

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2008-404-3596

BETWEEN

CSR BUILDING PRODUCTS (NZ)
LIMITED TRADING AS CSR
BRADFORD INSULATION NZ
Plaintiff

AND

RODERICK JAMES MCANEANEY
Defendant

Hearing: 3 March 2009

Appearances: C Waugh for Plaintiff
L Herzog for Defendant

Judgment: 11 May 2009 at 3 pm

RESERVED JUDGMENT OF ASSOCIATE JUDGE H SARGISSON

*This judgment was delivered by Associate Judge Sargisson on **11 May 2009** at **3 pm** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date

*Solicitors:
Craig Griffin Lord, PO Box 9049, Auckland 1003
Nigel Faigan, PO Box 2597, Shortland Street, Auckland*

[1] CSR Building Products (NZ) Limited seeks summary judgment in this proceeding against Mr McAneaney for the sum of \$480,903.32, plus default interest, and the costs of this proceeding.

[2] Mr McAneaney is sued in his alleged capacity as guarantor of a debt owed to CSR by AIS Insulation Limited. He accepts he signed a guarantee that on its face names him as the individual guarantor of the debt but he contends he is not personally liable under the guarantee. His grounds are essentially that he has arguable defences based on the following:

- a) When he signed the guarantee he lacked the necessary intention of assuming personal liability. He would never have signed it if he thought he was undertaking personal liability;
- b) Alternatively, the guarantee is unenforceable as the signature is not capable of being treated as the valid personal signature of the named individual guarantor and the guarantee does not therefore satisfy the requirements for enforceability under s27 of the Property Law Act 2007.

[3] Both grounds rely on Mr McAneaney having signed the guarantee in the space it provided for a corporate guarantor's signature and not in the space it provided for an individual guarantor's signature. But for the placement of his signature in the first of these spaces, there would be no dispute that he had assumed personal liability and was bound personally by the guarantee that he acknowledges he signed, nor any dispute or that CSR is entitled to the orders it seeks.

[4] The sole issues for determination are therefore whether it is arguable that Mr McAneaney's signature, placed as it was in a particular place on the guarantee:

- a) Is evidence of an intention to sign the guarantee in his capacity as director of AIS and not to assume personal liability; or

- b) Is incapable of being treated as a valid personal signature for the purpose of the Act.

[5] If the answer to either question is 'yes' or arguably so, then it is common ground that summary judgment will be inappropriate and the case should go to trial. For reasons I will come to, I am satisfied there is no tenable argument that Mr McAneaney did not intend to be personally bound when he signed the guarantee or that his signature is not a valid personal signature. I am more than satisfied that he intended to provide his personal guarantee for the debts his company incurred with CSR, and that the guarantee is enforceable, and that the particular placement of his signature is nothing more than an inconsequential slip.

The Guarantee

[6] On 27 November 2006 CSR agreed to supply insulation product to AIS on credit, on the terms set out in one of CSR's standard form credit applications, which Mr McAneaney, who was managing director of AIS, signed. The application states that he signed it 'for and on behalf of' AIS in his capacity as director. Mr McAneaney also signed another document in support of AIS' credit application. It was a printed form guarantee prepared by and in favour of CSR for all of AIS's current and future indebtedness.

[7] The credit application included terms that:

- a) Payment was to be made before the 20th of the month following the month of invoice;
- b) If AIS defaulted in any payment CSR would be entitled to charge interest on the amount unpaid at the rate of 2% per month or part thereof until payment in full;
- c) Interest would continue to accrue after as well as before judgment, and be payable on demand to CSR;

- d) If AIS defaulted under the agreement, or should be placed into receivership or liquidation, then the total amount outstanding would become immediately payable and CSR would be entitled to enforce payment on both the amount owing and interest;
- e) AIS would pay all expenses incurred by CSR in the recovery of any monies owing and due under the agreement.

[8] The relevant part of the guarantee, which expressly names Mr McAneaney as guarantor and AIS as debtor, provided:

In consideration of CSR at the request of **the Guarantor named and described in Item A** of the Schedule hereto ("the Guarantor") agreeing to supply goods and services and give credit to the person/partnership/company to whom CSR extends credit to and being named and described in Item B of the Schedule hereto ("the Debtor") the Guarantor HEREBY GUARANTEES payment to CSR on demand of all monies now due or which may at any time in the future fall due by the Debtor to CSR

AND IT IS HEREBY AGREED

1. This guarantee shall be a continuing guarantee and shall not be wholly or partly discharged by any monies which may at any time or times hereafter be received by CSR to the credit of the said Debtor.
2. CSR may at any time refuse further credit or supplies of goods and services to the Debtor.
3. The Guarantor shall be deemed to be liable as principal and the Guarantor shall not be released by any matter act or thing the happening of which could release. The Guarantor liable only as surety.
4. The Guarantor further agrees to keep CSR fully protected and indemnified against all loss suffered by CSR as a result of CSR extending credit to the Debtor, or as a result of any incapacity or insufficiency of authority on the part of the Debtor or person.
5. Where there is more than one guarantor the provisions hereof shall apply to each guarantor on a joint and several basis.

Name of Company "*AIS Insulation Ltd*"

Executed as a Deed this 27 day of November 2006

Item A: Full Name, address and description
of Guarantor/s

*"RODERICK JAMES McANEANEY
6/30 CLARENCE RD*

NORTHCOTE PT”

Item B: Full name, address and description of Debtor

*“AIS INSULATION LTD
6/108 STATION RD
OTAHUHU”*

[9] The italicised references naming AIS as debtor and Mr McAneaney as guarantor are hand written. They lack any added notation that might indicate that Mr McAneaney was not named as guarantor in his personal capacity, or that he was named as guarantor only in his capacity as director or officer of AIS. There is no dispute that on any objective reading this part of the guarantee identifies Mr McAneaney in his personal capacity as guarantor.

[10] However, beneath Items A and B, the guarantee provides two separate spaces for the guarantor’s signature. The guarantee states that the first space is to be signed “If the Guarantor is a Company”, and the second space is to be signed “If the Guarantor is an individual”. Consistent with his being the named guarantor, Mr McAneaney signed the guarantee. He did not add any notation to show he was not signing in his personal capacity, or to show he was signing on behalf of AIS, such as ‘for and on behalf of AIS’ or “as director of AIS”. He contends he did not need to because the space where he put his signature was the space provided for a corporate guarantor’s signature, and not the second space that was for an individual guarantor’s signature. His signature was not witnessed but both sides accepted at the hearing that nothing turns on that.

[11] On the basis of the signed guarantee, CSR supplied various types of insulation to AIS. AIS failed to pay the relevant invoices for a series of instalments supplied on a monthly basis from August 2007 through to November 2007. The total value of the outstanding instalments was \$428,651.47, which AIS never paid. The result was that on 3 December 2007 AIS was placed into liquidation.

[12] A short time later CSR issued demand on Mr McAneaney, in his alleged capacity as personal guarantor, seeking payment of the unpaid invoices. To date Mr McAneaney has not paid any part of the claimed amount.

Discussion

Issue 1 – Is there a tenable argument that Mr McAneaney did not sign the guarantee with the intention of undertaking personal liability as guarantor?

[13] At the hearing it was common ground that:

- a) The printed text of the guarantee is not unusual and shows clearly and unequivocally that its purpose was to provide as guarantor a separate surety and not simply the debtor “guaranteeing” to meet its own obligations;
- b) Consistent with that purpose, the main body of the text refers to the guarantor’s obligation to guarantee the debtor’s obligations. Clause 3 deems the guarantor is liable as principal, and Items A and B provide that the guarantor and debtor be identified separately. These provisions would not be needed if the guarantor were not intended to be a different person or entity to the debtor, or if the guarantor was not intended to give a meaningful guarantee;
- c) A signatory to a commercial document is generally to be taken to have known what its contents say and to be bound by it;
- d) Mr McAneaney in fact signed the guarantee as a condition of ongoing supply, and would have to have known that there would have been no credit allowed by CSR if the guarantee that was offered was not his personal guarantee but a mere worthless and meaningless gesture;
- e) There is nothing in the actual body of the guarantee that lends any support for the possibilities advanced by Mr McAneaney that he did not intend to name himself as guarantor in his personal capacity when he signed the guarantee, but rather intended to bind AIS as guarantor. Conversely it is to be inferred from his signing the guarantee at least

on a prima facie basis that personal liability for the AIS's contractual obligations was what he must have intended.

- f) There would have to be some compelling reason on the face of the guarantee to raise the possibilities that Mr McAneaney advances. Failing such reason it could only be assumed, as a matter of construction, that he intended to take on personal liability as guarantor and did not intend to sign for the purpose of giving AIS's guarantee of its own indebtedness. Otherwise, the guarantee would be meaningless.

[14] Nevertheless counsel submitted the particular placement of Mr McAneaney's signature in the space where corporate signatories were supposed to sign on the guarantee was indeed, on its own, a sufficiently compelling reason to raise those possibilities. He submitted the placement of the signature plainly supported an intention on Mr McAneaney's part not to name himself as guarantor in his personal capacity, and showed that his real intention was to sign the guarantee on behalf of AIS. At the same time, counsel accepted that if Mr McAneaney did not intend to give a personal guarantee, it must have been obvious that AIS could not be bound as it was not named as guarantor. Therefore he would have to have had the intention of deliberately providing a guarantee that was worthless or meaningless. Counsel indicated that this may seem unlikely but he argued the possibility could not be ruled out.

[15] I agree with counsel for CSR that the particular placement of Mr McAneaney's signature is not a sufficient evidential reason to corroborate Mr McAneaney's assertion that he did not intend to give a personal guarantee or to raise doubts about the otherwise clear personal nature of the guarantee.

[16] There is no dispute Mr McAneaney signed the guarantee as a condition of ongoing supply, or that on its face the text of the guarantee is intended to fix the person who signed it as guarantor with personal liability as if he were the principal debtor, and conversely that the text raises not the slightest possibility that the parties

meant or intended that AIS was to be its own guarantor. Had that been the intention of the guarantee, then AIS would have been named in Item A as the guarantor.

[17] It is against this background that Mr McAneaney's professed intention, when he signed the guarantee, needs to be considered: see *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74. There the Court said at 82 with respect to the correct approach to ascertaining intention or meaning:

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.

[18] The Courts also take an objective view in determining whether there has been valid contract formation: see *Mechenex Pacific Services Ltd v TCA Airconditioning (NZ) Ltd* [1991] 2 NZLR 393 at 397.

[19] Applying these principles, the only reasonably available understanding Mr McAneaney could have had when signing the guarantee was that he was signing and giving a personal guarantee.

[20] Further, the only reasonably available view of the placement of his signature was that it was inconsequential. The contrary view stretches the test of what is credible beyond the point of plausibility, and I reject it. This is one of those cases where a robust and realistic approach is warranted: see *Krukziener v Hanover Finance Ltd* (2008) 19PRNZ 162.

[21] In these circumstances, Mr McAneaney's signature can only reflect an intention to be held personally liable as surety. As a matter of construction, he must have intended to undertake personal liability. The contrary intention, which amounts to nothing more than an intention to provide a meaningless guarantee, is simply implausible.

[22] The answer to the first issue therefore is "no". There is no arguable case the Mr McAneaney did not intend to provide his personal guarantee when he signed the guarantee.

[23] That brings to me to the second submission raised on Mr McAneaney's behalf.

Issue 2 - Is the guarantee unenforceable because it was not validly executed?

[24] Again, the short answer is "no". My reasons follow.

[25] Counsel submitted in respect of the alternative argument that even if there was sufficient reason to find that Mr McAneaney did intend to assume liability as guarantor in his personal capacity, the result of his placing his signature in the incorrect space is that the guarantee is invalid. In other words, the guarantee on its face was effectively unsigned or it was signed by Mr McAneaney in the wrong capacity. Therefore it was submitted that it is not a guarantee that meets the requirements of s 27 of the Property Law Act, which requires that to be enforceable contracts of guarantee must be:

- a) In writing, and
- b) Signed by the guarantor.

[26] The guarantee is in writing. It is also signed by the guarantor, albeit that the signature is not in the correct space. For the reasons already discussed there is no merit in the argument that the guarantee cannot be treated as bearing Mr McAneaney's signature simply because he placed his signature in the wrong space. The fact that he signed in the wrong space is inconsequential and does not give rise to an issue of enforceability.

Result

[27] It follows that there should be an order for summary judgement.

[28] CSR has met the requirement in Rule 12.2 of the High Court Rules to satisfy the Court that the defendant has no defence. That was explained by the Court of Appeal in *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 as follows:

In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.

[29] The Court added at 4:

Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

[30] In *Australian Guarantee Corporation (NZ) Ltd v McBeth* [1992] 3 NZLR 54 at 59 the Court said:

Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.

[31] Here there is no bona fide defence. The plaintiff's verification that it was provided with Mr McAneaney's personal guarantee stands unchallenged by any tenable defence.

Orders

[32] The orders I make are:

- a) There will be an order for summary judgment in the sum of \$480,903.32, plus interest at the rate of 24% per annum from 15 May 2008 to the date of judgment;
- b) There will be a costs order in favour of CSR on a 2B basis, plus disbursements as fixed by the Registrar.

Associate Judge Sargisson