IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-00974
[2014] NZHC 2136

BETWEEN	ALL METALS TRADING COMPANY LIMITED Plaintiff
AND	HADLEY JOHN WRIGHT Defendant

Hearing: 29 August 2014

Counsel: P Dalkie for Plaintiff
K Glover and C Hallowes for Defendant

Judgment: 5 September 2014

JUDGMENT OF ASSOCIATE JUDGE SMITH

Introduction

[1] The plaintiff applies for summary judgment on a guarantee given by the defendant in respect of rent and outgoings payable in respect of certain premises owned by the plaintiff at Alfred Street, Onehunga. The lessee was a company called Wire by Design Ltd (Wire). The lease was for a term of 3 years commencing 1 December 2010, and provided for annual rent of $364,000 per annum plus GST.

[2] There were three guarantors, the defendant Mr Wright, and two companies with which Mr Wright was associated, namely Eagle Wire Products Ltd (Eagle) and Tawil Holdings Ltd (Tawil).

[3] The guarantee is contained in an Agreement to Lease dated 1 December 2010. It is in the following terms:

> The guarantor (and if more than one jointly and severally), in consideration of the landlord entering into this Agreement at the guarantor's request, agrees with the landlord to guarantee to the landlord the obligations of the tenant and to sign the lease as guarantor.

[4] An additional cl 8 provides that "the guarantee of [the defendant] shall be limited to 12 months rent and outgoings".

[5] Clause 4 of the Agreement to Lease provided for the parties to enter into a formal lease in the Auckland District Law Society's standard form. It appears that no lease was ever executed, but the tenant went into possession of the premises and payments of rent were made. The plaintiff relies on cl 4.3 of the Agreement to Lease, which provides:

> Notwithstanding that the lease may not have been executed the parties shall be bound by the terms, covenants and provisions contained in the Agreement and in the Lease as if the Lease had been duly executed.

[6] The first six months' rental was secured by a guarantee provided by New Zealand Transport Agency (NZTA), pursuant to arrangements made following the compulsory acquisition of a property which one of Mr Wright's companies had been occupying in Stoddart Road, Mount Roskill.

[7] Wire fell into default with payments under the Agreement to Lease, and it was placed in receivership on 9 May 2012.

[8] The plaintiff says that a total of $405,577.01 is outstanding for rent and outgoings under the lease. It has pursued liquidation proceedings against Mr Wright's co-guarantors, Eagle and Tawil, but no recovery has been made from them. Both are now in liquidation.

[9] Mr Wright opposes the application for summary judgment. He acknowledges that he provided a personal guarantee, but says that it was only supposed to operate for the first 12 months of the lease. He says that rent and outgoings have been paid for that period. Mr Wright also contends that the plaintiff has failed to comply with certain alternative dispute resolution procedures contained in the Agreement to Lease.

Background

[10] The Agreement to Lease was preceded by no fewer than three other Agreements to Lease the same premises, all of which were made by the plaintiff in the period between August and December 2010. All of the agreements were made on the Auckland District Law Society's standard form of Agreement to Lease, and in each case the lessee was a company associated with Mr Wright.

[11] The first Agreement to Lease was made between the plaintiff and Eagle in early August 2010. Mr Wright was a guarantor, but in this agreement his guarantee was limited to "six months' rent and outgoings". The August 2010 Agreement to Lease was conditional on agreement being entered into between the Crown (for NZTA) and the lessee for the payment of advance compensation under the Public Works Act 1981, becoming unconditional by 5pm on 6 August 2010.

[12] After this agreement was signed, Mr Wright asked the plaintiff if another of his companies, Faulkner Collins Ltd, could be substituted as tenant. The plaintiff agreed, on the basis that Mr Wright, Eagle, and Tawil would guarantee the lease to Faulkner Collins. A substitute Agreement of Lease was signed on 30 September 2010. This time, Mr Wright's guarantee was stated to be limited to 12 months' rent and outgoings. This second form of agreement remained conditional on agreement being reached between the Crown and the tenant for advance compensation, the date for satisfaction of that condition being extended to 12 October 2010. There was also a condition expressed in the following terms:

> 9.2. The agreement is further conditional upon the Tenant procuring the Crown to pay direct to the Landlord on terms acceptable to it for the initial term of the lease the compensating rental.

[13] The third Agreement to Lease was entered into with Faulkner Collins on 16 November 2010. The date for satisfying the advance compensation agreement condition was further extended to 19 November 2010. Mr Wright's guarantee was still expressed as being "limited to 12 months' rent and outgoings". Clause 9.2 in the second agreement was deleted.

[14] The fourth (and final) form of the agreement was the agreement with Wire on which this proceeding in based. The agreement was made after Faulkner Collins was put into liquidation on 24 November 2010.

[15] In his evidence, Mr Wright listed a number of matters which he says formed the basis on which the lease negotiations proceeded. One was that the Crown would be responsible for lease payments until the business which Mr Wright's company had been operating at Stoddard Road had been relocated to the Alfred Street property. He says that was estimated to take between nine and 12 months. The Agreement to Lease was to be approved by the Crown**.**

[16] He says that he initially agreed to provide only a six month guarantee of the tenant's obligations, and that it was "clearly understood by all parties that any personal guarantee was only for a six month period which started when the lease commenced." He later agreed to extend that period to 12 months, again commencing on the date the lease commenced. Mr Wright says that he agreed to the extension because the Crown had by then agreed to pay the first six months' rental and outgoings, so his exposure would effectively remain at six months' rental and outgoings: there was no risk of the Crown defaulting. He says that he told the plaintiff's Mr Westgaard these things, and that he would not have entered into an open-ended guarantee. He claims that there was a clear understanding between the plaintiff and himself that he was only guaranteeing the first 12 months' rent and outgoings, running from 1 December 2010.

[17] Mr Wright asserts that there are documents to support this but they are held by Wire's receiver and cannot be obtained easily at this time.

[18] Mr Wright also refers to a judgment given by Christiansen AJ on unsuccessful stay applications made by Eagle and Tawil in the liquidation proceedings brought against them by the plaintiff.[1] At paragraph [24] of his judgment given on 6 March 2013, the Associate Judge noted that:

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1 *All Metals Trading Company Ltd v Eagle Wire Products Ltd* [2013] NZHC 425.

> [Mr Wright's] personal guarantee was limited to rental arrears, if any, which accrued during the first year of the lease. It appears to be the case that no rental arrears accumulated during that period.

[19] However Mr Wright was not a party to those proceedings, and it is not suggested that the Associate Judge's statement creates any issue estoppel in this proceeding. Nor is it clear whether the point now raised by Mr Wright was the subject of more than peripheral attention at the hearing.

[20] Mr Wright also relies on an affidavit sworn by the Wire/Eagle/Tawil group's former chief financial controller, Mr Tennent. Mr Tennent says that he attended a number of meetings at which the Agreements to Lease were negotiated.

[21] Mr Tennent says that "it was clear in the meetings that I attended that [Mr Wright's] personal guarantee was intended to be limited…to the first 12 months of the lease…". He says that it was "made clear to everyone" in the discussions that Mr Wright's guarantee would commence when the lease started, and would terminate at the end of the first 12 month period. He says that this was expressly linked to the compensation arrangements with the Crown, and the plaintiff knew that.

[22] In his first reply affidavit, Mr Westgaard denies that there was any discussion that Mr Wright's guarantee would be limited to the first 12 months. He says he would never have accepted such a limitation.

[23] Mr Westgaard produced with his first reply affidavit an email dated 23 September 2010 from the plaintiff's solicitor to the barrister then acting for Mr Wright. In this email, Mr Wright's barrister was asked to note that "the personal guarantee of Hadley Wright is for 12 months".

[24] In an affidavit dated 15 August 2014, Mr Wright says that from the beginning of the lease the plaintiff applied rent payments to the earliest period and to the earliest arrears (if any). But at some point this policy was changed, without any notice to Wire.

[25] Working from rent records provided to Wire by the plaintiff and information obtained from Tawil, Mr Wright identified a total of 12 payments made between

1 May 2011 and 11 April 2012 which he says should have been credited to rent and outgoings payable in the first twelve months of the lease. The total of these payments was $244,178.37.

[26] At paragraphs [14] and [15] of his updating affidavit, Mr Wright says:

> When these payments are correctly applied to the plaintiff's rent account the rent arrears at the end of the first 12 month period is only $17,687.14.
>
> The above payments have been verified by James Tennent, the group's financial controller.

[27] At the commencement of the hearing, Mr Dalkie submitted a further affidavit in reply from Mr Westgaard, attaching copies of the plaintiff's relevant bank statements into which payments for rent and outgoings under the lease were said to have been paid. Mr Glover and Mr Wright reviewed the bank statements over the luncheon adjournment, but Mr Glover was unable to confirm that $17,687.14 was the exact sum owing to the plaintiff at the end of the first 12 months of the lease term. Mr Wright maintained the position that $17,687.14 is the *maximum* which might then have been owing to the plaintiff on his interpretation of his obligations under the guarantee.[2]

Summary Judgment Principles

[28] Under r 12.2 of the High Court Rules, a plaintiff may obtain summary judgment where it is clear that the defendant has no arguable defence. The procedure is not appropriate where material issues of fact are disputed, and it may not be appropriate where an issue cannot be properly determined without all of the evidence that would be available to the trial Judge, including evidence obtained from the other party (or from third parties) on discovery and evidence given by witnesses under cross-examination.[3]

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[2] Mr Glover raised the possibility that additional payments may have been made into the plaintiff's bank account which Mr Wright would not necessarily recognise. At least one subtenant of Wire, Master Maintenance Services Ltd was making subrent payments direct into the plaintiff's bank account, and the suggestion was made that a debtor of one of Wire's subtenants may have satisfied its obligations to that subtenant by making a subrent payment for that subtenant directly into Wire's bank account. But there was no evidence that that occurred. It appears to be little more than speculation on Mr Wright's part.

[3] See generally *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) 5.

[29] Sometimes disputes over the interpretation of written contracts will be unsuitable for summary judgment. An example of such a case is the Court of Appeal decision in *E & E Development Ltd v Housing New Zealand Ltd & Anor*, where the Court of Appeal determined that a dispute over the wording of a provision in a lease was unsuitable for determination on a summary judgment application.[4] The Court of Appeal noted that the background evidence was "sparse", and that further evidence at trial might affect the Court's tentative conclusion on the interpretation issue.[5]

Issues

[30] The following are the issues for determination:

(1) What is the effect of the alternative dispute resolution clause in the Agreement to Lease, and the arbitration clause in the Auckland District Law Society's standard form of lease? Do these provisions preclude the plaintiff's claim?

(2) What is the correct interpretation of the guarantee cl 8.1? Was it intended to operate as a monetary cap on Mr Wright's liability, or was it intended to create a temporal limitation, so that he would only be liable for rent and outgoings for the first 12 months of the lease?

(3) If the limitation to 12 months' rental and outgoings was intended to provide a monetary cap on Mr Wright's liability (and not to limit the operation of the guarantee to the first 12 months of the lease), does Mr Wright have arguments for rectification of the Agreement to Lease, or estoppel, which should be allowed to go to trial?

(4) If Mr Wright's interpretation of cl 8.1 is correct (guarantee limited to rent and outgoings payable in the first 12 months of the lease), does Mr Wright have an arguable defence in respect of the sum of $17,687.14?

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4 *E & E Developments Ltd v Housing New Zealand Ltd & Anor* [2012] NZCA 7.
5 At [20] – [21].

[31] I will address each of these issues in turn.

Issue 1: What is the effect of the alternative dispute resolution clause in the Agreement of Lease, and the arbitration clause in the Auckland District Law Society's standard form of lease?

[32] Clause 5 of the Agreement to Lease provided as follows:

> **5.0** Dispute resolution
>
> **5.1** Unless otherwise provided in this Agreement if a party considers that there is a dispute in respect of any matters arising out of, or in connection with this Agreement, then that party shall immediately give notice to the other party setting out details of the dispute. The parties will endeavour in good faith to resolve the dispute between themselves within five (5) working days of the receipt of the notice, failing which the parties will endeavour in good faith within a further ten (10) working days to appoint a mediator and resolve the dispute, time being of the essence
>
> **5.1** Neither party will commence legal proceedings against the other except for injunctive relief before following the procedure set out in sub-cl 5.1.

[33] In this case, a letter of demand was sent by the plaintiff's solicitors to Mr Wright on 19 May 2012. Attached with it was a schedule of rent and outgoings said to be owing as at 3 May 2012. The plaintiff made demand for payment.

[34] There is no evidence that Mr Wright made any response. On the evidence produced, he appears to have failed to comply with his cl 5.1 obligation to immediately give the plaintiff notice setting out details of the dispute.

[35] It is not clear what happened after the plaintiff sent the May 2012 letter to Mr Wright. There appears to have been no follow-up until some time shortly before 29 August 2013, when the plaintiff's solicitors wrote to Mr Wright's barrister making a further demand for payment. It appears that this letter had been preceded by some discussion between Mr Wright and Mr Westgaard, but nothing had been resolved. Mr Wright's barrister replied promptly, setting out Mr Wright's arguments on the interpretation of cl 8.1. But he did not propose good faith discussion in an attempt to resolve the dispute, of the kind referred to in cl 5.1. He concluded his letter by seeking confirmation that the plaintiff would not take the matter further, adding:

> If it does, this letter will be exhibited to the Court in support of a submission that [the plaintiff] should pay solicitor/client costs on an indemnity basis for any failed attempt to seek summary judgment.

[36] In my view, the terms on which Mr Wright's barrister concluded his letter as set out above, read against the background of discussions having earlier taken place between Mr Wright and Mr Westgaard, sufficiently show that Mr Wright waived any rights he may still have had by August 2013 to call for further good faith discussion, or to refer the dispute to mediation.

[37] I conclude that Mr Wright has no defence under cl 5.2 of the Agreement to Lease.

[38] Although there is an arbitration clause in the Auckland District Law Society's standard form of Deed of Lease, Mr Wright did not seek to invoke it in opposition to the application for summary judgment. And no application has been made under the Arbitration Act 1996for a stay of the proceeding. But even if such an application had been made I do not believe it would have precluded the Court from considering whether Mr Wright has an arguable defence. An arbitration provision will not normally usurp the summary judgment process.[6] If and to the extent that a defendant cannot show an arguable defence, there is normally nothing to which the arbitration provision can apply.

[39] I conclude that neither cl 5 of the Agreement to Lease nor the arbitration provision in the form of the Deed of Lease will preclude the entry of summary judgment, if and to the extent that I find some amount is payable to the plaintiff on Mr Wright's interpretation of cl 8.1.

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6 *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd* [2013] NZCA 180; [2013] 3 NZLR 219.

Issue 2: What is the correct interpretation of the guarantee cl 8.1? Was it intended to operate as a monetary cap on Mr Wright's liability, or was it intended to create a temporal limitation, so that Mr Wright would only be liable for rent and outgoings for the first 12 months of the least term?

[40] As the Court of Appeal noted in *Trustees Executors Ltd v QBE Insurance (International) Ltd*,[7] the approach to contractual interpretation in New Zealand is based on principles set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[8] as applied by the New Zealand Court of Appeal in *Boat Park Ltd v Hutchinson*.[9] The principles were later reviewed by the Supreme Court in *Vector Gas v Bay of Plenty Energy Ltd*.[10]

[41] In *Trustees Executors Ltd*, the Court of Appeal derived the following interpretation principles from *Vector Gas*:

(1) The language the parties have used must be read in the context of the document as a whole and the surrounding circumstances.

(2) The wider background and circumstances in which the contract was made should always be considered: there is no need for any ambiguity or other interpretive difficulty for the Court to take background circumstances into account.

(3) Evidence of background circumstances is not admissible if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or to prove what a party's negotiating stance might have been at a particular time.

(4) While it usually makes sense to start with the words of the contract, and then move to the context of the contract before considering the wider background and circumstances, there is no presumption in favour of ordinary meaning. A meaning which on its face (and devoid

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7 *Trustees Executors Ltd v QBE Insurance (International)Ltd* [2010] NZCA 608.

8 *Investors Compensation Scheme Ltd v West Bromich Building Society* [1998] 1 WLR 896; [1998] 1 ALL ER 98 (HC).

9 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

10 *Vector Gas v Bay of Plenty Energy Ltd* [2010] NZSC 5;[2010] 2 NZLR 444.

> of any external context) is plain and unambiguous, may not ultimately be what the parties intended when considered against all relevant circumstances.

[42] To that summary, I think the following may be added. The essential exercise is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge available to the parties in the situation in which they were at the time of making the contract. While the plain meaning of a contractual provision may be departed from, the plain meaning must be such that the parties cannot sensibly be taken to have agreed to it: something must have gone wrong with the language.[11] The Court may consider the reasonableness of results when choosing between rival interpretations, however caution is needed if a construction contended for would amount to a substantial re-writing of the contract. For example, if parties have chosen in their contract specific criteria to satisfy their commercial objective, it is not for the Courts to substitute different criteria, not stated in the contract, on the grounds that the different criteria would satisfy the commercial objective equally well or better.[12]

[43] Mr Dalkie submits that there is no ambiguity in cl 8.1: it is clear that the clause was intended to create a monetary cap on Mr Wright's liability equivalent to 12 months rent and outgoings, and it does not matter when during the lease term the defaults giving rise to the liability occurred. In his submission, it would have been a simple matter for the author of the clause to have added the words "the first" before the words "12 months' rent and outgoings" if that had been the intention. Furthermore, Mr Wright agreed to the same wording through four separate iterations of the agreement, without any suggestion that the words used in cl 8.1 did not capture what the parties intended. On Mr Dalkie's submission, the issue is a simple one of giving the words used in the contract their plain, ordinary meaning. Nothing is added by looking to the background circumstances.

[44] I accept that the plain meaning of the words used in cl 8.1 of the Agreement to Lease is a sensible starting point. And I would accept that if that was as far as one

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[11] Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [6.22].

[12] *Yoshimoto v Canterbury Gold International Ltd* [2002] UKPC 40; [2004] 1 NZLR 1.

looked, the words used would be more apt to create a general cap on Mr Wright's liability, rather than limit his liability to rent and outgoings payable in respect of a defined period within the lease term. However it is clear on the cases that the Court must consider not only the words used, but also the commercial context in which they were used. That will include the background circumstances known to both parties.[13]

[45] In this case, I think the background circumstances must include the three earlier Agreements to Lease entered into by the plaintiff and Mr Wright's companies. It must also include the compensation arrangements made between the Crown and Mr Wright's companies, at least to the extent that those arrangements were known to the plaintiff.

[46] In addition, there is the parties' evidence of background circumstances which may shed light on the meaning of the words used in the relevant guarantee provision. Mr Wright says that the plaintiff and Wire expected that by the end of the first 12 month period NZTA would have relocated Wire's business to the Alfred Street premises. The business would be fully re-commissioned, and by the end of that period Wire would be able to meet its commercial obligations. It seems to me that the plaintiff must have been keenly interested in how Wire would fare commercially following the move from Stoddard Road, especially after the replacement of Eagle as lessee and the subsequent liquidation of Faulkner Collins. It is not improbable that the parties discussed the impact of the change of premises and how long it might take Wire to get its operations in the new premises on a sound commercial footing.

[47] Mr Wright's evidence is that, while NZTA agreed with Wire to pay six months' rent on the Alfred Street property, it would not initially agree to pay that compensation direct to the plaintiff.[14] It wanted to make the payment to Mr Wright's company. Mr Wright says that this is the reason cl 9.2 (tenant to procure the Crown to pay rent direct to the plaintiff) was deleted from the first agreement. He says that his personal guarantee was extended from six months to 12 months in the later

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13 *Vector Gas Ltd v Bay of Plenty Electricity Ltd*, above n 10, at [22] and [64].

14 At some point between completion of the first agreement and the signing of the final agreement with Wire, NZTA did agree to pay rent direct into the plaintiff's bank account, and that is what happened.

agreements, as the plaintiff required certainty that the first 12 months' rent would be paid.

[48] Mr Wright says that he was prepared to agree to an extension of his guarantee from six months' rent and outgoings to 12 months, because in reality his exposure would only remain at six months' rent and outgoings (being the second six month period following the commencement of the lease): there was no risk of NZTA defaulting on payment of the rent for the first six months.

[49] The principal question mark thrown up by the earlier agreements is why the plaintiff was prepared to accept a six months' limitation of Mr Wright's liability in the first agreement, while the following three agreements all provided for a 12 months' limitation.

[50] If the plaintiff is correct on the interpretation of Mr Wright's guarantee, Mr Wright was effectively doubling his financial exposure from the position he had been prepared to accept in the first form of agreement. It is not clear on the evidence why he would have been prepared to do that.

[51] NZTA's responsibility to the plaintiff was clearly temporal: it applied only in respect of the first six months of the lease. If Mr Wright's guarantee obligation (and especially the change from the six months to the 12 months) is considered against the background of what NZTA was prepared to do, it may be that Mr Wright's obligation was also intended to be temporal in nature i.e. covering the six month period immediately after NZTA stopped paying the rent.

[52] There is little or no evidence on the role played by NZTA, the deletion, reinstatement, and subsequent deletion again of cl 9.2, or the linkage if any between the arrangements for NZTA to pay the rent and the nature and extent of Mr Wright's guarantee. In all the circumstances, I think this is a case where I cannot say (with sufficient certainty to enter summary judgment) that no further evidence is likely to be adduced which would affect the interpretation of cl 8.1.

[53] In those circumstances, the issue is not suitable for determination on a summary judgment application. The case is similar in that respect to *E & E Development Ltd v Housing New Zealand Ltd & Anor*, where the Court of Appeal was not satisfied that the "sparse" background evidence was adequate for it to rule definitively on the lease interpretation issue with which that case was concerned.[15]

Issue 3: If the limitation to 12 months rental and outgoings was intended to provide a monetary cap on Mr Wright's liability (and not to limit the operation of the guarantee to the first 12 months of the lease), does Mr Wright have arguments for rectification of the Agreement to Lease, or estoppel, which should be allowed to go to trial?

[54] If I am wrong in my view that the interpretation issue is not suitable for the entry of summary judgment, because there is likely to be "background circumstances" evidence not presently before the Court which could affect the interpretation of cl 8.1, it appears to me that Mr Wright would still have an arguable defence in the law of estoppel, whether by representation or convention, of the kind discussed by the Supreme Court in *Vector Gas*. In *Vector Gas*, Tipping J noted that an estoppel would usually arise from the adoption of a special meaning, but it is in cases where words are capable of bearing more than one meaning that estoppel is likely to have its primary application.[16] There are possibilities of one party to a contract being estopped from denying one of two possible meanings, or that the parties may have made an agreement, outside the four corners of the contract itself, as to some aspect of its meaning.

[55] Tipping J referred to the decision of Kerr J in the *Karen Oltman* where the issue was whether the words in a break clause "after 12 months trading" meant "on the expiry of 12 months" or "at any time after the expiry of 12 months".[17] Kerr J admitted evidence of negotiations in the form of telex exchanges.

[56] Tipping J noted that the case involved interpretation of an expression with two possible meanings. Tipping J said:[18]

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15 *E & E Development Ltd v Housing New Zealand Ltd & Anor,* above n 3 at [20].
16 *Vector Gas v Bay of Plenty Energy Ltd*, above n 12, at [34].
17 *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd (Karen Oltman)* [1976] 2 Lloyd's Rep 708 (QB).
18 *Vector Gas v Bay of Plenty Energy Ltd*, above n 12, at [36]-[37].

> If the parties agreed or represented to each other in the telexes that the word "after" meant "on the expiry of" and the agreement or representation was relied on when they entered into the time charter, the parties were each estopped by the agreement or representation from contending that the word "after" bore the alternative meaning. Indeed…they were bound by any such definitional agreement.
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> Of course, the court must be satisfied that an agreement or representation as to meaning reached or made during negotiations, was still operating at the time the contract was formed and represented a linguistic premise on which it had been formed…[In *The Karen Oltman*] the parties had consensually resolved which meaning was to apply, or an estoppel had been created, and evidence to that effect was admissible.

[57] McGrath J also considered the question of estoppel by convention in *Vector Gas*. He accepted that where lawyers are involved in framing contractual terms, strong and unequivocal evidence is required to warrant an inference of a common understanding that is inconsistent with what is expressly recorded in their contract.[19]

[58] In this case, Mr Tennent says that he participated in discussions with the plaintiff's representatives in which Mr Wright's guarantee was discussed. His evidence is that it was made clear to everyone at the discussions that Mr Wright's guarantee would commence when the lease started, and would terminate at the end of the first 12 month period. Mr Wright's evidence of these discussions was to the same general effect.

[59] Mr Dalkie criticised this evidence as being inadmissible (to the extent that it expressed an opinion about Mr Westgaard's state of mind), vague, and lacking in particularity.

[60] I have some sympathy with those criticisms: the evidence of Mr Wright and Mr Tennent on this issue is unsupported by any detail of precisely what was said, where, when, and to whom. However the email dated 23 September 2010 from the plaintiff's solicitors to Mr Wright's barrister arguably does lend some support to the evidence of Mr Wright and Mr Tennent on this point. The email said:

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[19] At [96]; referring to *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 (CA) at 225 per Gault J.

Please note:

…

2 the personal guarantee of Hadley Wright is for 12 months.

[61] On a plain reading of those words, I think it reasonably arguable for Mr Wright that the author was referring to the length of time Mr Wright's guarantee would continue, and not to any general liability cap. If that is right, the most likely period of 12 months would be the first 12 months of the lease.

[62] On the evidence produced, a defence in either estoppel by convention or estoppel by representation is arguable.

Issue 4: If Mr Wright's interpretation of cl 8.1 is correct (guarantee limited to rent and outgoings payable in the first 12 months of the lease), does Mr Wright have an arguable defence in respect of the sum of $17,687.14?

[63] In his updating affidavit, Mr Wright states unequivocally that, on his own interpretation of cl 8.1, the rent arrears relating to the first 12 month period were $17,687.14. The payments on which he relies in calculating that figure were verified by Mr Tennent, a qualified accountant.

[64] Mr Wright speculates that further payments may have been made into the bank account in reduction of the rent and outgoings by a debtor or debtors of a subtenant, and might not be readily identifiable as a payment of rent or outgoings. But there is no evidence to support that suggestion and it seems an improbable scenario. Why would a debtor of a subtenant not simply pay the subtenant? I conclude that there is at least $17,687.14 owing to the plaintiff for arrears of rent and outgoings, referable to the first 12 months of the lease. The question is whether Mr Wright has raised a sufficient argument that his liability is not *higher* than that figure.

[65] Mr Westgaard produced with his affidavit sworn on 28 August 2014 a schedule which he says identifies all outstanding rent and payments received. It was supported by the plaintiff's bank statements for the period, with the credits highlighted on the bank statements. Mr Westgaard asserts that his schedule and bank

statements show that payments which Mr Wright says were made were never received.

[66] I am unable to determine on this application whether the various payments which Mr Wright says were made but have not been credited to Wire's account, were in fact made. I note that in a schedule which Mr Westgaard attached to an affidavit sworn on 12 August 2014, there were credits for payments of $2,592.56 and $30,835.26 made by Wire on 1 July 2011 and 1 September 2011 respectively, but neither payment appears to be recorded in the schedule produced by Mr Westgaard with his affidavit sworn on 28 August 2014. And neither payment appears to be shown as having being deposited into the bank account, statements from which were produced by Mr Westgaard. In addition, Mr Wright says that payments were made direct to the plaintiff by a subtenant, Master Maintenance Services Ltd. Those payments, (of $3,354.16 per month) *are* shown in the plaintiff's bank statements, but they do not appear as credits against rent and outgoings in the various schedules produced by Mr Westgaard.

[67] In the end, I cannot exclude the possibility that some payments made by or on behalf of Wire may not have been included in the plaintiff's schedules, or may not have been paid into the bank account which was produced. In those circumstances I am not prepared to enter judgment on a summary basis for any figure higher than the $17,687.14 which I find is the amount owing on Mr Wright's (arguable) interpretation of cl 8.1.

[68] Accordingly, there will be summary judgment for the plaintiff in the sum of $17,687.14.

Summary

[69] I give summary judgment to the plaintiff for the sum of $17,687.42. The plaintiff's claim for rent and outgoings over and above that sum is to proceed to trial (or arbitration as may be appropriate).

[70] The costs of the application are reserved.

Associate Judge Smith

Solicitors:
Dyer Whitechurch, Auckland for plaintiff
Schnauer and Co Limited, Auckland for defendant