

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

CIV-2010-454-831

BETWEEN	RAVENSDown FERTILISER CO- OPERATIVE LIMITED Plaintiff
AND	MELVYN CLAUDE EVELEIGH First Defendant
AND	DARREN CRAIG EVELEIGH Second Defendant

Hearing: 11 May 2011

Counsel: M. Fogarty - Counsel for Plaintiff
K. Johnston - Counsel for Defendants

Judgment: 30 June 2011

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

*This judgment was delivered by Associate Judge Gendall on 30 June 2011 at 3.00 pm
under r 11.5 of the High Court Rules.*

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Introduction

[1] This is an application by the plaintiff, Ravensdown Fertiliser Co-operative Limited, seeking summary judgment against the defendants, Melvyn Claude Eveleigh and Darren Craig Eveleigh, pursuant to personal guarantees said to be given for the supply of goods and services to the defendants' company, Eveleigh Farming Company Limited (in receivership) (the Company).

[2] The application is opposed by the defendants.

[3] The defendants are directors and shareholders of the Company. Between 2002 and 2009 the plaintiff supplied fertiliser and related products and services to the Company on various credit terms.

[4] The plaintiff now applies for summary judgment against the defendants pursuant to r 12.2 High Court Rules as a result of its claim that the defendants personally guaranteed all amounts which were payable under the supply contract between the Company and the plaintiff .

[5] The plaintiff contends that the defendants provided their respective personal guarantees in late November 2005 under a signed contract with the plaintiff headed "Application for Super Plan Extend" (the Extended Credit Agreement).

[6] On 7 July 2010 the Company was placed into receivership.

[7] The Company owes the plaintiff first, \$393,494.78 for goods and services provided in November and December 2008, secondly \$104,227.02 for contractual penalty interest (at 2% per month) between 20 September 2009 and 23 November 2010, thirdly contractual penalty interest accrued from 23 November 2010 until the date the debt is paid, and fourthly, solicitor/client costs on its default under the Extended Credit Agreement.

[8] The defendants do not appear to contest any of this quantum claim. Before me, Mr Johnston counsel for the defendants confirmed that although liability is strongly denied, the quantum amounts noted above are not challenged.

[9] Given that the Company has been placed into receivership and recovery from it of any amounts owing to the plaintiff is unlikely, the plaintiff now seeks to recover from the defendants as guarantors of the Company's obligations all amounts owing to it.

Summary Judgment Principles

[10] The present summary judgment application is brought pursuant to r 12.2(1) of the High Court Rules which provides:

12.2 Judgment when there is no defence or when no cause of action can succeed

- (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[11] The principles of summary judgment have been summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26]:

The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

Counsels' Submissions and My Decision

[12] As I have noted above, it is not contested by the parties here that the debts outlined at para [7] above are owing by the Company to the plaintiff. What is the key issue before me in the present proceeding is the claim by the defendants that they are not responsible for these debts as they did not give personal guarantees of the Company's obligations. This is because they contend they signed the November 2005 Extended Credit Agreement in one capacity and one capacity only which was

on behalf of the Company as two of its directors and not in their personal capacities as guarantors.

[13] It is clear that to be enforceable a guarantee must be in writing and signed by the guarantor or a person authorised by the guarantor – ss 2(1)(d) and 2(2) Contracts Enforcement Act 1956 (the applicable Act at the time the guarantee was provided in 2005). Further, although a guarantee need not be in any particular form nor use any particular words, it must show clearly that the alleged guarantor is binding himself to answer for the default of the principal debtor – *Gibbons v Summers*, HC, Rotorua, 28 September 2007, CIV-2007-463-202.

[14] The guarantee provision here in the Extended Credit Agreement is near the foot of page 2 on the reverse side of the document and states:

Guarantee (where the applicant is a Company)

I/We the Directors of the Company agree to guarantee all amounts which are payable to you at any time by the Company and acknowledge that you may demand and recover from us any amounts which are payable by the Company instead of or as well as demanding payment from the Company.

[15] I am satisfied that on their plain and ordinary meaning the words of the guarantee noted in para [14] above are clear and unambiguous and do constitute a personal guarantee obligation – see *Robinson v Tanners Timberworld Ltd* CA301/90, 16 May 1991.

[16] Returning to page 1 of the Extended Credit Agreement the defendants both signed on this page of the document but only once under a section headed “Signing and Acknowledgement” that reads as follows:

Signing and Acknowledgement

I/We apply for Ravensdown Fertiliser Co-operative Ltd’s extended credit facility (Super Plan Extend) and agree to comply with the Terms and Conditions on the reverse. I/We acknowledge receipt of a copy of the Terms and Conditions and waive any right to receive from Ravensdown a copy of any financing statement, financing change statement or verification statement that is registered, issued or received at any time in relation to the Terms and Conditions.

Signed: “See below”

Name: “Eveleigh Farming Co Ltd”

Position: _____

Date: _____

Where the applicant is a Company/Partnership/Trust, all of the Directors/Partners/Trustees must also sign the acknowledgement below:

“M.E. Eveleigh”

“D. Eveleigh”

Director

Director

Director/Partner/Trustee

[17] The key issue before me here therefore is whether the defendants, who were both directors and shareholders of the Company, signed the Extended Credit Agreement for the company only, in their respective capacities as directors of the

Company, and not personally as well as guarantors. In considering this, the intentions of the parties as gathered from the terms of the Extended Credit Agreement and the surrounding circumstances are important here.

[18] On these aspects, it is well established that a person is able to sign a contract once but in a dual capacity – *Chiswick Investments v Pevats* [1990] 1 NZLR 169 at 174.

[19] In *Vuletic v Contributory Mortgage Nominees Limited* CA250/05, 31 July 2006, however, the Court of Appeal went on to say at para [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 it may be inferred the signer's intention when affixing his or her signature.

[20] Before me, there appeared to be general agreement between counsel for both parties that, at this early summary judgment stage in this proceeding, there is no extrinsic evidence of intentions and events relating to the guarantee and the purported execution of the Extended Credit Agreement sufficient to dispose of this matter. The issue on the present application reduces itself therefore to a consideration of whether the words used in and the terms of the Extended Credit Agreement are sufficiently clear to leave me in no doubt that the defendants signed the contract not only for the Company in their capacity as directors but also personally as guarantors of the Company's liability.

[21] This brings me to consider the terms of the Extended Credit Agreement document itself. As I have noted, this document is headed "Application for Super Plan Extend" and contains two pages. On page 1 the key sections here are the first headed "Entity" and the second headed "Signing and Acknowledgement".

[22] Under the "Entity" section, the "Applicant" for the credit plan is noted as the Company, its address and contact details are provided and under the heading, "Names of Directors" details of the defendants have been completed.

[23] In the second section on page 1 headed “Signing and Acknowledgment”, it is clear that it is the Company which applies for the credit facility. As I have noted, this section specifically states in part:

I/we apply for Ravensdown Fertiliser Co-Operative Limited’s extended credit facility (Super Plan Extend) and agree to comply with the Terms and Conditions on the reverse. I/we acknowledge receipt of a copy of the Terms and Conditions ...

[24] In the signing section under this “Signing and Acknowledgement” portion of the contract as noted above, the following has been recorded:

Signed: “See Below” Name: “Eveleigh Farming Company Limited”

Position: Date:

Where the applicant is a Company/Partnership/Trust, all of the Directors/Partners/Trustees must also sign the acknowledgment below:

“M E Eveleigh” (Director) “D Eveleigh” (Director) Director/Partner/Trustee

[25] It is plain that strictly speaking this section of the Extended Credit Agreement has not been completed correctly. It should have been signed at the top by the person or persons who were signing on behalf of the Company and they should have recorded their names and positions. This did not occur. Instead, no doubt, because of some confusion on the part of the defendants to whom the document had been sent by the plaintiff, the area for signature on behalf of the Company simply stated:

Signed: “See below”.

[26] As can be seen from that part of the “Signing and Acknowledgement” section of the contract noted at [24] above, the second execution section specified three capacities in which a person could sign – “Director/Partner/Trustee”. In this case, the defendants have clearly signed crossing out the words “Partner” and “Trustee” from this attestation clause leaving the word “Director”.

[27] In my view there can be no doubt that, at the very least, the defendants signed the Extended Credit Agreement as directors of and on behalf of the Company. In doing so they clearly agreed that the Company would comply with the applicable

terms and conditions on the reverse side second page of the Extended Credit Agreement.

[28] The real question here is whether it is arguable, as Mr Johnston for the defendants contends it plainly is, that the defendants signed only on the Company's behalf and not personally as guarantors.

[29] What is clear in this case is that the defendants, in signing the Extended Credit Agreement when it was forwarded or left with them for this purpose, also noted in their own handwriting on this standard form provided by the plaintiff in the place for signature by the Company, the words: "See below". In my view, it was intended that their signatures "below" would be seen at the very least as being on behalf of the Company and thus binding it.

[30] As I have already noted, above the actual signatures of the defendants on the Extended Credit Agreement are the words:

Where the applicant is a Company/Partnership/Trust, all of the Directors/Partners/Trustees must also sign the acknowledgement below.

(emphasis added)

[31] On the plain words of the document, Mr Johnston for the defendants contends that the most that can be said is that if the defendants seem to have signed the contract both for the company and in some other capacity, in that second capacity they were simply signing an "acknowledgement".

[32] To ask what that means requires me to return to the first part of this operative "Signing and Acknowledgement" section of the contract from which the "Applicant" who is noted as the Company:

- (a) applies for credit; and
- (b) agrees to the Terms and Conditions on page 2; and

- (c) acknowledges receipt of a copy of those Terms and Conditions and waives certain rights to other material probably to ensure that the plaintiff does not fall foul at the outset or in the future of any relevant consumer legislation in this area.

[33] It is not disputed that the reverse side page 2 of the Extended Credit Agreement contains the guarantee clause which takes the form I have outlined at [14] above:

[34] This “Guarantee” is clearly a statement by the “Directors of the Company” and not by the Company itself. It is contended for the plaintiff that it is an acknowledgement that the directors making the application for “Super Plan Extend” on behalf of the company are extending their personal guarantees.

[35] There can be no doubt in my mind that the Extended Credit Agreement contemplated personal guarantees being given where a company itself was the applicant. In addition, the plaintiff clearly intended the guarantee clause to be applicable immediately the Extended Credit Agreement was signed. There is no separate guarantee agreement. The guarantee clause is said to be an integral part of the Extended Credit Agreement and the plaintiff suggests that if the defendants had not provided personal guarantees here it would not have provided the credit facility to the Company or later increased its credit limit under the facility.

[36] Be that as it may, I remind myself that the application before me is one for summary judgment on which the plaintiff needs to satisfy me that the defendants have no defence to the claim against them in the sense that there is no real question to be tried.

[37] On this, Mr Johnston for the defendants argued that the present case is clearly not one that is suitable for summary judgment. He contended that the background to this entire matter and a careful examination of the Extended Credit Agreement needs to occur at trial with further detailed evidence provided and tested. He suggests that the Extended Credit Agreement which is, in his words, the plaintiffs own “stock standard” contract document “is confusing and that it is a shambles document for a

large organisation such as the plaintiff”. He submits that any doubt about the form of the Extended Credit Agreement should be interpreted *contra proferentem* against the plaintiff as the author of the document, he suggests its wording is entirely unclear and finally, he says that the plaintiff also failed to draw the attention of the defendants to the guarantee requirement and guarantee clause “disguised” in the fine print at the foot of page 2 of the contract.

[38] In response, before me, Mr Fogarty for the plaintiff urged me to conclude that in reality there is no credible factual dispute between the parties in this case. He claimed first, that the terms of the guarantee contained in the Extended Credit Agreement itself are clear, secondly, from that contract there were always to be more than two parties, thirdly, the guarantee clause was an integral part of the contract, and fourthly that the Court should take a robust approach in considering the present application. He claimed also that in 2005 the plaintiff sent to the defendants their “Super Plan Extended Credit” brochure (a copy of which is annexed as Exhibit “HGH3” to the 26 November 2010 affidavit of Harley James Henderson filed on behalf of the plaintiff) and this brochure noted under “Terms of Trade” that a personal guarantee of the directors of an applicant company would be required to guarantee the credit provided. As I understand the position here, however, the defendants strongly contest that they received this brochure at any time. And at this point, there is no evidence before me to the contrary. In the face of this, before me, Mr Fogarty for the plaintiff went on to claim that even though the plaintiff believed the defendants had in fact received this brochure, in any event, it was irrelevant to the present application if they had not actually received it.

[39] All of this, of course, goes to the question whether the plaintiff had a duty to draw to the attention of the defendants the requirement that they would give a guarantee of the Company’s credit account and whether or not in this case it may have failed to discharge that duty – *L’Estrange v F Graucob Ltd* [1934] KBD 394 at 403.

[40] In summary, on the limited evidence which is at present before the Court, I reach the conclusion but only by a reasonably fine margin that it cannot be concluded here that the defendants unequivocally agreed to provide personal

guarantees before signing the Extended Credit Agreement. As in the cases of *Trotter v Avenmore Holdings Limited & Anor* CA162/047 July 2005 and *Vuletic v Contributory Mortgage Nominees Limited* CA250/05 17 May 2006 at this point on the evidence before me I can only conclude that there was no preceding oral agreement to guarantee provided by the defendants. Any personal guarantee here had to arise from their execution of the Extended Credit Agreement and thus a finding that the defendants signed this document in a dual capacity. As noted above, the defendants signed this contract in one place only. It was under the words “Where the applicant is a Company/Partnership/Trust, all of the Directors/Partners/Trustees must also sign the acknowledgement below”, (emphasis added). It is presumed that this “acknowledgement” refers to a related earlier paragraph in the same section of the Extended Credit Agreement “agreeing to comply with the Terms and Conditions on the reverse”. But this is not made entirely plain on the form of the contract itself, and in any event there does not seem to be any “acknowledgement” below, but rather a simple space for signatures.

[41] Although, in my view, there is a possible argument open to the plaintiff that the defendants here did sign the Extended Finance Agreement in a dual capacity and thus as personal guarantors as well as on behalf of the Company, there is equally a possible argument open to the defendants that they did not sign the contract here as guarantors. The presumption that if a signer of a contract purports to sign on behalf of a company he or she is signing only in that capacity in the present case may very well not be displaced by either the wording of the document itself, which is confusing to say the least, or any extrinsic evidence.

[42] By a fine margin only, therefore, I must conclude that the plaintiff in this case has not done enough to satisfy the onus upon it to show that the defendants have no arguable defence to the present claim against them. The question whether the defendants signed the Extended Credit Agreement in their capacity both as directors of the Company and personally to engage their guarantee needs to be fully explored at trial. The Court, in my view, would be assisted by a full examination of all the circumstances both leading to the execution of the Extended Credit Agreement and surrounding its execution in deciding whether or not the personal guarantee would take effect.

Conclusion

[43] For all these reasons the present application for summary judgment is dismissed.

[44] Costs are reserved pending final determination of this proceeding.

[45] The Registrar is directed to list this matter for call in the next Associate Judge's List for time tabling directions to be made towards trial.

‘Associate Judge D.I. Gendall’