IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-470-000723

	BETWEEN	BRIAN JOSEPH SCANTLEBURY Plaintiff
	AND	ROBERT ELLIS PINNY Defendant

Hearing: 10 August 2011

Counsel: M C Black for the Plaintiff
M Colthart for the Defendant

Judgment: 9 September 2011

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 9 September 2011 at 2:30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:

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Introduction

[1] The plaintiff applies for summary judgment in respect of his claim against the defendant for various sums of money said to be owing to him following their joint purchase of a commercial property at 158 Elizabeth Street, Tauranga (the property). Leave is required to bring a summary judgment application under r 12.4(2) of the High Court Rules as the application was not made at the time the statement of claim was served on the defendant but only after a statement of defence had been filed.

Factual Background

[2] On 4 August 2006 the parties entered into a shareholders' agreement. It noted that the parties had incorporated a company, West CBD Investments Limited, to acquire a commercial property at 158 Elizabeth Street, Tauranga and to construct a building for long-term rental investment on that property. The parties were 50/50 shareholders in the company. The agreement also acknowledged that they held their shares in the company entirely on trust, in the case of the plaintiff for the trustees of the Matua Family Trust (Matua) and in the case of the defendant for the trustees of the Markline Trust (Markline).

[3] It was intended that the plaintiff would contribute 50% of the cash contribution through Matua to acquire the property with the balance of the cash contribution being contributed by the defendant through Markline. The remaining balance of the acquisition was to be funded by a commercial loan. In the event the defendant was unable to make his contribution and the plaintiff agreed that Matua would advance that amount to Markline.

[4] On 21 August 2006 a heads of agreement was executed between the parties to record the changed circumstances. In the heads of agreement, it was agreed that the parties would transfer their shareholding to their respective trusts and document the loan made by Matua to Markline. That loan would be by way of a mortgage of Markline's shares, such mortgage to provide security for the loan, interest to be paid by Markline on the loan, and the defendant's guarantee of Markline's obligations to Matua.

[5] The heads of agreement further noted that in order to equalise cash contributions, the defendant or Markline would repay the 50% cash contribution during the term of that loan or at such time as development funding was arranged, and Matua would meet the interest on the commercial loan and be reimbursed by the defendant or Markline for 50% of that interest at the time of repayment of his 50% cash contribution to Matua.

[6] There was also a dispute resolution procedure contained in the heads of agreement.

Submissions

[7] The plaintiff submits that the clauses in the heads of agreement clearly confirm that the defendant is personally liable to equalise the cash contribution for the acquisition funding between the plaintiff and the defendant and that this personal obligation exists irrespective of the alternative obligation that the defendant's trust, Markline, may separately owe.

[8] The defendant says he has arguable defences to the plaintiff's claim in that the advances were not made to the defendant in his personal capacity but to Markline and were made subject to an express or implied term that the defendant's liability to repay the advances was not personal but limited to Markline's assets. Although the heads of agreement provided that the parties would, after obtaining professional advice, document the loan made by Matua to Markline, which was to include a personal guarantee, the documentation was never prepared or executed and the heads of agreement do not include a guarantee of Markline's obligations by the defendant. In addition, the quantum of the plaintiff's claim is in dispute.

Leave application

[9] The defendant opposes leave being granted to the plaintiff to bring the summary judgment application on the basis that no new evidence became available after the statement of claim was filed to justify such a late application. The defendant also says that if summary judgment had been sought at the outset it would

have given consideration to forcing the plaintiffs to arbitration under the dispute resolution procedure contained in the agreement.

[10] The plaintiff responds by saying that he elected to bring this summary judgment application after considering the admissions in the statement of defence which indicated to him that no defence was available to the plaintiff's claim. In any event, even if the parties were engaged in arbitration, the plaintiff says that the Arbitration Act procedures allow an application for immediate relief similar to summary judgment.

[11] The commentary in *McGechan* states:[1]

> [I]t is permissible to make an application at any later time with the leave of the Court. No guidelines are laid down for the granting of leave. The question is clearly a discretionary one, and it will be up to the party applying for leave to show why it should be granted. If the absence of a defence has only became apparent after discovery or the exchange of briefs, this may well be an adequate reason for granting leave. In many cases, as with appeals, the leave question will be bound up with the merits, and it may be sensible to resolve the two together.

[12] I take the view that it is sensible to resolve the leave application together with the substantive application. The leave question is bound up with the merits. The plaintiff's claim largely turns on the interpretation of the heads of agreement for which summary judgment procedure is appropriate.

Discussion

[13] The heads of agreement upon which the plaintiff relies clearly indicated that the shareholding in the company would be held by the parties' respective trusts. When the defendant was unable to contribute 50% of the deposit and of the amount required to settle the property, the heads of agreement records that the plaintiff arranged for Matua to advance that amount to Markline. Documentation was to be prepared to record the loan made by Matua to Markline and to secure the loan by way of a mortgage of Markline's shares. The term of the loan was to be a maximum of 12 months from the date of settlement of the property with interest to be paid by

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1 *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR12.4.01].

Markline at a specified rate. The defendant was to guarantee Markline's obligations to Matua.

[14] The documentation was never prepared and signed but the intention of the parties was tolerably clear. The plaintiff relies on cl 8.3 which provides that the defendant or Markline would repay the loan and while Matua would meet the interest on the loan it would be reimbursed for 50% of the interest by the defendant or Markline at the time of repayment of the loan. The plaintiff submits that although Markline may have a concurrent liability with the defendant, on the wording of the heads of agreement the defendant was also clearly liable for the debt.

[15] Clause 13 confirms that although the agreement was entered into between the plaintiff and defendant, it involved them using their respective trusts to implement the terms of the agreement. A personal guarantee was never completed. The defendant submits that in the absence of a signed personal guarantee the references to himself or Markline in the heads of agreement should be seen in the context that the parties were entering into the arrangement on behalf of their trusts.

[16] While there is some merit in the defendant's submissions, the transfer of the parties' shareholding to the respective trusts never occurred. Such a transfer was, in any event, only to occur after the receipt of professional advice, which was also never obtained.

[17] The defendant relies heavily on cl 4(f) which states that once the parties' shareholdings were transferred to the respective trusts, the loan made by Matua to Markline would be secured by way of a mortgage of Markline's shares. That mortgage would include a guarantee by the defendant of Markline's obligations to Matua. A proper interpretation of that clause does not however lead to the conclusion that it would be only at that point that the defendant would be personally liable for the debts incurred in the acquisition of the property. Clause 4(f) is not inconsistent with the defendant having a personal liability from the outset of the arrangement made with the plaintiff to be equal partners in the acquisition of the property.

[18] The heads of agreement also records the terms of the commercial loan taken out by the company to fund the balance of the purchase price after the parties' contribution. Guarantees were given not by the respective trusts but by the parties personally. My view is that when cl 8.3(c)(vi)(bb) and (cc) state "Rob or Markline will ... repay" and "Matua will ... be reimbursed by Rob or Markline", the proper interpretation of the words "Rob or Markline" is "Rob (before his shares are transferred to his trust) or Markline (if and when Rob's shares are transferred to it)" - The defendant's personal liability would, however, continue after the transfer of his shares to Markline through a personal guarantee to be executed by him under cl. 4(f).

[19] The interpretation of the defendant's personal liability is entirely consistent with Baragwanath J's statement in *NZHB Holdings Ltd v Bartells*[2] that:

> ...in New Zealand law, and in that of England and of New South Wales, in the absence of more limiting language the description of a contracting party simply as "trustee" renders that party personally liable. There is a presumption in favour of personal liability which must be refuted if a person contracting as "trustee" is to be relieved of liability beyond the extent of the trust assets.

[20] The plaintiff notes that in the present case, the defendant did not even purport to contract as trustee for Markline. The parties are specifically defined as the plaintiff and the defendant. The defendant has also signed the heads of agreement in his personal capacity. There is, moreover, no attempt in the document to the limit the defendant's liability as a trustee to the assets of Markline.

[21] The defendant rightly submits that the question is what meaning is to be given to the language used by the parties. He submits that the heads of agreement clearly establishes the lender as Matua and the debtor as Markline and that the parties were talking about a personal guarantee quite separate from the obligations in the agreement.

[22] I am of the view, however, that if the defendant meant to limit his liability to that of himself as a trustee of Markline and only to the extent of the trust's assets, it was for him to see that the words used in the heads of agreement were sufficient to

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2 *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506 (HC) at [41].

make that clear. The heads of agreement do not make that clear. The presumption in favour of the defendant's personal liability has therefore not been displaced.

[23] In terms of when the loan fell due to be repaid, cl 8.3(c)(vi) is relevant:

> (vi) In order to equalise between them Brian and Rob have agreed:
>
> (aa) Matua has advanced 50% of the cash contribution to Markline.
>
> (bb) Rob or Markline will either repay that 50% during the term of that loan, or at such time as Development Funding is arranged, if earlier.
>
> (cc) Matua will meet the interest on the Marac Loan, and be reimbursed by Rob or Markline of 50% of that interest at the time of repayment of his half share cash contribution to Matua.
>
> (dd) As a result of the loan given by Matua without Rob or his Trust paying interest to Matua on due date), Matua is liable for tax under the Accruals Regime and Rob or Markline will pay in cash to Matua an amount equal to that liability in part reduction of Markline's Interest liability on the loan.
>
> (ee) These arrangements are intended to equalise the cash contribution for the Acquisition Funding between Brian and Rob and their respective Trusts.

[24] In sub-paragrah (bb), "that loan" refers to the commercial loan taken out by the company to fund the balance of the purchase price after the parties' contributions. No development funding has been arranged and the commercial loan is still outstanding. Clause 8.3(c)(i) noted that the term of the loan was one year. Although it has been rolled over, it is my view that the proper interpretation of when "Rob or Markline" were to repay the loan from Matua was either within the initial one year term of the commercial loan or at the expiration of that year. Fifty percent of the interest on the Marac loan was also payable at the same time.

[25] Accordingly, the plaintiff is entitled to summary judgment for 50% of the acquisition costs of purchasing the property. The plaintiff has satisfied me that the defendant does not have a defence to the core of his claim. However, I am not satisfied as to the liability of the defendant for the additional costs sought.

Quantum

[26] The deposit on the property was $150,000 and the cash required to complete the settlement after taking into account the commercial loan raised, was $326,000. The defendant's share of these two sums is $238,000. In terms of the agreement between the parties, interest is payable on that sum. The interest rate was set in the heads of agreement at 12.5% per annum compounding monthly (to match Matua's borrowing). It was however intended that the sum would be repaid within a year of settlement and interest rates have varied considerably since then. I have no information on the cost of Matua's borrowings since 3 July 2007, being a year after settlement.

[27] The plaintiff also seeks 50% of working capital contributions of $20,000 and $25,000 he says he made on 2 August 2006 and 2 September 2006 which were used to pay interest on the commercial loan. As evidence in support, he annexes pages 6 and 7 of the company's bank statements from Macquarie Investment Services Limited, which cover the period 31 July 2006 to 29 September 2006. The payments to the commercial lenders do not however match the deposits made into the account by the plaintiff. In addition, one of the bank statements shows a substantial deposit made by the defendant which is not explained nor taken into account in the plaintiff's calculations of the amount owing.

[28] In addition, the plaintiff seeks the sum of $43,228.59 which he says is 50% of further working capital contributions made by him or Matua between 22 June 2009 and 10 September 2009. However, he says that at the time one-third of the company's shares had been transferred to the trustees of the Parsons Trust and that he and the defendant were each only responsible for one-third of the capital contributions he made. The capital contributions he made between those dates appear to amount to $86,457.19 but, rather than claiming just one-third from the defendant, he appears to be claiming one-half.

Decision

[29] Summary judgment is therefore entered in favour of the plaintiff against the defendant for the sum of $238,000 together with interest at 12.5% compounding monthly on the sum of $75,000 from 25 September 2005 (the date the deposit was paid) to 3 July 2007 and on the sum of $163,000 from 3 July 2006 (the date of settlement) to 3 July 2007. Thereafter, interest at the rate described in the Judicature Act 1908 is payable on the balance outstanding.

[30] In relation to the additional costs sought – the interest paid on the Marac loan, the costs of managing the loan and contributions to working capital – I am not satisfied that the plaintiff's demand is to an indisputable amount. I am unable to give summary judgment in respect of this part of the plaintiff's application.[3] If the plaintiff wishes to pursue these additional costs, a trial as to both liability and quantum will be necessary.

Costs

[31] The plaintiff is entitled to costs on a 2B basis. If the parties are unable to agree, I will receive memoranda from counsel.

Woolford J

[3] See *Australian Guarantee Corp (NZ) ltd v McBeth* [1992] 3 NZLR 54 (CA) at 61.