IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-007049
[2013] NZHC 1707

BETWEEN	CRANE DISTRIBUTION (NZ) LIMITED (trading a Mico Plumbing) Plaintiff
AND	GREGORY DAVID DURRANT Defendant

Hearing: 24 June 2013

Appearances: Mr R Connell for Plaintiff
Mr J B Samuel for Defendant

Judgment: 5 July 2013

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***5.07.13 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..

Background

[1] The plaintiff, Crane Distribution (NZ) Limited (trading as Mico Plumbing), carries on business as a wholesaler and retailer of electrical and plumbing supplies. A company called Insight Plumbing North Harbour Limited ("Insight") entered into a credit account agreement with the plaintiff on 14 November 2011. It was signed on behalf of Insight by Mr Durrant, the defendant. The defendant also signed a guarantee in the following form:

> In consideration of the Provision of Credit to *INSIGHT PLUMBING NORTH HARBOUR LTD* (the Applicant)
>
> (Please print in full)
>
> I *GREG DURRANT* of *106 TUCK RD* (town) And
>
> [1] I _____ of *WHANGAMATA* (town)
>
> **GUARANTEE**
>
> hereby jointly and severally guarantee due and punctual payment to CRANE DISTRIBUTION NZ LTD (CRANE) of all money as and when the same shall become due and payable by the Applicant.
>
> I/we acknowledge and agree that:
>
> 1. I/We will be deemed to be a principal debtor(s) and not merely a surety(-ies), and jointly and severally liable with the Applicant to pay the moneys; and
> 2. I/we indemnify CRANE against all loss or costs (including without limitation costs of enforcement) incurred by CRANE should the Applicant fail to comply with the Terms and Conditions or pay all monies as it falls due; and
> 3. CRANE may require me/us to pay such monies and to indemnify CRANE as aforesaid without CRANE first taking proceedings against the Applicant or any other person; and
> 4. My/Our liability under this guarantee shall be a continuing guarantee and shall not be discharged by any settlement or account; and
> 5. My/Our liability under this guarantee shall not be discharged by any variation of the Terms and Conditions which may be agreed by CRANE and the Applicant, any waiver, extension of time or credit or other indulgence given to the Applicant, or any other act or omission which, but for this provision, might operate to discharge or impair the effect of this guarantee.
> 6. I/We acknowledge having read and understood the terms of this guarantee and have been advised, and been given the opportunity, to seek independent legal advice prior to signing.

[2] Disputes arose between the parties about what the plaintiff alleged were unpaid debts and the parties ceased trading together. The plaintiff issued

proceedings against the defendant on 22 November 2012. The plaintiff sought summary judgment for the sum of $135,050.37. In the usual way the plaintiff provided an affidavit verifying the statement of claim and deposing to the company's belief that the defendant had no defence to the plaintiff's claim.

[3] In response, the defendant filed a notice of opposition which materially read as follows:

> (i) The Plaintiff's terms and conditions of sale signed by the Defendant as guarantor and/or applicant provide in para 11 as follows:
>
> > "Disputes – Any claim or dispute arising hereunder shall be subject to arbitration in accordance with the Arbitration Act (1996)".
>
> (ii) The Defendant has guaranteed monies which are due and payable by Insight Plumbing North Harbour Limited ("the Company") to the Plaintiff.
>
> (iii) The Company has genuine disputes with the Plaintiff as to liability in respect of some invoices and the quantum in respect of others to the extent that it has not been established which sums if any are due and payable by the Defendant to the Plaintiff in respect of the various invoices.
>
> (iv) The Company has a right to set off and/or counter-claim in respect of numerous aspects arising from errors and omissions in the invoices.

[4] Both parties agree that in light of the decision of the Court of Appeal in *Zurich Insurance*,[1] if this Court is left with the view that the defendant has an arguable defence to the plaintiff's claim, the Court ought to grant a stay of the proceeding pursuant to a protest to jurisdiction which the defendant filed and which was dated 19 May 2013. What the Court is required to do is determine whether the plaintiff is correct in asserting that there is an absence of any real question to be tried: *Pemberton v Chappell*.[2]

[5] It appeared from the affidavits filed for the defendant that a key aspect of the defence was the defendant's contention that Insight would only be liable for amounts

---

[1] *Zurich Australian Insurance Limited T/A Zurich New Zealand v Cognition Education Limited* [2013] NZCA 180.
[2] *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).

debited to the account with the plaintiff if the Insight employee who placed the order produced a purchase number which was provided by Insight.

[6] It further emerges that the defendant is of the view that there were mistakes in the plaintiff's accounting so that Insight was invoiced for items which were never supplied. It is further alleged that the wrong quantities (presumably less than what was required) were delivered on occasions. As well, the defendant says that the amounts charged out to it were not in compliance with the pricing arrangement which the parties agreed.

The purchase number issue

[7] The written terms of trade which the parties entered into in November 2011 did not, as the defendant accepts, make any reference to the requirement that the plaintiff was only entitled to invoice the defendant in regard to merchandise which was provided on production of an order number. The defendant's counsel submitted that a previous arrangement between a company related to Insight and the plaintiff had provided for such a term. The defendant's evidence about this alleged arrangement is unsatisfactory. Mr Durrant deposed that he gave a guarantee of Insight's account as requested by the plaintiff. He said that:

> One of the critical terms of that arrangement was that the plaintiff Mico was not to supply anyone purporting to be a plumber employed by (IPNZL) or allow anyone to pledge that company's credit unless that person had a purchase order docket. In other words if Mico was looking to (IPNZL) to pay the invoice unless the person produced a purchase order in writing and on (IPNZL) form no supplies were to be made. If the person did not have his PO book he was able to call the office and obtain a number that number was required to be shown on the ultimate invoice rendered by the plaintiff.

[8] He said that unless there was such a purchase order "neither my company nor I would accept liability for any ensuring invoice". He set out reasons which supported the need for such a regime, being essentially to enable Insight to keep track of purchases made on its behalf. He then went on to say:

> (v) The plaintiff knows that its agreement to supply (IPNZL) also included a requirement that this order number for supplied goods be provided to the invoice destined for the company. This is the same position which pertains to the new company Insight Plumbing North Harbour Limited in respect of which I have said I am the guarantor.

> [Note above that the defendant says that the terms and conditions were to be on "precisely the same basis as IPNZL".]

[9] He went on to say that he was surprised that the plaintiff has failed to mention "my company's requirements" for an order number when such a term had been agreed by IPNZL in its earlier arrangements with the company.

[10] The defendant concluded by saying:

> (vii) I believe therefore that the purchase order number should be seen as the Plaintiff's authority to deal with the plumber who might be at its counter if my company or I are to be liable for the invoice or the account. If there is no purchase order the plaintiff has no authority to bind any company or me to any transaction and neither does the plaintiff or its representative have such authority. If the transaction proceeds the issue then should be seen as between the plaintiff and the person who actually ordered the goods instead of the company being held vicariously liable in the absence of a purchase order.

[11] I will leave to one side the inadmissibility of the concluding words of the last quote which in effect amounted to submissions concerning the legal effect of the purported arrangement which are plainly inadmissible and should not have been included in the affidavit. Of more concern in the present context is the generalised references by the defendant to what the arrangement with the plaintiff was. The substance of Mr Durrant's evidence seems to be:

a) There had been a provision in the earlier trading agreement with another company IPNZL that there would be no liability without an order number being provided;

b) The same position therefore pertains to the new company;

c) It was "my company's requirements for an order number to be provided";

d) It is Mr Durrant's view that his company should not be liable unless a purchase order was given;

e) The "arrangement" was that a purchase order was to be provided.

[12] A deponent in the position of the defendant is not entitled to state conclusions without giving a basis for them.[3] I respectfully agree with the following statement to be found in the Australian text *Cross on Evidence* that opinion evidence is generally excluded unless it complies with the requirements peculiar to that evidence and the conditions of admissibility rests on the tendering party.[4] As well I agree with this passage that appears in the same work: [5]

> In the law of evidence "opinion" means any inference from observed or assumed facts, and the law on the subject arise from the general rule that witnesses must speak only to that which was directly observed by them. The treatment of evidence of opinion by the law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inferences is said to be the function of the judge of jury, while it is the business of a witness to state facts.

[13] Thereafter a number of exceptions to the inadmissibility of opinion evidence are given. The Evidence Act 2006 allows a non-expert witness to give an opinion in evidence if that opinion is necessary to enable the witness to communicate what he or she saw, heard or otherwise perceived, or necessary to enable the fact finder to understand those things. That is not the case here.

[14] In any case, provision of an affidavit in this form would be in contravention of r 7.30 High Court Rules which says that the grounds for a belief must be stated in an affidavit.[6]

[15] The process of determining what the parties' contractual intention was involves the Court reaching a conclusion as to what the acts and words of the parties objectively viewed their contract to be. The subjective views of one party about what the arrangement was intended to be or what they understood the words to mean is irrelevant.[7] My conclusion therefore is that the evidence that the defendant has given is objectionable both on the grounds that it is expressive of his unsubstantiated conclusions or opinions and also because it is confined to his subjective views about what the parties agreed to. What he was required to do was not difficult. That was

---

[3] *R v Williams* [2007] 3 NZLR 207 (CA) at [223](b); and see also *Brunton v Brunton* HC Auckland CIV-2007-404-4717, 28 November 2007 and *O'Loughlin v Tower Insurance* [2012] NZHC 438.
[4] J D Heydon *Cross on Evidence* (9th ed, LexisNexis Butterworths, Australia, 2913) and Evidence Act 2006 ss 23-25.
[5] At 29010.
[6] See also *Hanna v Auckland City Corp* [1945] NZLR 622 (CA) at 632.
[7] *Vector Gas v Bay of Plenty Energy Limited* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

to set out what communications he, and perhaps others, being mindful of the hearsay rule, had with the plaintiff on behalf of Insight both orally and in writing, and to submit those facts to the Court which would then come to a conclusion about what the contractual intention of the parties was. However, the defendant did not take that opportunity and as a result I consider that his evidence, to the extent that it is conclusory and so far as it details Mr Durrant's subjective views about what the contract did and did not provide for, ought not to be read.

[16] That leaves the admitted fact that another company in which the defendant had an interest in and which had dealings with the plaintiff came to an arrangement with the plaintiff concerning the necessity for purchase orders. In my view that is neither here nor there in the circumstances of the present case. While it is not necessary to set out detailed reasoning as to why the earlier arrangement entered into with the other company is irrelevant, at least one circumstance potentially explains why the earlier arrangement was not perpetuated and that is because of difficulties that the plaintiff might have experienced in dealing with employees of IPNZL who seem to be the same people who work for Insight, or at least work under a similar regimen as was operated by IPNZL. There seem to have been many cases where the employees simply did not have order numbers available.

[17] If the view I have set out is correct, the only source to which the Court can have resort when seeking to ascertain the contractual intentions of the parties is the written agreement that they entered into. The written contract does not contain a provision of the kind that the defendant now contends for.

[18] In case I am wrong concerning that, I will consider further what the position would be if the contract contained a provision of the kind that the defendant contends for.

[19] The consequences of the contract containing the type of provision which the defendant claims can only have one meaning. That meaning is that unless an Insight employee provided an order number, Insight would not be obliged to pay for the goods which it admittedly received. I would regard such an outcome as being commercially improbable and one which, when weighed against the evidence of the

defendant about what the parties agreed to, wholly outweighs what he says the contractual arrangement was. I would regard it as farfetched that the plaintiff and the defendant entered into an agreement which would entitle the defendant to receive goods, as it did, and goods which it has retained, worth thousands of dollars, and not have to pay for them because the defendant's own employee failed to provide an order number.

[20] There is another problem with the argument for the defendant in any event. If the contract was as the defendant says it was, then there must have been an obligation on the part of Insight to provide order numbers. There is no argument that those order numbers were generated by the defendant from its own system. The arrangement between the parties would not work unless Insight ensured that its employees, over whom it had control as a result of its employment contracts, provided order numbers at the time when ordering goods. Such a provision would seem to be not only necessary but reasonable and fair. If the contracts were subject to such an implied term, the outcome for which Insight and the defendant contend would amount to them receiving a windfall as a result of Insight's breaches of its own contractual obligations.

[21] A further obstacle stands in the path of the defendant and Insight. That is that the contract between the parties effectively specified that any entitlement to claim such damages would not be able to be the basis of a claim to a right of set off, in view of the obligation in paragraph 3(vi) to make payment in full without deductions of any nature whatsoever. Such a provision would appear to rule out the possibility of the defendant relying upon an equitable set off.[8]

[22] The view that I take of the contractual arrangements is that even if there had been a breach on the part of the plaintiff, that would not necessarily result in the plaintiff receiving nothing in return for the merchandise that it provided to the defendant. If there had been a breach of contract by the plaintiff there may have been an entitlement on the part of Insight to claim against the plaintiff for such loss as it incurred through the plaintiff's breach. It is possible that compensation for

---

[8] *Grant v New Zealand Motor Corporation Limited* [1989] 1 NZLR 8 (CA) at 13.

extra accountancy expenses etc might come into this category but there has been no evidence provided of any loss having been incurred.

[23] That being so, and in regard to the terms of the guarantee which the defendant provided as a principal debtor, he is liable to pay the plaintiff for the amounts to which the plaintiff is entitled for merchandise supplied in terms of the contract with Insight. To this point I have been considering the alleged defence based upon a failure to provide order numbers but there are other defences as well which the defendant claims are arguable in the circumstances of this case.

Other defences

[24] Broadly speaking, there are two other heads of defence which the defendant puts forward. The first is that there were mistakes in the make-up of the accounts in relation to many of the remaining transactions which make up the outstanding balance which the plaintiff claims. Goods were billed for which were not supplied and there were errors concerning quantities of goods supplied. All of these items were identified in spreadsheets which the parties provided. Mr Connell strenuously submitted that most if not all of these items were of no merit at all. He claimed that many of the objections put forward by the defendant were a late invention to defend off a creditor who was pressing Insight.

[25] The general stance that Mr Durrant took was that the state of the plaintiff's accounts was so poor that he did not have any faith in their accuracy and that the Court should take a similar view. His opinion was that there needed to be a full scale investigation of the trading account between the two entities and only once that had been completed, could there be any assurance of the extent of the indebtedness of the plaintiff to the defendant, if any.

[26] The approach which is suggested by the defendant is not one that is justified in a summary judgment case. A similar situation came before the court in the case of *AGC v McBeth*.[9] There the Court of Appeal was critical of the approach that the Master took, noting that:

[9] *Australian Guarantee Corporation (NZ) Ltd v McBeth* [1992] 3 NZLR 54 (CA).

> In this case the appellant quite rightly did not attempt to deal in detail one by one with the vehicles and other assets but asserted and verified its claim overall, accompanied by the documentation which provided the essential support for that. To enter into an analysis of that, as the Master did, pre-empted any answer that might have been raised or explanation that might have been made by the appellant and, by implication, questioned the appellant's verification when the respondents had not done so themselves. … While the plaintiff must verify its claim it is not required to prove the details with the same precision as might be required in a viva voce hearing where everything might be in issue. That standard would undermine the simplicity and the benefit of the summary judgment procedure.

[27] It is not open to a party in the position of the defendant to take the equivalent position of putting the plaintiff to the proof of the detail of its claim, where the plaintiff has provided an affidavit in support of its application which verifies the statement of claim and testifies to the belief that there is no defence. I do not consider that there would be any profit in going through the disputed items which were identified in the spreadsheets which the parties provided. It is not feasible for the Court to come to a view on the rights and wrongs of those disputes. Any resolution of disputes over those items must await trial.

[28] The same can be said of the other items that were identified by the defendant as giving rise to a "pricing issue", which was the second head of defence. The defendant alleged that the plaintiff broke agreements which established the pricing levels that the defendant would have to pay for the merchandise supplied. These pricing agreements, I understand, had built in trade discounts and possibly other markdowns. The evidence for the plaintiff is that there is no defence available to the defendant and that the defendant has misunderstood the agreement about pricing levels. I understand that one of the points the plaintiff makes is that some of the special prices which were available to Insight were only available for a limited time or until specified stock volumes were exhausted and that outside those parameters the special pricing agreement did not apply. There is no way of resolving that difference on a summary judgment application and that matter will need to be resolved at trial.

Result

[29] It is possible for the Court to enter judgment for part of the plaintiff's claim leaving the balance to be resolved at trial.[10] That is the intent of r 12.2 HCR which empowers the Court to give judgment against the defendant where the defendant has no defence to a particular part of any cause of action.

[30] Based on such considerations, it is my view that the plaintiff is at least entitled to judgment in respect of items which are set out in the schedule annexed to this judgment and which total $8,954.70. That is the total amount of the items which the defendant sought to avoid payment of on the basis that no order number had been provided. There will be judgment for that amount.

[31] The parties are to confer on the matter of costs and if they are unable to agree they are to provide memoranda not exceeding four pages on each side within 14 days of the date of this judgment.

[32] Given the conclusion that the defendant has an arguable defence in regard to the amounts other than those for which judgment has been entered, it follows in terms of the *Cognition Education* judgment that he is entitled to a stay of proceedings so that the dispute between the parties can be referred to arbitration. The parties should also confer on the question of the form of the order for stay and submit a memorandum to me if further directions are required in that regard.

[33] I reserve leave to the plaintiff to apply for additional judgment for the costs of enforcing the claim and for the contractual interest on the unpaid amounts for which judgment is to be entered. It may not be possible to enter any such additional component of judgment given the limitations of the evidence before the Court at the present time.

---

[10] *Raptorial Holdings Ltd (in receivership) v Elders Pastoral Holdings Ltd* (2000) 14 PRNZ 663 (CA).

_____
J.P. Doogue
Associate Judge

Document Number	Disputed amount
D2	69.81
D4	259.77
D6	587.07
D8	17.76
D9	194.36
D10	8.29
D11	49.69
D12	446.4
D13	34.62
D14	90.8
D16	758.98
D18	321.79
D19	150.71
D20	263.62
D24	19.62
D26	103.15
D27	4.7
D28	7.2
D29	107.4
D30(1)	479.47
D30(2)	9.27
D32	133.46
D34	1844.52
D37	1066.1
D39	151.84
D40	18.39
D43	534.75
D45	201.17
D48	68.33
D49	164.6
D50	686.05
D53	21.72
D55	79.29
	8954.7