decide the application on this basis.

The absence of legal advice

[17] Mr Morris's second paragraph in opposition contains first the assertion that he did not in fact get legal advice before signing the Guarantee.

Discussion

[18] Through the facts established in the affidavit evidence, that defence is not open to Mr Morris. While the email correspondence would appear to indicate that

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1 *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449.

2 *Greer v Kettle* [1938] AC 156 (HL) at 171; applied in *Featherston Park Developments Ltd (in rec and liq) v Radley* HC Auckland CIV 2010-404-3820, 31 May 2011, Associate Judge Bell at [6] and [72].

Mr Morris and his colleague signed the documents before sending them to their lawyer for checking, the reality is that they and their lawyer retained control of the documents until the time the lawyer sent them back to StockCo (following the correspondence concerning the solicitor's certificate). Mr Morris accordingly did have independent legal advice before the Guarantee was returned to StockCo.

Non-reading of the document

[19] In the second part of the second paragraph of his opposition, Mr Morris asserts that he did not read the Guarantee before being asked to sign it.

Discussion

[20] Ms Goodwin has correctly noted that there is no plea of *non est factum* by Mr Morris nor has Mr Morris deposed that he did not understand the nature of the Guarantee.

[21] As explained in the judgment of Tipping J in *Bradley West Solicitors Nominee Co Ltd v Keeman,*[3] the plea of *non est factum* is not available to a signatory who has not taken all reasonable care in the circumstances. Where that person is of full age and capacity that would include taking steps to read and understand the document. On the facts in *Bradley West,* the purchasers were found to have brought about their own problem by their failure to read the documents and they were accordingly found not to have taken all reasonable care in the circumstances.

[22] In this case, the document in question is very clearly headed "**GUARANTEE**" and Mr Morris signed against the words "Executed by the Guarantor/s in person or by its Directors". There is no room for an argument (even if it had been advanced) that Mr Morris should be excused upon the basis of the doctrine of *non est factum* or some similar concept.

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3 *Bradley West Solicitors Nominee Co Ltd v Keeman* [1994] 2 NZLR 111 at 121.

Giving of guarantee to StockCo only

[23] Mr Morris's third point of opposition was that he was unaware of the possibility of assignment from StockCo to another. He asserts that the Guarantee he gave was only to StockCo.

Discussion

[24] By the Deed of Guarantee, Mr Morris guaranteed performance of obligations of Wedderburn under the Master Livestock Agreement. That agreement in turn contains an assignment clause by which Wedderburn agreed that StockCo, without giving Wedderburn or any guarantor notice or obtaining the consent of Wedderburn or the guarantor, at any time, could sell, assign, transfer or otherwise dispose of or deal with StockCo's interest in the Agreement. The clause goes on to provide that Wedderburn and the guarantor will continue to be bound by the Master Livestock Agreement and any related documents in all respects following any sale, assignment, transfer or other disposal or dealing by StockCo.

[25] In short, the documentation expressly provided for assignment while preserving the obligations of Wedderburn and its guarantor. The fact that the Guarantee expressly provides that Mr Morris was to be a principal debtor reinforces this conclusion.

[26] Ms Goodwin submitted in the alternative that the effectiveness of StockCo's assignment to Marac is provided for by s 50(1) Property Law Act 2007. Relying upon the specific provisions of s 51(3) of that Act, Ms Goodwin asserted that with the giving of notice of the assignment to Mr Morris, the underlying debt became payable to Marac. By reason of the previous conclusion it is unnecessary that I determine the application on this basis and I do not do so.

Execution of the contractual documents

[27] Mr Morris's final ground of opposition was a questioning of whether all the documents relied on by Marac were correctly signed and enforceable. The reference

to "enforceability" was not further developed by Mr Morris in his grounds of opposition or in his evidence. Rather, his affidavit focussed on a proposition that not all the documents had been signed or dated. Mr Morris does not identify particular documents in this context.

Discussion

[28] There are three contractual documents to be considered:

(a) Master Livestock Agreement – this agreement was executed by StockCo by Mr Hall, its finishing finance manager, and by Mr Morris as sole director of Wedderburn, and is dated 1 March 2011.

(b) Guarantee – this document was executed as a deed by Mr Morris alone and is dated 1 March 2011 (and as a deed is not required to be executed by any other party)

(c) Assignment and purchase agreement – this document is executed (on counterpart execution pages, in accordance with clause 16.10 of the contract) by StockCo by two of its directors and by Marac by two of its directors, and is dated 30 September 2010.

[29] Accordingly, all the contractual documents are in order. It may be that Mr Morris in receiving the exhibits in the proceeding did not appreciate that signatures for the assignment and purchase agreement were contained on separate pages rather than on the one page, although that is surmise on my part. When the documents are read in their entirety, there is nothing to support Mr Morris's fourth ground of opposition.

Outcome

[30] Marac has satisfied me that Mr Morris has no defence to the cause of action in the statement of claim.

Order

[31] I order:

(a) Judgment for the plaintiff in the sum of $1,021,876.42 together with interest on that sum from 29 June 2012 to today's date in the sum of $99,948.10;

(b) There is no order as to costs or disbursements.

Associate Judge Osborne

Solicitors:

Lane Neave, PO Box 13149, Armagh, Christchurch 8141
Mr G J Morris (in Person)