

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP61/99

BETWEEN: N. ARCHER

Appellant

A N D: BENCHMARK BUILDING
SUPPLIES LIMITED

Respondent

Hearing: 16 August 1999

Counsel: P.J. Morgan for appellant
T.J. Ferrier for Respondent

Judgment: 24 August 1999

RESERVED JUDGMENT OF PENLINGTON J

Solicitors: Almao Kellaway, Hamilton
McCaw Lewis, Hamilton

This is an appeal from a Reserved Judgment of His Honour Judge Rea, delivered in the District Court at Hamilton on 8 April 1999.

In the District Court the respondent was the plaintiff and the appellant was the defendant. The respondent sought to recover from the appellant, under an alleged guarantee, the amount due by a company called Discovery Homes Ltd, (Discovery Homes) now in liquidation, on its trading account with the respondent. Discovery Homes, before its liquidation, was in business at Hamilton as a building contractor.

The Judge found for the respondent. He entered judgment in its favour for \$75,731.24, together with interest. The total judgment, including with costs, will exceed \$120,000.

At the heart of the case is a document headed "Limited Liability Company application for trading account" which was signed by the appellant. It contained a form of guarantee.

A photocopy of the document is attached as Appendix 1.

Background

The background to the case is as follows.

In April 1993 the appellant was a self employed builder in Hamilton who was trading under his own name. On 4 April 1993 he applied for and obtained a trading account with the respondent.

The appellant had a brother, Paul Archer, who was then in Australia. A few months after the appellant obtained his trading account with the respondent, Paul Archer returned to Hamilton. He and the appellant then commenced a loose partnership arrangement to build houses. The purchase of building supplies for the partnership was carried out through the appellant's personal account with the respondent.

Two companies were then incorporated by the appellant and Paul Archer to replace the partnership. One was Discovery Homes. It was incorporated on 28 June 1993. The other was Archer Bros Ltd. It was incorporated on 2 August 1993. The appellant, his wife Jeanette Marie Archer (Jeanette Archer), Paul Archer and his wife were the directors of and shareholders in both companies.

Jeanette Archer soon took the view that the purchase of building supplies for the companies through the appellant's personal account should cease and that instead separate company accounts with the respondent should be established. As the result, the appellant went to one of the respondent's business premises in Hamilton. There he picked

up some blank pre-printed forms for the purpose of each company making an application for a trading account.

The application which is relevant to this appeal was the document which was completed for Discovery Homes.

At this point it is proper to note that the respondent had two kinds of form - one for a sole trader and the other for an incorporated trader. The latter contained an application for a trading account and a form of guarantee. That guarantee is central to this appeal.

The appellant took the forms home to Jeanette Archer. The form which is in issue was partially completed by her. It was then dated and signed by the appellant. After the signing, it was returned to the respondent. Thereafter three employees of the respondent wrote on the document.

The top portion of the document above the word "Guarantee" was completed by Jeanette Archer, with the exception of the figures "5000" against "Credit limit" and "1000" against "Paid up capital \$". Lower down on the document she wrote in the words "Discovery Homes Limited" after the printed words "in consideration of you agreeing at my request to supply".

After the document was delivered to the respondent's premises, one D.R. Jones, the respondent's sales representative at the Te Rapa branch, completed the words "D.R. Jones", "Sales Rep", and "40 Houchens Road". The Judge found that Jones did not actually witness the appellant's signature, although he recognised it.

One Trevor Charles Rossiter, the respondent's regional credit manager, put his signature on the bottom of the document, made the notations "18.8.93 B/M M/A" and crossed out the word "declined". Rossiter also inserted the figures "5000" and "1000" referred to earlier.

A clerk named Mrs George (who was not called as a witness for the respondent) inserted the words "Archer", "Neil" and "105 Endeavour Ave Hamilton" in the middle portion of the document which requires the insertion of "The full name of guarantor" and the "residential address" of that person. At the time the document was returned to the respondent, that portion was blank. This point was the subject of emphasis in the appellant's argument, to which I shall later refer.

On 19 August 1993 the respondent wrote to Discovery Homes notifying that company that its application for a trading account had been approved. It was granted an approved credit limit of \$5000. A similar

letter was not sent to the appellant. The latter thought that it was unlikely that he saw the letter to the company.

After a relatively short period of time, the appellant and Jeanette Archer became dissatisfied with their business involvement with Discovery Homes and with Paul Archer and his wife. They no longer wished to be directors of and shareholders in Discovery Homes. Paul Archer and his wife, on the other hand, wished to continue as both shareholders and directors of both companies. An agreement was reached whereby the appellant and his wife would transfer their shares to Paul Archer and his wife and would resign as directors.

This occurred early in 1994. To this end the appellant and his wife took legal advice from a Mr Peter Kellaway, an experienced commercial solicitor, about the transfer of their shareholdings in Discovery Homes. Mr Kellaway raised with the appellant and his wife the question of guarantees. At the time the appellant believed that there was only one guarantee in relation to Discovery Homes, and that was a guarantee by him and his wife to Trustbank Waikato Ltd.

Mr Kellaway thereupon negotiated with Trustbank Waikato and arranged a release of that guarantee on terms. A Deed of Indemnity was drawn up and executed by the appellant, his wife, Paul Archer and his wife. The Deed is dated 18 July 1994. It records the resignations of the

appellant and his wife as directors of Discovery Homes and the transfer of their shares to Paul Archer and his wife.

After the resignations the appellant did not have anything further to do with the management or control of Discovery Homes. That company continued in business under the control and management of Paul Archer and his wife.

Discovery Homes' account with the respondent during the period October 1996 to February 1997 was allowed to go well in excess of the credit limit (which was not extended at any time). At one stage the debit balance rose as high as \$115,925.35.

Ultimately, Discovery Homes went into liquidation on 7 July 1997. Its indebtedness to the respondent at the time of liquidation was \$75,731.25, excluding interest and costs.

Discovery Homes was insolvent. The respondent therefore looked to the appellant under what it asserted was a guarantee by the appellant of the debts owed to the respondent by Discovery Homes in the application document.

The Pleadings.

The respondent sued the appellant on the guarantee in the document. It sought to recover from him as guarantor the amount due by Discovery Homes to the respondent at the time of the liquidation; namely \$75731.25 together with interest and costs. The appellant resisted the respondent's claim. He denied that he had given a personal guarantee and, in the alternative, he raised a number of affirmative defences which the Judge dealt with in his judgment.

The Judgment under Appeal

The Judge set out the background facts. I have already summarised them. Those facts were common ground on the appeal.

Additionally, the Judge made some other important findings of fact. They too were not attacked by either side. I now set them out as they were relevant to some of the arguments raised by both counsel.

1. The Judge said he was satisfied on the evidence given by the appellant and Mr Jones that the respondent was well aware that the appellant was no longer involved in the management or control of Discovery Homes after his resignation.
2. In evidence the appellant said that when he signed the document he believed he was signing a simple application for a trading account and that he was unaware that he was signing a guarantee. He accepted however that he did not read the document. Jeanette

Archer accepted that it was likely that she would at least have seen a reference to the "Full name of guarantor" on the form. She said that she did not appreciate that the form could also incorporate a guarantee as well as an application for a trading account. The Judge stated that he had no difficulty in finding as a fact that neither the appellant nor his wife appreciated that on 16 August 1993 – the date when the appellant signed the document – it included a guarantee of the debts owed by Discovery Homes to the respondent.

I now summarise the Judge's findings on the essential issues raised by the appellant.

First, the appellant argued that the document signed by him was in fact not a guarantee. The appellant emphasised that when the document was signed by him and returned to the respondent, the full name of the guarantor and that person's residential address in the middle part of the document was left in the blank. The contention for the appellant was that he signed the document in his capacity as an officer of the company and that it was intended to be and was an application for trade credit only and not a guarantee. The Judge rejected this argument and held that on the face of the document the appellant signed it in a dual capacity as a company officer applying for a trading account and as an individual guarantor.

Secondly, the Judge then addressed the question of whether the appellant's liability under the guarantee had been extinguished by other matters. The appellant had put forward a number of defences.

The appellant pleaded that he signed the document in reliance on misrepresentations made to him by the respondent by way of the format of the document and the absence of any explanation that the fine print included a form of personal guarantee. The appellant further pleaded that he relied in particular on the heading of the document "Limited Liability Company Application for Trading Account". It was said that that was misleading because in the body of the document there was, as well, a form of personal guarantee. The Judge rejected this defence. He held that a careful perusal of the contents of the document disclosed that it was intended to be both an application for trade credit and a personal guarantee. The Judge further held that the appellant was not misled in any way.

Next, the Judge dealt with the defence that the appellant's liability under the guarantee was discharged because the respondent allowed Discovery Homes to grossly exceed the maximum credit limit of \$5000. The appellant complained that he had not at any time been informed by the respondent as to what was happening in the trading account. The Judge rejected this defence. He relied on a judgment of Randerson J in

Mistry v Benchmark Building Supplies Ltd (Auckland, High Court, 144/97, 6 April 1998).

Next, the Judge addressed the defence of *non est factum*. The Judge held that the appellant's mistaken belief in the contents of the document had not resulted from an erroneous explanation or description of it by the respondent. Indeed, the Judge held that there was no evidence at all to indicate that anyone had ever given the appellant an explanation or description of the document at all. Further, the Judge held that the appellant had not acted with all reasonable care in the circumstances – he had simply not read the document.

Next, the Judge considered the plea that the document had been materially altered or added to after it had been signed. I have already referred in the background to what happened to the document after it was returned to the respondent. The Judge's finding that the appellant was bound by the guarantee in the document was based on the state of that document immediately after he signed and dated it. The Judge excluded from consideration all the additions or alterations. The Judge held that the alterations and additions relied on by the appellant were not sufficiently material to the purpose of the document and the effect of it to render it void and unenforceable against the appellant. That plea accordingly failed.

Next, the Judge dealt with the plea that the respondent was in breach of s.9 of the Fair Trading Act 1986 in that it engaged in misleading and/or deceptive conduct or conduct likely to deceive or mislead the appellant. The Judge held that there was no deceptive or misleading conduct by the respondent. Accordingly that plea failed on the facts.

And finally, the Judge dealt with the appellant's reliance on the Credit Contracts Act 1981. It had been pleaded that the respondent had acted oppressively. This plea was also rejected by the Judge.

Having rejected all the defences raised by the appellant, the Judge entered judgment in favour of the respondent as stated above.

The Grounds of the Appeal

A number of the appellant's arguments in the Court below were not repeated in this Court. In summary, the grounds of the appeal were as follows:

1. That the Judge was wrong in holding that what the appellant executed was a guarantee.
2. That if the first contention failed there was at least an ambiguity as to the capacity in which the appellant signed the document and the Judge was wrong in excluding parol evidence to resolve that ambiguity in the appellant's favour.

3. That the Judge was wrong in rejecting the plea that the respondent's conduct was not misleading or deceptive and therefore contrary to s.9 of the Fair Trading Act 1986.
4. That alternatively, the respondent should be deprived of the benefits of the guarantee, on the assumption that the appellant gave one, because of unconscionable conduct on the part of the respondent.

I now examine each of the four grounds of appeal in turn.

FIRST GROUND: The appellant did not execute a guarantee

The first ground concerns the capacity in which the appellant executed the document.

At the outset, Mr Morgan accepted that the proper approach was to look within the four corners of the document to see whether the appellant was bound as a guarantor. He contended that if this approach was adopted, it was evident, on the face of the document as executed by the appellant – and he here emphasised those words – that the appellant signed it only in his capacity as a director of and shareholder in Discovery Homes and not in any other capacity. In other words, as executed by the appellant, it was only an application for a trading account and not as well a guarantee by the appellant. The guarantee portions of the document were just surplusage.

The crucial factual point, so Mr Morgan submitted, was that when the document was signed and returned to the respondent, the middle section had been left blank. The full name of the guarantor and that person's residential address had not been completed. In other words, so Mr Morgan submitted, the identity of the guarantor had not been stated. That part of the form was completed by Mrs George. Mr Morgan did not challenge the Judge's finding that the document had to be looked at at the time of execution only and that what was entered onto it afterwards by Mrs George, Mr Rossiter and Mr Jones was to be ignored.

At this point in his argument Mr Morgan isolated what he submitted was the error of the Judge. The Judge cited *Mistry v Benchmark Building Supplies Ltd* (supra). It is to be noted that the respondent in that case was the same as the respondent in this case. Mr Morgan submitted that *Mistry* had been decided on different facts, and that that had led the Judge into error.

I pause here to set out the facts in *Mistry*. There was a company called Sustainable Removals Ltd in which Mistry was a shareholder and director. Benchmark supplied building materials to Sustainable Removals. The same trading account document was used. The company then got into financial difficulties and was unable to pay the amount due to Benchmark. The latter then sued Mistry. It sought summary judgment

against him, alleging that he had guaranteed the company's obligations under the document.

Mistry had completed the application document himself. He inserted his own name where the form provided for the "full name of guarantor". He maintained, however, that he had not provided a guarantee at all and had merely executed the agreement in his capacity as a director of the company and on behalf of the company.

As well, Mistry raised other defences: *non est factum* and exceeding the credit limit stated in the document without his knowledge or consent.

Randerson J referred to the contents of the document, and in particular clauses 1 to 8 (they were in the same form as in the present case). At p.7 of his judgment, His Honour said:

"Some of the operative clauses clearly apply to the guarantor alone while others are principally applicable to the company as the debtor. I refer in particular to clauses 5, 6, 7 and 8. Prima facie, these appear to impose obligations upon the company and use the alternative expressions "I/we" which do not feature in clauses 1 to 4.

The document does not make provision for separate signature by the company and the guarantor. It makes provision for the subscription of "my name". In those circumstances, there are three possible capacities in which Mr Mistry may have signed the agreement.

1. Solely in his personal capacity;
2. Solely in his capacity as a director of Sustainable Removals Ltd and on behalf of the company.
3. In a dual capacity as a personal guarantor and on behalf of the company.

Read as a whole, it is my judgment that Mr Mistry signed the agreement in a dual capacity both for the company and on his own behalf as personal guarantor. The opening provisions of the agreement plainly provide a personal guarantee of the company's obligations. Mr Mistry could have been in no doubt of that given the clear wording of clauses 1 to 4 of the agreement. Clauses 5 to 8 relate primarily to the company's obligations and it is to be expected in those circumstances that Mr Mistry would also sign the agreement in his capacity as a director of the company. It is common ground that Mr Mistry was the sole director and shareholder of the company at the relevant time according to the records produced from the company's office by consent. Accordingly, I am of the view, based on the true construction of the document, that Mr Mistry executed it both for the company and himself as personal guarantor."

Now returning to the present case, the Judge first of all noted that Mistry was the sole director of and shareholder in the company involved in that case, whereas, here, the appellant was one of four directors and shareholders in the present case. He did not however consider that that distinction assisted *Mistry*. The Judge then went on to say:

"The only relevant difference between the document in this case and the one considered by Randerson J in *Mistry* is that the defendant's name and address were not included in the document at the time it was executed by the defendant and must be excluded from consideration when interpreting the document.

In my view the fact that the defendant's name and address did not appear in the part of the guarantee provided for

them at the time he executed the document cannot assist him. The document clearly provides the wording "In witness whereof I have hereunder subscribed my name this day of 19 . Signed by ." The defendant dated the document and signed his name accepting the contents of the document including the guarantee.

For all practical purposes this case is almost identical to *Mistry* and therefore I consider I am bound by the decision of Randerson J and I find on the face of the document that the defendant signed it in a dual capacity as a company officer applying for a trading account and as an individual guarantor.

The defendant (and his wife) either did not read the document at all or were very careless when they did so. The document speaks for itself and unfortunately for the defendant even years after his involvement with the company he is still bound to the plaintiff as a guarantor of the debts of Discovery Homes Ltd."

Mr Morgan submitted that in this passage the Judge had wrongly concluded that *Mistry* was on all fours with the present case and that the decision in that case was therefore binding on him. Mr Morgan contended that the Judge had not properly directed his attention to what had happened in *Mistry* as compared with what had happened in the present case. Rather, the Judge had, so Mr Morgan submitted, wrongly, focused his attention on the terms of the printed form to the exclusion of what he contended was the critical distinction which, if recognised, would have led the Judge quite consistently with Randerson J's dicta in *Mistry* to a conclusion favourable to the appellant.

Mr Morgan compared the two cases. In *Mistry*, the appellant had completed that part of the document which identified the guarantor. In contrast, in the present case, the appellant had not completed that part of the document; and so in *Mistry* the guarantor was identified; whereas in this case, so Mr Morgan submitted, he was not.

Mr Morgan then took me to the analysis of the document put forward by Randerson J. His Honour said in *Mistry* that there were three possible capacities in which that appellant could have signed the agreement:

1. Solely in his personal capacity;
2. Solely in his capacity as a director of Sustainable Removals Ltd and on behalf of the company;
3. In a dual capacity as a personal guarantor and on behalf of the company.

Randerson J had found that Mistry had signed in a dual capacity. Here, in contrast, so Mr Morgan submitted, the document as executed by the appellant (and because the name of the guarantor was not stated) fell into the second category postulated by Randerson J.

Mr Morgan, in further support of his argument, relied on *Chiswick Investments v Pevats* [1990] 1 NZLR 169 in which Gallen J, at p.173, stated:

"The first principle which emerges from these decisions is that the Court will endeavour to ascertain the capacity in which a particular person signed the document from a consideration of the document itself and the cases illustrate various matters which have assumed importance in the particular cases."

Mr Morgan further submitted that given the requirements of s.2(2) of the Contracts Enforcement Act 1956, the onus was on the respondent to establish on the balance of the probabilities that the appellant had signed the document not only in his capacity as a director of and a shareholder in Discovery Homes, but also as a guarantor. Mr Morgan asserted that given the facts in the present case the respondent had failed to discharge the onus incumbent on it.

Miss Ferrier for the respondent met Mr Morgan's arguments in this way.

First, Miss Ferrier emphasised the Judge's finding of fact that the appellant did not read the document. She contended that that was fatal to the appellant's argument. She pointed to the appellant's evidence at p.34 lines 1-5:

"Q. Do you accept that the word guarantee is clear on the form if you read it carefully?

A. Yes.

Q. But you simply didn't read the terms and conditions?

A. That's correct.

Q. You just took a risk as to what they might be?

A. Well yeah, in hindsight yeah I did."

Secondly, Miss Ferrier contended that the document spoke for itself; that a reasonable reader would immediately see that it contained a guarantee; that when the document was read as a whole, it contained not only an application for a trading account, but also a guarantee; and that the Judge was correct when he held that the appellant, when he dated and signed the document, accepted the contents of it, including the guarantee. Miss Ferrier pointed to the phraseology of the following clauses in the document:

- Clause 1: "I hereby unconditionally guarantee..."
- Clause 2: "You may take whatever security (if any) which you may require from the debtor or any other person for all or any part of the said indebtedness at any time without impairing my liability hereunder."
- Clause 3: "This guarantee shall be in addition and without prejudice to any other securities."
- Clause 4: "I require no notification of any advances, loans, guarantees, or credits made for or on behalf of the debtor and you may at any time without reference to me refuse any further

advances....and I declare that you are at liberty to act as if I was principal debtor and I as surety expressly hereby waive all rights whatsoever which may be inconsistent with my liability hereunder"

- The execution clause "In witness whereof I have hereunder subscribed my name this day of 19 ."

I was asked to pay particular attention to the underlined words.

Miss Ferrier contended that the signature had to be read in conjunction with the phraseology of the clauses, especially the ones set out above, which preceded it. Miss Ferrier emphasised that Clauses 1 and 4 were in first person singular; that Clause 2 referred to "my liability"; that the execution clause was also in the first person singular; that the appellant's signature was not disputed; that identity was not therefore in dispute; and that the signature was not qualified in any way - for example "For and on behalf of the company" or some similar phrase; and that none of the guarantee clauses had been struck out or amended. Had the appellant read the document, so Miss Ferrier contended, he would have seen quite plainly that it contained a form of guarantee. He did not do so. He was not therefore entitled to escape liability because of his own default.

Thirdly, Miss Ferrier categorised the portion of the document which was left blank by the appellant as an "administrative detail" only. She

submitted that the Judge was correct when he held that the absence of the appellant's name and address at the time when the document was executed did not assist him. The signature and Clauses 1 to 4 sufficiently identified the appellant as the guarantor.

And fourthly, as to the asserted mis-application of *Mistry*, Miss Ferrier invited me to reject that contention. She submitted that the Judge was correct in holding that for all practical purposes the two cases were identical and that he was bound by the decision of Randerson J.

I have considered the submissions of counsel. Initially, I was attracted by the simplicity of Mr Morgan's argument that because the middle portion of the form – that is the part relating to the full name and address of the guarantor – was not completed by the appellant, that the guarantor had not been identified. Upon careful reflection, however, I have concluded that that argument, in spite of its attractive presentation must fail. I have concluded that the Judge was correct when he dismissed that point as a relevant consideration in this case.

Further, I do not consider that the Judge allowed himself to fall into error by following the decision of Randerson J in *Mistry*. I accept that Mistry filled in the middle portion of the form relating to the full name of the guarantor and his address, whereas the appellant did not do so. I do not, however, consider that that difference between *Mistry* and this case

is in any way decisive. In my view, the reasoning of Randerson J could equally be applied to the present case for the reasons I am about to set out.

A careful examination of the document reveals that at the commencement of the lower half of the form, it is addressed to the respondent. The consideration is stated in the first person singular – “In consideration of you agreeing at my request to supply Discovery Homes Ltd (hereinafter called ‘the debtor’) with goods and/or to perform work or services to or for or on account of the debtor after the date hereof.” These words are stated immediately ahead of the eight clauses which follow. Those clauses distinguish between “you”, which was the respondent, “the debtor” which was Discovery Homes and the guarantor who was expressed in the first person. I accept that in Clauses 5, 6 and 7 there is a switch to “I/we”. While that is somewhat inelegant, in my view a reasonable reader would clearly comprehend that change to mean a reference to the debtor, that is Discovery Homes.

Clause 1 could not be clearer. It contains words of guarantee. In Clause 2 the guarantor acknowledges that the respondent can take security without affecting the guarantor’s liability. In Clause 3, the guarantor acknowledges that the guarantee is in addition, without prejudice to any other securities which the respondent at that time or thereafter possesses in respect of the monies or payments to be secured.

And in Clause 4 the guarantor acknowledges that he does not require notification of any advances, loans, guarantees or credits made for or on behalf of the debtor, that is Discovery Homes. The guarantor further acknowledges in this clause that the respondent may at any time without reference to him, refuse any further advances, loans, etc for or on behalf of Discovery Homes. Likewise, in this clause the guarantor acknowledges that he does not require prior notification of any compounding with or granting time or other indulgence to Discovery Homes. And finally the guarantor declares that the respondent is at liberty to act as if the guarantor "was the principal debtor and the guarantor, as surety, expressly waives all rights which may be inconsistent with [his liability] hereunder".

These clauses could not be clearer. They were not amended or struck out by the appellant. The appellant's signature, as Miss Ferrier submitted, was not qualified in any way at all. The appellant has not stated the name of the company. Likewise, he has not signed the document "for or on behalf of" the company only. And further, the signature is preceded by the words:

"In witness whereof I have hereunder subscribed my name this sixteenth day of August 1993."

It is true that the form has a place for a witness to sign and that the appellant did not have his signature witnessed. A witness however is not necessary for a valid guarantee and so that point can be put to one side.

There was no issue as to who signed the document. The appellant admitted that he signed it. In my view, the combination of his signature, unqualified as it was, and the preceding eight clauses, make it abundantly clear that the appellant signed in a dual capacity; that is to say, he signed it not only on behalf of Discovery Homes but also as a guarantor.

Had the appellant crossed out the clauses which are related to the guarantee, and in particular Clauses 1, 2, 3 and 4, or had he qualified his execution of the document, for example by stating that he was signing "for and on behalf of" the company then the position might have been different. But he did not, no doubt because he did not read the document.

The principle of commercial certainty underlies the rules of construction which are applicable to the issue presented for decision. In this case. The intention of the appellant objectively ascertained from the document must prevail.

Accordingly, for these reasons I reject the first ground of appeal.

Second Ground – Ambiguity

The second ground of appeal is advanced in the alternative. The appellant contends that if the first ground fails, then the Court should at least hold that there was an ambiguity and admit parol evidence to resolve it. The central point in this ground is that there was only one active execution of the document and that there was therefore an ambiguity as to the capacity in which the appellant signed the document.

I have already held that the Judge correctly found that the appellant executed the document in a dual capacity; that is to say, he signed it not only on behalf of Discovery Homes but also as a guarantor. In case, however, that finding is wrong I now address the second ground. In the Court below the Judge rejected the submission that parol evidence should be admitted. He said at p.12 of his judgment:

"I accept the defendant was signing the document believing he was applying to the plaintiff for a trade credit facility on behalf of Discovery Homes Ltd. I accept from his evidence that at the time he signed the document he did not intend to commit himself as a guarantor of company debt to the plaintiff. However based on the parol evidence rule or the plain meaning rule what the defendant intended or believed at the time he signed the document cannot in the circumstances of this case assist him. What the document means and its effect must be ascertained objectively from the document itself."

Mr Morgan submitted that the Judge had erred in that he had not considered the matter on the basis of an ambiguity and accordingly admitted parol evidence.

In support of this submission, Mr Morgan cited *Benjamin Developments Ltd v Robert Jones (Pacific) Ltd*, [1994] 3 NZLR 189 CA, in which Gallen J giving one of the judgments in the Court of Appeal said:

"On the other hand where words or a clause or indeed a contract as a whole is ambiguous or the result of a literal construction gives rise objectively to ambiguity or absurdity, then the authorities allow the true intention to be elucidated by the admission of evidence directed to that end."

Secondly, Mr Morgan cited *Young v Schuler* (1882-83) 11 QB 651 CA. In that case Schuler had signed an agreement on behalf of a company. The agreement contained a personal guarantee. There was verbal evidence that Schuler had said at the time he executed the agreement, that he understood it to be a personal guarantee. The Court found that the evidence of the contemporaneous statement by Schuler of his intention when signing the agreement was admissible because it did not contradict the document itself and resolved any possible ambiguity in it.

In *Schuler*, Brett MR said at p. 654:

"If there is here a signature by Schuler as a contracting party, then an effectual guarantee has been given by him. The question then simply is, did he sign as a contracting party? Looking at the document alone this is doubtful, and if there were no evidence on the subject I should say that Schuler signed only for Abrahams and Co. But the question whether a person has signed his name at the

foot of a document, and if so, for what purpose, are questions of evidence, and any evidence on the subject which does not contradict the document is admissible. Here is a signature by Schuler, which may, as it seems to me, without contradicting the document, be taken as a double signature; a signature on his own behalf and also as agent for Abrahams and Co. Evidence then is given of such admissions made by him at the time as plainly show that he intended it to be a double signature. This evidence does not contradict anything on the face of the document, and is, in my opinion, clearly admissible."

And Cotton LJ said at p.655:

"The contract is between the Plaintiffs and Abrahams and Co; but it contains what purports to be a guarantee by Schuler. Schuler signs the contract 'ppa John Abrahams and Co, J O Schuler' and there is evidence that he signed with the intention of binding himself. Prima facies he would be taken to have signed only for Abrahams and Co; but evidence that he intended to sign in both capacities, in his own right and as attorney for Abrahams and Co, does not contradict the document and is admissible."

(The emphasis is mine.)

See also *Elpis Maritime Company Ltd v Marti Chartering Co. Inc.* (1992) 1 AC 21; *Doughty-Pratt Group Limited v Perry Castle* (1995) 2 NZLR 398 CA.; *12 Halsbury* 4th ed. paras 1479 and 1483.

Mr Morgan contended: (i) that given that there was only one active execution there was therefore an ambiguity as to the capacity in which the appellant signed the document: (ii) that accordingly parol evidence of the appellant and his wife on that issue should have been admitted; and (iii) once admitted it resolved in favour of the appellant the capacity in

which he signed the document; namely for and on behalf of the company only and not as a guarantor.

Mr Morgan pointed to the Judge's findings of fact (i) that the appellant did not fill in the middle portion of the document; (ii) that he believed that he was making an application for credit and nothing more; and (iii) that neither the appellant nor his wife appreciated when the appellant signed the document that it contained a guarantee of the monies owed by Discovery Homes to the respondent. Mr Morgan also pointed to the evidence of the appellant to the effect that had he realised he was guaranteeing the company's account for the respondent, he would not have signed the document. Once again, Mr Morgan placed emphasis on the fact that the document, as executed, contained a blank in that part of it which referred to the "Full name of Guarantor" and his address.

Mr Morgan submitted that the appellant's evidence did not contradict the document as executed because the guarantor had not been identified therein. He further submitted that on the authority of *Young v Schuler* the Judge should have admitted the evidence of the appellant's intention and that, had he done so, that would have established that the appellant signed the document on behalf of the company only and not as a guarantor.

Miss Ferrier accepted that in limited circumstances parol evidence is admissible to resolve an ambiguity as to the capacity in which a person has signed a document. She hastened to submit, however, that there was no ambiguity in the present case for the reasons advanced in respect of Ground 1. She then went on to submit that even if there was an ambiguity (which she did not concede) the parol evidence upon which the appellant relied was not admissible.

First, she submitted that it was objectionable on the basis that the evidence relied on contradicted the document as executed.

Miss Ferrier then made two further points: (i) that whatever the appellant's intentions, they were not communicated to the respondent and did not form part of the negotiations between the parties before the document was signed and were not therefore admissible; and (ii) that the appellant's subsequent declarations as to what he intended were likewise not admissible.

As to the former, Miss Ferrier took me back to *Chiswick Investments v Pevats* (supra). In that case Pevats had read the agreement before he signed it. He did not, however, make it clear that he was not signing it in his personal capacity. Gallen J, at p.174, said:

"Whatever the intention of the respondent may have been, on the evidence it was certainly not communicated to the appellant nor did it form part of the negotiations between the parties. From the approach adopted in the cases to which reference has already been made then it would not be admissible for the purposes of construing the document itself."

And as to the second proposition, Miss Ferrier relied on *Robinson v Tanners Timberworld Ltd* CA1301/90, Judgment 16 May 1991. In that case the appellant opened a trading account for his company. The standard form contained five printed paragraphs headed "Terms of Trade". These paragraphs referred to the purchaser and the customer. At the foot of the document the following words appeared:

"I agree to the above conditions in Terms of Trade and do hereby personally guarantee to pay the due payment of any monies undue."

This paragraph was followed by a space for signing and a second space for witnessing. The appellant signed the agreement and dated it. His signature was not witnessed. When enforcement against the appellant was undertaken, he maintained that he had not been advised of the personal guarantee and was not aware it existed. He, like the present appellant, asserted that he had signed the agreement on behalf of the company alone and that the document was simply a trading account.

Hardie Boys J, in delivering the Judgment of the Court, made a number of observations which are relevant to the present case. At p.5 he said:

"It is elementary that this document is to be construed objectively. The parties' intentions to be gathered from the words used, given their ordinary meaning. Subsequent declarations of the parties as to what they intended or understood are not admissible"

And at p. 6:

"We think that on their plain and ordinary meaning the words in issue here are a personal guarantee by the signatory. We see no ambiguity such as to bring the *contra proferentum* rule into play. The words, I, ... do hereby personally guarantee are in themselves plain and unambiguous ... Further we see considerable significance in the change from the third person to the first person."

And at p.7:

"The law has always recognised that for the sake of certainty in contractual dealings people must in general be bound by what they have signed."

This ground can be dealt with quite shortly. I do not consider that there was an ambiguity as to the capacity in which the appellant signed the document. I am unable to accept Mr Morgan's argument that the non completion of the section of the document "Full name of Guarantor" and his address, created an ambiguity.

Even if that view is wrong, I agree with Miss Ferrier's submission that for the appellant to say 'if I had known that it was a guarantee I would not have signed the document' is contrary to the written words of the document in which *inter alia* it clearly states:

"I hereby unconditionally guarantee the due and punctual payment to you by the debtor of all monies in which the debtor is or may hereafter become indebted to you in any way whatsoever and which are overdue and unpaid or may hereafter be due and unpaid."

I then asked the question: is the parol evidence admissible on any other basis? My answer to that question is "no".

Here, there was no discussion or negotiation on the role of the appellant before the document was signed. Further, when it was returned to the respondent there was no accompanying qualification of any kind by the appellant. As Hardie Boys J said in the *Robinson* case, the intention of the person signing the document must be objectively ascertained. The test is: what would the reasonable reader take from the document itself after it was executed? Not what the appellant has said unilaterally was his intention – a subjective matter – at that time or at a later date.

And finally before leaving this ground I pause to observe that I find it difficult to see how the appellant can say 'I did not intend to give a guarantee but, of course, I did not read the form'. I merely ask: how

could the appellant have had that intention when he did not know, on his own admission, what was in the document?

Accordingly for the reasons given the second ground of appeal must also fail.

Ground 3: Section 9, Fair Trading Act.

Ground 3 is a challenge to the Judge's rejection of the appellant's plea that the respondent's conduct was misleading or deceptive contrary to s.9 of the Fair Trading Act 1986.

The alleged conduct of the respondent was a number of alleged misrepresentations which, it was said, induced the appellant to sign the document. The appellant alleged that he relied on (i) the form of the document; (ii) the fact that it contained not only an application for a trading account, but also a guarantee; (iii) the provision of only one space for a signature; (iv) the absence of any explanation that "the fine print of the document provided for and included a form of personal guarantee"; and (v) the silence of the respondent as to the fact that the form contained both an application for a trading account and a guarantee. As I have said earlier, the Judge rejected this plea on the facts.

Section 9 provides:

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Whether any particular conduct is misleading or deceptive or likely to mislead or deceive is essentially a question of fact. The test is objective. *Mills v United Building Society* [1988] 2 NZLR 392, 413, per Casey J delivering the judgment of the Court.

In the same case, Casey J described the language of s.9 as "clear and unambiguous". Later, in *Unilever NZ Ltd v Cerebos Greggs Ltd* [1994] 6 TCLR 187 CA, Gault J in delivering the judgment of the Court said at p.192:

"The statutory wording is straightforward and does not call for extensive judicial gloss: *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 39 (HC & CA), also reported as *Taylor Bros Ltd v Taylors Textile Services Auckland Ltd* (1988) 2 TCLR 447, 455. Matters essentially of fact identified in the reasoning in previous decisions are not to be elevated to propositions of law: *Taco Co of Australia Pty Ltd v Taco Bell Pty Ltd* (1982) 42 ALR 177, 199, approved by this Court in *Trust Bank Auckland Ltd v ASB Bank Ltd* [1989] 3 NZLR 385, 389, also reported as *ASB Bank Ltd* (1989) 3 TCLR 77, 81 (CA). A plaintiff is required to show that conduct of the defendant in trade is, or is likely to be, misleading or deceptive. It is necessary to identify those who have been or are likely to be misled or deceived. In this case it is said to be the purchasers or potential purchasers of the coffee. Such people will be misled or deceived if caused by the conduct in question to form a mistaken belief or impression. That is a matter to be determined in all the circumstances in which the conduct impacts upon them: *Allied Liquor Merchants Ltd v Independent Liquor (NZ) Ltd* (1989) 3 TCLR 328, 334; 17 IPR 79, 85. Merely being caused to wonder is not to be misled or deceived although, as said in the *Taylor Bros* case, there may be only a short step from one to the other.

What must be shown are misrepresentations by words or conduct or a combination of words and conduct: *Taco Co of Australia Inc v Taco Bell Pty Ltd* (above) at p.202."

In the later case of *Bonz Group Pty Ltd v Cooke*, (CA 196/94) the Court, after discussing the meaning of the term "misrepresentation" went on to say at p.11:

"It is of course clear that there is no element of intention necessary for contravention of s9. There will be breach where the conduct results in a substantial section of the public being misled or deceived or a likelihood of that. Where misrepresentation is said to be required, that is to exclude from the ambit of the prohibition wholly accurate indications which, in particular circumstances, give rise to misunderstanding (as was the issue in *Unilever v Cerbos Greggs*) – not to introduce an element of intention".

In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988)

79 ALR 83, Lockhart J at p.93 helpfully said:

" it is erroneous to approach sec 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation ... ultimately in each case it is necessary to examine the conduct whether representational in character or not, and ask the question whether the impugned conduct of its nature constitutes misleading or deceptive conduct."

See also, *Prudential Insurance Co. NZ Ltd v Prudential Building Investment Society of Canterbury* (1988) 3 TCLR 62, (CA) 67.

Mr Morgan's argument was based on the matters which were pleaded in the statement of defence and which I have set out above. He

pointed out that the respondent had two kinds of application for a trade account: one for completion by a sole trader, and the other for completion by a limited liability company. The appellant himself had completed the sole trader document in April 1993. Mr Morgan pointed out that there was a critical distinction between the two forms. The sole trader form did not contain a guarantee while the limited liability company form did contain a guarantee. Mr Morgan submitted that the latter form, in all the circumstances 'tricked' the appellant, who was signing on behalf of the company, into becoming a guarantor of the company's debt.

Mr Morgan relied not only on the events before the document was signed, but also on events which occurred afterwards; namely, Mrs George inserting the appellant's name in the section of the form marked "Full name of Guarantor"; failing to communicate with the appellant at any time after the form was returned; allowing the credit account to rise without advising the appellant; and seeking to recover three and half years after the time when the respondent knew that the appellant had ceased to have anything to do with Discovery Homes.

At this point I shall deal with the post guarantee conduct relied on. In my view, that conduct is irrelevant and can be put to one side. It was not pleaded but in any event it was conduct on the part of the respondent which could not possibly have affected the giving of the guarantee. That

had already occurred when the document was signed and returned to the respondent.

There was no issue as to whether the respondent was "in trade". That was common ground. The respondent, however, denied that there was any conduct on its part which was misleading or disceptive, or likely to mislead or deceive; and that stance was upheld by the Judge.

In my view, the Judge properly and correctly rejected the appellant's defence. All the respondent did by way of conduct was to give the appellant a blank form and later receive it back from him with a signature on it. There was no suggestion that any staff member of the respondent, either when the document was handed out or when it was returned, made any representation or statement to the appellant.

In my view, the observations of Master Williams QC, as he then was, in *National Bank of New Zealand v Narayan*, (High Court Wellington, CP 646/92, 10 February 1993) are equally applicable to the present case. Master Williams stated:

"The only conduct on the part of the Bank which is in evidence in relation to the execution of the guarantee is the requiring of the guarantee itself and the explanation by the solicitor. There is nothing misleading or deceptive about a bank requiring a guarantee to provide part of the security for an overdraft. The only explanation which is in evidence which occurred prior to the execution of the guarantee was accurate and described the

guarantee's principal features. It could not be categorised as misleading or deceptive."

The respondent in this case was in the same position as the Bank in the Narayan case. It required a guarantee as a part of the security for a trading account. That was not of itself either misleading or deceptive.

Because the appellant was unable to point to any positive conduct on the part of the respondent which was either deceptive or misleading he was forced to rely on the document itself. In my view, the document was not in any way misleading or deceptive. It plainly stated that a guarantee was sought. If the appellant had read the document he would have discovered that point. He was not misled or deceived by the document; rather he misled or deceived himself.

I do not consider that the existence of a sole trader form in contrast to the limited liability form, was a relevant consideration in the present case. Had there been evidence that an employee of the respondent said to the appellant when he picked up the form that it was the same as the sole trader form or words to that effect then the position might have been different, but there was no evidence of that kind and so that point can be put to one side.

Accordingly, for these reasons, the third ground of appeal must also fail.

Fourth Ground: Unconscionable Conduct.

The appellant pleaded, *inter alia*, that he was discharged from liability as a guarantor by reason of (i) the respondent's conduct in allowing Discovery Homes to have credit in excess of \$5000 after knowledge of the appellant's withdrawal from that company; and (ii) seeking to recover from the appellant three and half years later. On appeal, the appellant complained that that defence was not properly considered by the Judge and that recovery in such circumstances should have been refused because the conduct of the respondent was in all the circumstances inequitable and unconscionable.

The Judge disposed of the point quite shortly. He relied on *Mistry* (supra) in which Randerson J had said at p.10:

"Leaving aside altogether the issue of whether the credit limit ever became a term of the contract as the respondent contended, the short answer to this point is to be found in clause 4 of the agreement in which Mr Mistry agreed to be bound as if he were a principal debtor. There was no such clause in the **Relwood** case. It is well established that a clause of this nature will normally preclude a guarantor from relying upon a range of matters which would ordinarily entitle the guarantor to be discharged from responsibility... Although the issue will depend upon the true construction of the guarantee in each case, I am satisfied that the present guarantee is so worded that defences which would ordinarily be available to a guarantor in that capacity are not available to Mr Mistry as he has agreed to be bound as if he were the principal debtor. In particular, he waived any need for notification of advances made to the company and expressly waived 'all rights whatsoever which would be inconsistent with my liability hereunder.' The effect of this clause was to render Mr

Mistry liable as if he were the company and to deprive him of the right to be discharged through material variation of the credit limit."

The appellant on appeal relies on the judgment of Richardson J in *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 at 174 where His Honour said:

"But it is not sensible to speculate on the matters or what conjunction of matters may or may not be considered material in a particular case. At the end of the day equity will intervene to deprive parties of their contractual rights where they have unconscionably obtained benefits or have accepted benefits in unconscionable circumstances. That is where they would be acting unconscientiously in receiving or retaining their bargain."

It was the argument for the appellant in this Court that the respondent's conduct had been unconscionable on account of the matters set out above and, additionally, because of (i) the nature and content of the document which 'forced the person completing it' on behalf of Discovery Homes to also be a guarantor; and (ii) the alterations to the document after it was returned to the respondent.

In my view, none of these matters either individually or collectively amounted to unconscionable conduct on the part of the respondent. I have already held that the document was not deceptive or misleading. The alterations to the document were disregarded by the Judge and were not in any way material to his decision. In any event, I would not regard

those alterations as being unconscionable. The respondent did not rely on any of them.

I consider that the Judge was correct when he followed Randerson J's observations in *Mistry*. The words of Clause 4 in the document were clear and unambiguous. The respondent was entitled to rely on them notwithstanding the lapse of time and the appellant's severing of his connection with Discovery Homes to the knowledge of the respondent. After that occurred the appellant did not at any time seek a discharge of his liability under the guarantee.

The words of Somers J in *Nichols v Jessup* [1986] 1 NZLR 226 (CA) at p. 235 are apt:

"The equitable jurisdiction to set aside unconscionable bargains is not a paternal jurisdiction protecting or assisting those who repent of foolish undertakings."

Had the appellant read the document, he would have known what obligations he was undertaking. It is not open to him now because he did not take that simple and practical step to categorise the conduct of the respondent as unconscionable when all the respondent was doing was acting in accordance with the written terms of the contract.

For these reasons the fourth ground of appeal must also fail.

Conclusion.

All four grounds of appeal have failed. The appeal is accordingly dismissed. There will be an order for costs against the appellant and in favour of the respondent. The appellant is to pay the respondent costs in the sum of \$1500 together with disbursements as fixed by the Registrar.

A handwritten signature in black ink, appearing to read 'P.G.S. Penlington J.', with a stylized flourish at the end.

P.G.S. Penlington J

BENCHMARK BUILDING SUPPLIES

Limited liability company application for trading account

Branch	<u>Te Rapa Hamilton</u>	Date	<u>15-8-93</u>	Ref. no.	<u>17331</u>
Account type	☐	Customer account no.			
Account name	<u>DISCOVERLY HOMES LIMITED</u>				
Postal address	<u>PO BOX 121010</u>				
	<u>HAMILTON</u>				
Telephone (bus.)	<u>854 9977</u>	(Private)	<u>854 0980</u>		
Customer group	☐	Agency status	☐	Credit rating	☐
				Credit limit	<u>50000</u>
1. Company details					
Paid up capital \$	<u>1000-00</u>	Date of formation	<u>25-6-93</u>	Registered office <u>105 Endeavour Ave Hamilton</u>	
Bankers	<u>Trustbank</u>	Branch	<u>Hamilton North</u>		
for	<u>Peter Kelburny</u>	Almona McAllen	Accountant <u>Business Management Service</u>		
Name and address of directors/shareholders					
<u>Raul & Karen Archer 800 River Road Hamilton</u>					
<u>Neil & Jeanette Archer 105 Endeavour Ave Hamilton</u>					
2. References (names of present suppliers and other firms)					
1.	<u>Benchmark - Ark Neil Archer</u>	Telephone			
2.	<u>Trade Link Supplies</u>	Telephone			
3.	<u>Pencemakers Bruce Street</u>	Telephone			
3. Source of funds			Amount of credit required each month		
Guarantee					
Full name of guarantor					
\$	<u>ne</u>	Full given names	<u>Neil</u>		
Residential address <u>105 Endeavour Ave Hamilton</u>					

To: Benchmark Building Supplies Limited

In consideration of you agreeing at my request to supply Discovery Homes Limited (hereinafter called 'the debtor') with goods and/or to perform work or services to or for or on account of the debtor after the date hereof:

- I hereby unconditionally guarantee the due and punctual payment to you by the debtor of all moneys in which the debtor is or may hereafter become indebted to you in any way whatsoever and which are overdue and unpaid or may hereafter be due and unpaid.
- You may take whatever security (if any) which you may require from the debtor or any other person for all or any part of the said indebtedness at any time without impairing my liability hereunder.
- This guarantee shall be in addition and without prejudice to any other securities negotiable or otherwise you may now or hereafter possess in respect of any moneys or payments intended to be hereby secured to you and you may at your absolute discretion vary exchange release renew modify refuse to complete or enforce or assign all or any judgements specialties or instruments negotiable or otherwise and whether satisfied by payment or not.
- I require no notification of any advances, loans, guarantees, or credits made for or on behalf of the debtor and you may at any time without reference to me refuse any further advances, loans, guarantees or credits for or on behalf of the debtor or compound with or grant time or other indulgence to the debtor or any other guarantor of the debtor without affecting my liability hereunder and I declare that you are at liberty to act as if I was principal debtor and I as surety hereby expressly waive all rights whatsoever which may be inconsistent with my liability hereunder.
- I/we undertake to make payment for goods purchased by 20th of the month following supply.
- I/we will pay you interest at the rate of 2 1/2 cents per dollar per month (or the current rate applicable) on all moneys owing by me/us after the due date for payment therefore computed from the respective due date/s up to and including the date/s upon which payment is made. Subsequent payments shall be applied first in payment of interest charged and secondly in reduction of principal.
- Before payment is made by me/us as aforesaid, you have instructed a solicitor or collection agency to recover any moneys owing by me/us then in addition to interest as referred to in (6) which shall continue to accrue I/we will pay you as liquidated damages the costs and disbursements usually allowed by the court on the proceedings taken on your behalf and also an amount which will reasonably reimburse you for the expense incurred by you in instructing such solicitor or collection agency.
- That ownership and property of the goods delivered remains with you until payment in full has been received by you and if payment is not made by due date you shall, without prejudice to other remedies, be entitled to retake possession of the goods and hold them until payment in full has been received, or to resell the goods and recover from me the deficiency on resale plus costs of repossession.

In witness whereof I have hereunder subscribed my name this 16th day of August 19 93Signed by: MaibeeIn the presence of: D.R. Jones Occupation Sales Rep Address 41 Houchens Road

18-8-93
B/N
N/A

Approved/declined

Customer copy

Signature [Signature]