IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CIV-2021-090-382
[2022] NZDC 21271

BETWEEN	ROCK AND RUBBLE LIMITED Plaintiff
AND	SIMON WILLIAM OWERS Defendant

Hearing: 13 October 2022

Appearances: B Martelli and A Piatine for the Plaintiff
Defendant in Person

Judgment: 31 October 2022

RESERVED JUDGMENT OF JUDGE AA SINCLAIR

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[1] This is an application for summary judgment by the plaintiff, Rock and Rubble Limited ("Rock & Rubble"), for the recovery of a debt which it says is owed to it by the defendant, Simon Owers, under a personal guarantee.

Background

[2] Rock & Rubble agreed to supply construction materials and services to Apex Earthmoving Ltd ("Apex") on the terms of trade set out in the credit account application and credit agreement signed by Apex on 14 February 2019 ("the Agreement"). Mr Owers was a director of Apex.

[3] The terms of the Agreement included the following:

(a) Rock & Rubble would supply goods and services to Apex;

(b) Apex would pay Rock & Rubble for the goods and services on the 20th day of the month following the date of invoice;

(c) Apex would indemnify Rock & Rubble against all losses and costs that it may suffer as a result of the breaching of the Agreement;

(d) Apex would indemnify Rock & Rubble against all debt collection costs that it may incur as a result of the breaching of the Agreement by Apex;

(e) In the event that a liquidator was appointed to Apex, all amounts owing to Rock & Rubble would become immediately due and payable whether or not they were due for payment.

[4] In consideration of Rock & Rubble supplying the goods and services to Apex, Mr Owers entered into a personal guarantee with Rock & Rubble pursuant to which Mr Owers "personally guaranteed jointly and severally the due and punctual payment of all amounts outstanding to Rock & Rubble on the terms set out in the attached Terms of Trade".

[5] In or about September 2020, Apex breached the Agreement by failing to make payment of outstanding invoices on their due dates. On 4 March 2021, the shareholders of Apex put the company into liquidation.

[6] At the date of liquidation, the amount owing by Apex to Rock & Rubble for construction materials and services supplied totalled $58,375.54.

Summary judgment principles

[7] Rule 12.2(1) of the District Court Rules 2014 provides:

> 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.

[8] The proper approach to be taken to a plaintiff's application for summary judgment was considered by the Court of Appeal in *Krukziener v Hanover Finance Ltd*, where the Court said[1]:

> [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 at 3 (CA). 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 Young v Letchumanan* [1980] AC 331 at 341 (PC). 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).

[9] In summary, the onus remains throughout on the plaintiff to satisfy the Court that the defendant has no arguable defence to the claim namely that there is no real question to be tried. However, if the defendant asserts that there is an available defence, the defendant is required to respond with evidence of that defence in order to defeat the application.

[10] In the present case, affidavits have been filed on behalf of Rock & Rubble and by Mr Owers.

Grounds of opposition

[11] Mr Owers raises two defences to the summary judgment application:

(a) On 16 June 2020, Mr Owers says that he sent Rock & Rubble an email revoking the guarantee. After sending the email, Apex paid the full amount owing to Rock & Rubble with the result that Mr Owers' liability under the personal guarantee was extinguished.

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[1] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

(b) Soon after sending the email, Rock & Rubble's operation manager Mr Daniel Moller, told Mr Owers that Rock & Rubble agreed to Mr Owers revoking the guarantee. Mr Owers relied on the alleged representation to his detriment and Rock & Rubble is now estopped from enforcing the guarantee.

[12] In his statement of defence, Mr Owers also alleges that the guarantee was illegible. He does not appear to rely on this allegation in opposition to the present application but in any event, Mr David Geor, a director of Rock & Rubble, gave evidence that the application form provided to Apex was able to be read. The guarantee set out on page 3 of the credit application annexed to Mr Geor's affidavit is clearly legible. The following pages 3 and 4 containing the Terms of Trade are not easy to read. This appears to be the copy being referred to by Mr Owers in his statement of defence. Mr Geor explained that this came about when Rock & Rubble copied and stored the document received back from Apex. Mr Geor further observed that if the terms were not clear when the document was provided for execution, any party entering into the credit arrangements and giving a guarantee could be expected to have queried the illegible portions before signing the document. I agree and do not place any weight on this allegation.

(a) Cancellation of Guarantee?

[13] On 16 June 2020, Mr Owers as managing director of Apex, sent the following email to Rock & Rubble ("the email"):

> Apex Earthmoving and Civil Ltd is writing to you today to inform you of a policy change within our organisation.
>
> Recently we have decided as a company we will no longer carry any type of personal guarantees with any other entity.
>
> This is not a reflection on Apex's solvency or any other financial matter, but more of a reflection on the uncertainty of the economic climate moving forward.
>
> As I am sure all of you are aware, many companies have suffered through Covid -19 which has left a lot of companies and their directors very financially exposed, Apex refuses to carry such an unnecessary burden and risk at such an uncertain time in history.

> If Apex could get a personal guarantee out of every client it did business with, then perhaps this would be a different situation. Unfortunately, this is not realistic in our industry.
>
> If this conflicts with your trading organisation's policies, then we will be happy to close our account and be released of the security interests.
>
> If this is something your trading organisation is cautious of, I welcome a phone call to discuss this in person and look at other alternatives.

[14] The email was sent to the email address recorded on the credit application form. Rock & Rubble deny that they ever received the email as this was not the email address in use at the time. Mr Owers attested that he did not receive a "bounce – back" or any notification that the email had not been received. It is accepted by Rock & Rubble that this factual issue cannot be resolved in the context of this application.

[15] However, Rock & Rubble relies on a provision of the Terms of Trade which provides:

> **8 Guarantee and Indemnity**
>
> 8.1 The guarantor/s of the Customer jointly and severally unconditionally guarantee to Rock & Rubble the due and punctual payment by the Customer of all outstanding monies, and agrees to keep Rock & Rubble fully indemnified against all damages, losses, costs and expenses arising from any failure of the Customer to pay the monies hereby guaranteed.
>
> ....
>
> 8.4 The guarantee and indemnity in this clause 8 is an irrevocable and continuing guarantee and indemnity and shall remain in full force until all obligations under the Customer's credit account have been fully paid, satisfied or performed.

[16] Rock & Rubble and Apex operated a running account. At the beginning of each month, there was an opening debit balance being the amount of the invoices rendered in the prior month and due to be paid on the 20th of that month. On 1 June 2020, Apex had a debit opening balance of $9,198 (from invoices issued in May 2020). It follows that on 20 June 2020, Apex was required to pay $9,198. However, between 2 June 2020 and 25 June 2020, Rock & Rubble issued invoices totalling a further $19,798. Payment for these invoices was due on 20 July 2020. Apex paid the sum of $9,198 on 25 June 2020 but in order to clear the account Apex also needed to pay the June invoices which, while not due for payment, were still an existing liability.

Analysis

[17] Mr Owers asserts in his affidavit that "by making payment [on 1 August 2020] of the June 2020 invoices entered into under the guarantee, it brought to an end any liability [he] had for outstanding amounts under the guarantee". This analysis does not take into account default interest at the rate of 10% per annum which became payable under the Terms of Trade on the late payment of the invoices.

[18] However, in addition and significantly, Apex continued to trade with Rock & Rubble and further invoices were rendered during the month of July falling due for payment on 20 August 2022.

[19] Apex never paid off its account in full as required under clause 8.4 of the Terms of Trade. Consequently, Mr Owers was never entitled to terminate his continuing guarantee without first obtaining Rock & Rubble's agreement.[2]

(b) Is Rock &Rubble estopped from relying on Guarantee?

[20] Mr Owers submits that by their words or conduct, Rock & Rubble represented to him that Rock & Rubble would not rely on the guarantee. In his affidavit, he deposes that on or about 16 June 2020, after sending the email to Rock & Rubble, he had a conversation with Mr Daniel Moller, operations manager for Rock & Rubble. Mr Owers states:

> 12 ....Dan initially questioned the email and asked why such steps were required. I explained that covid 19 provided too much uncertainty and stated that if they were not happy with the proposed revoking of the guarantee then Apex would be happy to close the account with Rock & Rubble.
>
> 13 Apex and Rock & Rubble had a good trading history and a large monthly account. Dan agreed that the account could remain open to continue trading but that the guarantee would be removed. The conversation was pleasant and professional and at the end of it I was confident that the guarantee had been revoked.

[2] Notably, it is not asserted by Mr Owers that Rock & Rubble signed a new agreement releasing Mr Owers from his guarantee; that he gave any consideration for such a release or that the parties signed a deed releasing Mr Owers from the guarantee.

[21] In his affidavit, Mr Moller deposes that he had never seen the email prior to this litigation and denies that he had any conversation about it with Mr Owers. If he had seen the email, he says he would have referred it to Mr Geor for reply. Furthermore, Mr Moller avers that he does not have and never has had any authority to enter into, vary or terminate contractual agreements on behalf of Rock & Rubble.

[22] Mr Geor gave evidence as to Mr Moller's duties for Rock & Rubble in his role as operations manager. These duties include dispatching trucks and issuing invoices; overseeing machine maintenance and yard staff; and chasing debts and giving quotes. Mr Geor attests that Rock & Rubble has never represented to anyone that Mr Moller has authority to enter into, vary or terminate agreements between Rock & Rubble and its customers and guarantors. Only the directors of Rock & Rubble have that authority.

[23] Mr Owers also says in his affidavit that he spoke to Mr Moller "frequently, generally once or twice a week." He states that Mr Moller was "the only person I dealt with at Rock & Rubble and [he] made out to be someone who could make decisions regarding accounts".

[24] Mr Moller denies that he spoke to Mr Owers on a regular basis. It was his evidence that he spoke to Mr Owers on the telephone about "a maximum of 3 to 5 times a year regarding logistics and Apex's overdue accounts".

[25] In addition, Mr Geor deposes that as well as dealing with Mr Moller, Mr Owers also emailed other staff at Rock & Rubble and regularly texted him about overdue accounts. Copies of such emails and texts are annexed to Mr Geor's affidavit.

Analysis

[26] Whether or not Mr Owers had any conversation with Mr Moller about the email is a factual matter which cannot be determined in this summary judgment application. However, even if Mr Moller did make any concession in regard to the guarantee as alleged, Mr Owers' defence turns on whether Mr Moller had the requisite authority to do so or alternatively, had been held out by Rock & Rubble to have that authority.

[27] I accept Mr Geor's evidence that Mr Moller did not have actual authority to enter into, vary or terminate agreements between Rock & Rubble and its customers and guarantors. This was confirmed by Mr Moller. No contrary evidence was produced.

[28] The issue for determination is whether Mr Moller has been held out by Rock & Rubble as having authority to cancel Mr Owers' guarantee. Section 18(1) of the Companies Act 1993 relevantly states:

> **18 Dealings between company and other persons**
>
> (1) A company … may not assert against a person dealing with the company …that-
> …
>
> (c) A person held out by the company as a[n]… employee… of the company –
> …
>
> (ii) Does not have authority to exercise a power which a[n]… employee… of a company carrying on business of the kind carried on by the company customarily has authority to exercise:
>
> (d) A person held out by the company as a[n]… employee… of the company with authority to exercise a power which a[n]… employee… of a company does not customarily have authority to exercise, does not have authority to exercise that power:
> …
> unless the person has, or ought to have, by virtue of his or her position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (a), (b), (c), (d) or (e), as the case may be, of this subsection.

[29] Section 18(1)(c) and (d) are statutory estoppels designed to protect those dealing with a company. The key difference between s 18(1)(c) and (d) is that subs (1)(d) involves an agent having apparent authority that would exceed his or her normal customary authority.[3]

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[3] At [58].

[30] These statutory estoppels are largely based on the common law concepts of apparent or ostensible authority. Apparent or ostensible authority arises when an agent does not have actual authority, but the principal allows the agent to appear to have authority to third parties. Apparent authority acts as a form of estoppel, preventing the principal from denying the validity of the acts carried out by the agent with apparent authority.[4] The essence of the doctrine is that it is the principal's representation that creates the authority, not the agent's assertion that he has authority. Or to put it another way, the representation must flow from the company and not the agent.[5]

[31] The application of s 18(1)(c) and (d) was considered by French J in *Levin Meats Ltd v Perfect Packaging Ltd.*[6] In that case, Perfect sued for breach of contract when Levin Meats did not pay for a packaging machine. Levin Meats asserted that the general manager had no authority to enter into the agreement on behalf of the company. The general manager did not have actual authority to enter contracts. However, he had given himself the title of chief executive officer and had purported to sign a contract to purchase the packing machine.

[32] The High Court held that Levin Meats had given the general manager apparent authority to enter the purchase agreement. The Court said:

> 59 On the assumption it is not common for a chief executive officer of a meat processing company the size of Levin Meats to enter into contracts of this type, it follows that to satisfy subs (1)(d), more than just the designation chief executive officer is required.
>
> 60 In my view, there was more in this case. The evidence established that Levin Meats was a family owned company with the directors residing in the North Island and never seen at the plant. While Mr Grey was in regular contact with one director and was required to file monthly reports to the board, it is clear he enjoyed a significant degree of autonomy. The directors did not even know that Mr Grey's business card showed him as the CEO, nor presumably that his email signature also stated he was the chief executive officer. When outsiders contacted the plant, Mr Grey was the only person available, and appeared to be in complete control. Further, and very significantly, Mr Grey had previously negotiated and signed contracts for the purchase of valuable capital items on behalf of the company. He was also placed in a position to be able to make payment of the deposits and the GST. There was an obvious lack of supervision and monitoring.

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[4] *Levin Meats Ltd v Perfect Packaging Ltd* HC, Auckland, CIV 2011-409 - 000018, 1 August 2011[43] and [44].
[5] At [46].
[6] At [59]-[61].

> 61 The combined effects of these matters persuade me that, whatever the normal practice may be in meat processing companies, Levin Meats held out or represented to the world at large, and in particular Perfect, that Mr Grey did have the authority to enter into a contract of the type at issue. Section 18(1) and the conditions of ostensible authority at common law are satisfied.

[33] The operation of Rock & Rubble and other factors distinguishes the present case from that of Levin Meats. In particular:

(a) Mr Geor worked actively in the business. It was Mr Geor's evidence that when outsiders contacted Rock & Rubble, anyone wanting to discuss financial matters would be directed to him.

(b) While Mr Owers stated that he only dealt with Mr Moller, it was evident that Mr Owers had previously requested financial accommodation directly from Mr Geor.

(c) Mr Owers dealt with Mr Moller by email and telephone. It was Mr Moller's evidence that he had never met Mr Owers. Furthermore, if Mr Owers had come into the office, there were no signs from which Mr Owers could have formed the impression that Mr Moller was in charge of finances.

(d) Mr Moller had never previously negotiated and signed contracts or dealt with issues regarding accounts or guarantees. Relevantly, he had never previously approved any payment compromises.

[34] Mr Owers does not explain how Mr Moller made himself out as having authority to "make decisions regarding accounts". If that had been Mr Owers' understanding then it would be reasonable to expect that he would have sent the email for Mr Moller's attention, not to the generic email address used.

[35] I am satisfied on the evidence that Rock & Rubble did not hold out Mr Moller as having ostensible authority to terminate Mr Owers' personal guarantee and that this defence cannot succeed.

[36] Finally, with regard to s 18(1)(c) of the Companies Act 1993, the issue arises as to whether a person holding Mr Moller's designation could be expected to hold the authority to negotiate the variation or cancellation of guarantees. Mr Moller held the position of operations manager. This is a middle management role. Unsurprisingly, there is no evidence before the Court that, an employee having such a designation, customarily has authority to, enter into, vary or terminate contracts with customers and their guarantors on behalf of their employer.

Conclusion

[37] For the reasons discussed above, I am satisfied that Mr Owers has no arguable defence to this claim and accordingly, it is appropriate to enter judgment in favour of the plaintiff on this summary judgment application.

Result

[38] Judgment is entered in the sum of $83,589 made up of the following amounts:

- outstanding invoices totalling $59,264.
- collection costs payable pursuant to Rock & Rubble's Terms of Trade of $10,449.[7]
- default interest also payable pursuant to the Terms of Trade in the sum of $13,876.

[39] The plaintiff claims costs and disbursements. As the successful party, costs are awarded to the plaintiff on a 2B basis together with disbursements to be fixed by the Registrar. I would expect that as costs on this application can be clearly determined by reference to the scale, there will be no need to file submissions.

AA Sinclair
District Court Judge

[7] The amounts of $58,975.54 and $10,449.28 are admitted in the defendant's statement of defence.