

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA250/05**

**BETWEEN**

**ITA VULETIC**  
Appellant

**AND**

**CONTRIBUTORY MORTGAGE  
NOMINEES LIMITED**  
Respondent

Hearing: 17 May 2006

Court: Chambers, Baragwanath and Venning JJ

Counsel: R E Harrison QC for Appellant  
L McEntegart for Respondent

Judgment: 31 July 2006

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**JUDGMENT OF THE COURT**

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- A The appeal is allowed.**
- B Orders 1, 2, and 4 as set out in the judgment of the High Court as sealed on 19 December 2005 are set aside.**
- C The respondent's application for summary judgment against the appellant is dismissed.**
- D The respondent must apply to the High Court for the convening of a case management conference so that directions as to the future conduct of the proceeding may be given.**
- E Costs in the High Court with respect to the summary judgment application are reserved, for determination by that court at an appropriate time if the parties cannot agree them.**

- F With respect to costs in this court, the respondent must pay to the appellant the sum of \$6,000, plus usual disbursements.**
- G Liberty is reserved to the parties to apply to this court for any other orders consequential on the above orders.**
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## **REASONS OF THE COURT**

(Given by Chambers J)

### **Liability under a guarantee**

[1] This appeal is concerned with whether Ita Vuletic, the appellant, is liable as guarantor to Contributory Mortgage Nominees Limited, the respondent. Associate Judge Faire held that she was liable: *Contributory Mortgage Nominees Limited v Harris Road No 10 Limited* HC AK CIV 2005-404-3078 27 October 2005.

[2] The essential facts can be shortly stated. Contributory Mortgage held a mortgage over a property at Hulme Place in Henderson, Auckland. On 21 November 2003, Contributory Mortgage, exercising its power of sale as mortgagee, entered into a contract to sell the property to Harris Road No 10 Limited for \$2.5 million, plus GST. The terms of the agreement between the parties were captured in two documents, which were linked. We shall call the main document, which was the agreement for sale and purchase, “the sale agreement”. The other agreement, which we shall call “the mortgage back agreement”, provided that Contributory Mortgage was to provide or procure for Harris Road “second mortgage funding for the balance of the purchase price”.

[3] A critical term of the sale agreement, so far as this appeal is concerned, was clause 26:

This agreement shall be personally guaranteed by **ITA VULETIC** a director and shareholder of **HARRIS ROAD NO 10 LIMITED** as Trustee to the intent that the obligations of the purchaser or nominee shall be paid

personally by the said **ITA VULETIC** if the purchaser and/or its nominees shall fail to complete the agreement and terms thereof. This agreement shall bind the executors, administrators and assigns of **ITA VULETIC**.

[4] Settlement of the purchase took place on 23 January 2004. At that time, Harris Road did not pay the GST component of the sale price, namely \$312,500. The reason for that was a provision (clause 6) in the mortgage back agreement, by which Harris Road was immediately upon settlement to apply to the Inland Revenue Department for “a full refund of all GST input tax”. Harris Road purported to assign to Contributory Mortgage “all its right and title to a GST refund in respect of the purchase”. As soon as Harris Road received its refund, it was to “bank the same to [Contributory Mortgage’s] trust account”. The parties appear to have envisaged that the GST component of the sale price would be paid late to Contributory Mortgage from the GST tax refund Harris Road expected to receive.

[5] For reasons which are not currently clear, Harris Road never paid the GST. When it did not pay, Contributory Mortgage commenced the current proceeding against both Harris Road as purchaser and Mrs Vuletic as alleged guarantor pursuant to clause 26 of the sale agreement. Contributory Mortgage utilised the summary judgment procedure, asserting that neither defendant had a defence to the claim. As it turned out, the claim against Harris Road could not proceed, as Harris Road was apparently struck off the register of companies on 16 August last year. Associate Judge Faire adjourned Contributory Mortgage’s application against Harris Road while Contributory Mortgage considered whether it wished to apply to have Harris Road restored to the register. The summary judgment application against Mrs Vuletic did proceed, however, and succeeded. She was ordered to pay the unpaid GST.

### **Issues on the appeal**

[6] Dr Harrison QC, for Mrs Vuletic, raised a number of issues. We need deal with only one of them because the view we take on it determines the appeal in Mrs Vuletic’s favour.

[7] The issue is this: was the judge right in holding that Mrs Vuletic signed the sale agreement in a dual capacity? The factual background to this issue is this: Mrs Vuletic signed the sale agreement only once, in circumstances which we shall describe in more detail later. Was she signing merely as director of Harris Road or was she also signing as guarantor? The judge found that she had signed in a dual capacity. Dr Harrison submits he was wrong so to find. For the reasons we shall give, we think it fairly arguable that Mrs Vuletic signed the sale agreement only as director of Harris Road.

[8] We prefer to express no view on the other issues Dr Harrison raised. Since there will have to be a trial in any event, it is better that those other issues be explored when all the evidence is in and the facts are known.

### **Dual capacity**

[9] The form used for the sale agreement was the standard Auckland District Law Society form headed “Agreement for Sale and Purchase of Real Estate”, 7th edition (2) July 1999. At the foot of that agreement, where provision was made for “signature of purchaser(s)”, there appears Mrs Vuletic’s signature (“I Vuletic”), with underneath it, in her handwriting, the word “Director”. There is no dispute that this signature constituted Harris Road’s method of execution as purchaser (Mrs Vuletic, as its director, being authorised to sign on its behalf). But was it also her signature as guarantor?

[10] Associate Judge Faire found that it was. He held that, when Mrs Vuletic signed the agreement, she did so in a dual capacity; she signed on behalf of Harris Road, but she also authenticated the clause 26 guarantee in her name. He thought it unarguable that she had signed only on behalf of Harris Road.

[11] For the reasons that follow, we respectfully think the judge was wrong. We consider it clearly arguable that she signed only in her capacity as director of Harris Road. Because that is fairly arguable, summary judgment should not have been entered against her.

[12] The first point to be made is that, at least to date, there is no evidence that Mrs Vuletic ever orally agreed to guarantee Harris Road's obligations under the sale agreement. Mr McEntegart, for Contributory Mortgage, accepts that, for the purpose of the summary judgment application, the case proceeds on the documents alone. Further, in interpreting the documents, we look solely at them, their structure and words: neither side has suggested that there are any extraneous facts or matters which might colour the court's interpretation (on a "matrix of facts" basis). All of this may change, of course, by the time of trial, with the consequence that the views we express in this judgment may need revisiting. For this reason, while we have firm views as to Mrs Vuletic's liability *on the basis of the documents*, we say no more than that her stance is "fairly arguable" in recognition of the possibility that other evidence may emerge.

[13] No one disputes that it is possible for a person to sign a contract once but in a dual capacity. But there is a presumption that, if the signer purports to sign on behalf of a company or another, he or she is signing only in that capacity. Such presumption may be displaced by clear words within the contract or by extrinsic evidence from which may be inferred the signer's intention when affixing his or her signature. This was clearly established in *Young v Schuler* (1883) 11 QBD 651 (CA), and subsequently approved by the House of Lords in *Elpis Maritime Co Limited v Marti Chartering Co Inc* [1992] 1 AC 21 at 28-31. Both decisions were cited with approval by this court in *Doughty-Pratt Group Limited v Perry Castle* [1995] 2 NZLR 398. There is no such extrinsic evidence (at least at this stage) in the present case. And the structure and words of the sale agreement, far from displacing the presumption, reinforce it.

[14] There are three principal reasons why we consider it fairly arguable that Mrs Vuletic signed the sale agreement only as a director of Harris Road.

[15] The first reason arises from the overall structure of the agreement. It can fairly be argued from that that the drafters of the agreement (who are presumed, in the absence of evidence to the contrary, to be carrying out the parties' intentions) did not envisage that Mrs Vuletic would be a party. That is to say, those drafting the agreement appear to have contemplated that Mrs Vuletic's guarantee would be

provided in a separate document, or at the least by separate endorsement by her on the sale agreement. In this regard, we note the following features.

[16] First, at the beginning of the form, the parties are described:

VENDOR: CONTRIBUTORY MORTGAGE NOMINEES LIMITED at Auckland acting under the Power of Sale contained in Mortgage D487300.2 (North Auckland Registry)

PURCHASER: HARRIS ROAD NO 10 LIMITED as Trustee or nominee at Auckland

[17] There was no reference to Mrs Vuletic as a party.

[18] Further down that first page is set out the fundamental agreement under this document:

It is agreed that the vendor sells and the purchaser purchases the above described property, and the chattels included in the sale, on the terms set out above, and the General and Further Terms of Sale.

[19] Once again, there is no reference there to Mrs Vuletic as party to the essential promises made in the agreement.

[20] The document ended with provision for the “signature of vendor(s)” and the “signature of purchaser(s)”. The drafters had not seen fit to amend the document to make provision for “signature of guarantor”.

[21] We now turn to the mortgage back agreement. Unlike the sale agreement, it has been drafted specifically for this transaction. The mortgage back agreement begins:

## **PARTIES**

**Contributory Mortgage Nominees Limited (“Vendor”)**

**Harris Road No 10 Limited as trustee (“Purchaser”)**

### **Introduction**

A. The Vendor and Purchaser are parties to an agreement for Sale and Purchase of even date in respect of a property at Hulme Place, Henderson (**Collateral Agreement**).

- B. It is a condition of the Collateral Agreement that the parties enter into this Agreement.

[22] Once again, it is noteworthy that there is no reference to Mrs Vuletic as a party to the mortgage back agreement. Nor, in recital A, is there any reference to Mrs Vuletic being a party to what we have called the sale agreement.

[23] The mortgage back agreement ended with provision for signature by Contributory Mortgage Nominees Limited and Harris Road No 10 Limited. Again, there was no provision for execution by Mrs Vuletic, notwithstanding this agreement being “collateral” to the sale agreement.

[24] Clearly, each side when preparing to execute the two agreements would have appreciated that the other had various options open to it as to how to execute the agreements, since there was no provision in either agreement stipulating a particular mode of execution. Each would have recognised that the other might execute the agreement by applying its common seal, by the signature of one or more of its directors, or by the signature of anyone else authorised by the company: see Companies Act 1993, s 180. In short, therefore, Contributory Mortgage had no reason to expect (and no power to demand) that Harris Road would choose to exercise the agreements by signature of Mrs Vuletic, one of its directors. Had another director signed on behalf of Harris Road, say, the legal effect would have been identical to what in fact happened.

[25] So it may be argued the whole format of the agreement would have led the objective observer to conclude that there were only two parties to the sale agreement and the mortgage back agreement and that whoever executed the agreement on Harris Road’s behalf would be executing solely in that capacity.

[26] This leads on to the second reason. The format of clause 26 (above at [3]) reinforced the impression conveyed by the rest of the agreement. Clause 26 can be read as expressed in the passive voice, and in terms of future, not immediate, obligation. So read, on its face, and in light of the overall structure of the agreement, it was, as Dr Harrison submitted, no more than a covenant by Harris Road as contracting party to procure the guarantee by Mrs Vuletic. The form of clause 26 is

to be contrasted with the form of the guarantee clause in *Doughty-Pratt* (reproduced below at [31]).

[27] The fact that the clause in its form was no more than a covenant to procure a guarantee by Mrs Vuletic does not, however, mean that it could not have operated as a guarantee and been construed as having operative effect if Mrs Vuletic had indicated in some positive way (either in her manner of execution or extrinsically) that she was giving the guarantee envisaged by clause 26.

[28] The third reason we find it fairly arguable that she signed only as director is that, when she signed at that part of the agreement where the purchaser was required to sign, she added the word “Director” immediately under her name. That could be said to create a presumption that she has signed solely as director of the purchasing company. Such presumption could be displaced only if there were evidence of relevant extraneous material, such as conversations or correspondence, indicating a contrary intention. It is common ground that there is no such extraneous material available, at least at this stage.

[29] Associate Judge Faire, when finding that Mrs Vuletic had signed in a dual capacity, considered three cases. Two of the cases were decisions of this court, *Doughty-Pratt* and *Trotter v Avonmore Holdings Limited* (2005) 8 NZBLC 101,646.

[30] We shall consider *Doughty-Pratt* first. Associate Judge Faire clearly considered this case supportive of his finding of dual capacity. But the facts of that case were quite different. The case was concerned with what might loosely be called an agreement to lease between Doughty-Pratt Group Limited as lessor and Associated Sharebrokers Limited as lessee. Although the agreement contained a guarantee, there was no separate provision in the attestation clause for the guarantors to sign in that capacity. D P Lennan and D C Wylie signed the agreement on behalf of Associated Sharebrokers.

[31] The guarantee clause (clause 15.1) in the agreement to lease read as follows:

The *Directors* of Associated Sharebrokers Limited namely *Dennis Peter Lennan* and *David Craig Wylie* agree to guarantee the covenants of

Associated Sharebrokers Limited under this agreement and any sublease or assignment arising here from.

[32] As typed, the clause referred to the “principals”, not the “directors”, of Associated Sharebrokers and their names were left blank. When Mrs Pratt, on behalf of Doughty-Pratt, and Messrs Lennan and Wylie met to sign the agreement, Mrs Pratt said that Messrs Lennan and Wylie read clause 15.1, saw they were liable, and initialled it: [1995] 2 NZLR 398 at 403. Mr Lennan gave evidence that it was Mr Wylie who wrote their names into the clause. In his evidence, he said they were “comfortable” with it, accepting that they were giving personal guarantees: at 403. This evidence – of the guarantors filling in their names, initialling the clause, and orally advising Mrs Pratt that they accepted they were giving personal guarantees – was fundamental to this court’s decision that the guarantors were bound. This court found that the case fell within the principle of *Young v Schuler* and *Elpis*: see *Doughty-Pratt* at 403-404. There is no such extrinsic evidence – at least not yet – in the present case. The principle of *Doughty-Pratt* we respectfully endorse, but the case is clearly to be distinguished on the facts.

[33] We now turn to this court’s recent decision in *Trotter*. The judge essentially distinguished *Trotter* on the facts: High Court judgment at [27]. We agree that *Trotter* was a stronger case on the facts for a “non-dual capacity” finding than the present case. Nonetheless there were comments made in *Trotter* which bear on the present case. For instance, this court found it very significant that the alleged guarantors in that case had “signed the licence agreement in their capacity as directors of [the licensee] in order to bind the company”. This court added (at [28]):

Their status as directors was clearly identified in the document beside their signatures. ...In our view, there is nothing in the document to suggest they signed it in a dual capacity.

[34] This court went on:

[29] In addition, it has never been suggested that Ms Trotter or Mr Webb [the alleged guarantors] represented to Avonmore [the licensor] in any way that they had signed the documents in a dual capacity. The fact that the shareholder guarantee clause had not been deleted, in our view, cannot be taken as a representation of signing in a dual capacity. There was no need to delete it in so far as ACP [the licensee] was concerned. It had no operative effect on the company and it had no operative effect on the shareholders if

they did not sign the agreement. Ms Trotter and Mr Webb did not sign the agreement, apart from in their clearly identified capacity as directors of ACP.

[35] What is said in that paragraph applies equally here, if one substitutes Mrs Vuletic for Ms Trotter and Mr Webb, Contributory Mortgage for Avonmore, and clause 26 of the sale agreement for the shareholder guarantee clause.

[36] In short, therefore, while we recognise that there are factual differences between the agreement in issue in *Trotter* and the sale agreement here, the principles to be taken from the case are helpful to Dr Harrison's argument.

[37] The third case on which Associate Judge Faire relied was *Chiswick Investments v Pevats* [1990] 1 NZLR 169, a High Court decision. We need say little about this decision. It is clearly of doubtful authority since this court's decision in *Trotter*: see the doubts expressed at [33]. It is noteworthy that *Young v Schuler* appears not to have been cited to the High Court. In any event, as this court said in *Trotter*, "even if [*Chiswick*] were correctly decided, it was very dependent on the particular combination of circumstances". Those circumstances are described in *Trotter*, and this court then went on, at [34] to show how they did not pertain to the case under consideration. So here, we observe, the very unusual circumstances of *Chiswick* do not apply here; this case is much closer to the facts of *Trotter*.

[38] Mr McEntegart sought to uphold the judge's reasoning and argued that these cases supported the conclusion that Mrs Vuletic must be taken as having signed in a dual capacity in this case. With respect, we do not agree that they do lead to that conclusion.

[39] Mr McEntegart developed another argument under this head which had not been part of the judge's reasoning. He saw it as significant that clause 26 of the sale agreement referred to Mrs Vuletic as "a director" of Harris Road and that she then added the word "director" after her signature. The argument ran thus: the guarantee was required of her as director and, by adding the word "director", she indicated that she was fulfilling her obligation in that capacity.

[40] We do not accept that argument. The reference in clause 26 to Mrs Vuletic as “a director” of Harris Road is merely descriptive or identificatory. There could be no justification for drawing an inference that, when Mrs Vuletic added the word “Director”, she was intending to refer back to her status as described in clause 26. Had that been her intention, she surely would have written “Director and shareholder of Harris Road”, that being her clause 26 status. Obviously, when she wrote “Director” under her signature, which in turn was under the words “Signature of purchaser(s)”, Mrs Vuletic was indicating the basis upon which she was authorised to sign for the purchaser.

[41] Ironically, on Mr McEntegart’s argument, it is crucial that Mrs Vuletic should have added the word “director” after her signature; had she not done so, there would not have been the linkage back to clause 26. We, on the other hand, see the addition of the word “Director” as strengthening the inference that she was *not* signing in a dual capacity. In our view, the argument for “dual capacity” would have been stronger – though not by much – had she not added the word.

## **Result**

[42] Mrs Vuletic’s appeal must be allowed.

[43] The formal judgment of the High Court (as sealed on 19 December 2005) read as follows:

1. Judgment is entered for the plaintiff against the second defendant in the sum of \$312,500.
2. Judgment is entered against the second defendant for liability only in respect of the plaintiff’s claim for interest and default GST in accordance with clause 12.1(3) of the agreement, which issue is to be the subject of a trial.
3. The application for summary judgment against the first defendant is adjourned to a telephone conference with counsel at 9:00 am on 30 November 2005, where that issue will be considered and directions for trial will be made.
4. The second defendant is ordered to pay costs on Category 2 Band B together with disbursements, as calculated in the Schedule hereto.

[44] In light of our conclusions, orders 1, 2, and 4 must be set aside. Contributory Mortgage's application for summary judgment against Mrs Vuletic should not have succeeded and is now dismissed. The proceeding must now proceed to trial.

[45] All the other orders of this court, as set out in the formal judgment, need no further explanation, save for order G. We have reserved liberty to apply, in particular because we are not certain whether Mrs Vuletic has met the judgment against her. If she has, orders under rule 54 of the Court of Appeal (Civil) Rules 2005 may be required.

Solicitors:  
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Neumegen & Co, Auckland, for Respondent