IN THE COURT OF APPEAL OF NEW ZEALAND

CA435/2015
[2016] NZCA 340

BETWEEN	YAO WEI HE Appellant
AND	ZHIXIONG CHEN Respondent

Hearing: 14 April 2016

Court: Kós, Clifford and Brewer JJ

Counsel: P D Sills for Appellant
N R Campbell QC and A J Sinclair for Respondent

Judgment: 19 July 2016 at 3.30 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant is to pay the respondent's costs for a standard appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Chen sued Mr He for $300,000, plus interest. He pleaded that he lent $300,000 to Mr He and that Mr He failed to repay it. Mr He defended the claim on

the basis that the money was advanced to him on trust "in respect of and to have implemented a commercial joint venture ('CJV') agreement the terms and conditions of which have been agreed to by the parties and subsequently implemented by the parties".

[2] Following trial, Moore J found for Mr Chen.[1] Mr He now appeals the decision.

Background

[3] Mr Chen had the onus of satisfying Moore J, on the balance of probabilities, that he lent $300,000 to Mr He, that Mr He failed to repay it and that interest was due also. Mr Chen gave evidence to that effect and relied on a document that was handwritten by Mr He and signed by him. The document, in English translation, reads:

> Acknowledgement of Debt
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> I, HE Yao Wei, hereby borrow three hundred thousand New Zealand dollars in total from CHEN Zhixiong. The annual interest rate is 6 percent, which only applies to the sum of two hundred thousand New Zealand dollars of the whole amount of the loan. The remaining amount of one hundred thousand dollars is free of interest. The whole amount of the loan must be paid off within half a year.
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> The borrower: HE Yao Wei
>
> 16 August 2010

[4] Mr He accepted the authenticity of the acknowledgement of debt. He accepted that Mr Chen paid him $300,000 (in three tranches of $100,000 paid 15 June 2010, 16 August 2010 and 20 August 2010) and that he had not repaid it. Nor had he paid any interest. However, he pleaded, and gave evidence, to the effect:

(a) The advance was not a loan to him personally. Mr Chen and Mr He agreed that a joint venture company (NZPIL) would be established, to include Mr Chen's son, to export goods from New Zealand for sale in China.

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1 *Chen v He* [2015] NZHC 1593.

(b) The advance was made to enable the joint venture to be implemented and Mr He held the money in trust for that purpose.

(c) Mr He was to apply the $300,000 through NZPIL to purchase goods for export by the company.

(d) Mr Chen could pull out of the arrangement if, within six months, he was dissatisfied with Mr He's "credibility and ability in executing the business" of NZPIL. In such case, Mr Chen could require Mr He to personally repay the $300,000 as well as interest on $200,000 of that advance.

(e) If Mr Chen was satisfied with Mr He's performance, then he would "rollover" the $300,000 as his shareholder's advance to the joint venture and would provide millions of dollars in funding for it.

(f) Mr He applied the $300,000 to purchase goods in accordance with the trust.

(g) Mr Chen was satisfied with the performance of NZPIL and treated the $300,000 as Mr Chen's shareholder's advance.

(h) NZPIL later repaid the advance to Mr Chen.

(i) Mr He has no personal liability to pay Mr Chen anything.

The Judgment

[5] Justice Moore described the major issue for him to resolve as follows:[2]

> The question for me is whether, notwithstanding the clear words of the written document, the extrinsic evidence or matrix of fact is such that I should accept Mr He's claim that the agreement incorporated quite different terms such that its effect was materially different from the plain meaning.

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2 At [43].

[6] His Honour then considered the submissions advanced on behalf of Mr He. The first was that the acknowledgement of debt was more in the nature of a receipt of funds rather than an IOU. The Judge rejected this submission because of the history of Mr Chen's prior advances of money to Mr He and the way he made advances to NZPIL subsequently. None were acknowledged in writing, none provided for interest and none had repayment dates stipulated:[3]

> … That this advance reflects a departure from past and future practice reflects Mr Chen's concerns about Mr He's indebtedness to him and the need to formalise future personal loans in writing. Furthermore, if this had, in fact, been an advance to NZPIL, Mr Chen would have been unlikely to charge interest given his subsequent practice when advancing funds to NZPIL.

[7] The next submission was that other contemporaneous documents do not support the claim by Mr Chen that prior to this occasion he had made personal loans to Mr He. Instead, they support Mr He's evidence that he acted as a "runner boy" in New Zealand for Mr Chen and the payments were reimbursements.

[8] The Judge noted that substantial sums, totalling nearly $90,000, were transferred by Mr Chen to Mr He in June 2008, September 2009 and January 2010:[4]

> … While some may have been to reimburse Mr He for expenses he incurred on Mr Chen's behalf they are of a quantity and nature considerably greater than the sort of reimbursement described by Mr He, namely looking after the house, car repairs and recreational excursions.

[9] A document relied upon to support Mr He's case was a reconciliation statement dated 22 June 2010, compiled by Mr He and Mr Chen's son. This says, in part:

> Yaowei HE transferred $50,000 into the bank, should transfer further $19,920.34.

This sum is apparently the balance of the first tranche of $100,000 advanced to Mr He by Mr Chen in June 2010 after allowing for the $50,000 deposited by Mr He in NZPIL's bank account on 22 June 2010 and for $29,337.96 paid by Mr He for stock. The document also credits Mr He for $80,741.70 for "goods price in

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3 At [47].
4 At [49].

mainland China". Mr He's evidence is that this relates to goods he already had in China and which he supplied to NZPIL for its business.

[10] The Judge does not appear to have regarded this document as supporting Mr He's argument that the $300,000 was advanced to him on trust for the joint venture. It was, of course, not a document in which Mr Chen had a hand. The Judge concluded "that the more likely purpose of the document was to record cash purchases so that the appropriate entries could be made in NZPIL's financial records".[5]

[11] The next submission considered by the Judge related to the date of the acknowledgement of debt, 16 August 2010. By that date, the first tranche of $100,000 had already been advanced (on 15 June 2010). So there must have been an earlier oral agreement and the acknowledgement of debt cannot be taken to include all its terms:[6]

> [Mr Sills for Mr He] submits it is inconceivable Mr Chen would have lent $300,000 personally to Mr He shortly after discussing the incorporation of a joint venture which had Chen Jnr as a director and shareholder. He submits logic and commonsense dictates the two events must be linked.

[12] The Judge pointed out that Mr Chen gave evidence that immediately following the advance on 15 June 2010, Mr He wrote out an acknowledgement of debt in the form of an IOU for $100,000. Mr He did not assert in evidence that this acknowledgement of debt was negotiated on terms different to those in the later acknowledgement of debt document.[7]

[13] The Judge next considered a submission that accounting records of NZPIL support Mr He's claim. The Judge did not consider the fact that Mr Chen's son's shareholder account shows that the funds in NZPIL's bank account were treated as funds belonging to NZPIL to have any relevance. The Judge's view was that if Mr He, on receiving the first tranche of $100,000 from Mr Chen, advanced funds to NZPIL then that is as consistent with Mr Chen's case as it is with Mr He's.

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5 At [51].
6 At [52].
7 It was common ground that the IOU was destroyed. By inference, the acknowledgement of debt made it redundant.

[14] On the related submission that Mr He's shareholder account is consistent with his version of the overall contract, the Judge noted that it is not disputed that Mr He applied funds advanced by Mr Chen to the business of NZPIL. But the Judge's view was that this does not support Mr He's claims that all the $300,000 was for the purchase of products for NZPIL, that Mr He had six months within which to convince Mr Chen of his commercial ability, and that if Mr Chen was convinced then the $300,000 would become Mr Chen's shareholder advance to NZPIL, extinguishing Mr He's personal liability to repay it.

[15] Mr Sills had conducted a mathematical analysis of various bank statements and financial reports. His conclusion was that Mr Chen had received $283,734 which could only be explained by a repayment of the $300,000. However, the Judge accepted Mr Campbell QC's submission that if the analysis is correct, there is an obvious difference as to amount and that in any event to carry weight the analysis required proper evidence from an expert such as a forensic accountant. Further, the Judge agreed that the analysis should have been put to Mr Chen, which it was not, and that the analysis relied on documents which Mr He had said were inaccurate.

[16] Mr Chen denied in evidence that he was a part of the joint venture and that, in fact, he controlled it. Mr Chen's evidence was to the effect that he provided funding because his son was a part of the joint venture. In support of Mr He's evidence, Mr Sills submitted that in a reconciliation by NZPIL's accountants of the general ledger, all funds were shown as having been introduced by Mr Chen personally. The submission was that this is consistent with Mr Chen controlling NZPIL.

[17] The Judge noted that Mr Chen was neither a director nor shareholder of NZPIL and did not have authority to operate any of its bank accounts. Further, there was no contest that from September 2010, Mr Chen was the funder of NZPIL. The Judge agreed with Mr Campbell that the fact that Mr Chen was advancing funds and being repaid when NZPIL was in a position to do so, does not necessarily make him the controller of the joint venture.

[18] An important point for Mr He was the submission that Mr He's conduct in relation to NZPIL is consistent with his claim. In particular, that shortly after

receiving the first tranche of $100,000, Mr He purchased products and shipped them on behalf of NZPIL. Further, all the income derived from the sale of products purchased by Mr He, or provided by him when NZPIL was first incorporated, went into NZPIL. Mr He ceased operating his own business, transferred its products to NZPIL, and thereafter was fully involved in NZPIL.

[19] The Judge treated Mr He's involvement with NZPIL as a neutral factor. Mr Chen's evidence was that he lent the $300,000 to Mr He because Mr He told him he needed the money for personal reasons. The Judge noted that this would not have prevented Mr He using the funds for NZPIL's purposes if he chose to do so.

[20] It was at this stage of his judgment that Moore J turned to a significant piece of evidence which, in his view, went materially against Mr He's claims:

> [65] The first is the correspondence between Mr He's solicitor and Mr Chen's solicitor. On 30 March 2012 Mr Chen's solicitors wrote to Mr He demanding repayment of the $300,000 plus interest. This letter set out the three advances and confirmed that the loan was a private one given to Mr He personally by Mr Chen. Mr He's solicitors responded and in evidence Mr He accepted his solicitors' reply accurately reflected his instructions. On behalf of Mr He they said their client had instructed them the loan was not a personal one although expressed as such. They stated that the loan was to fund the export operations of NZPIL in which Chen Jnr was a shareholder with Mr He. The letter went on to record that Chen Jnr had previously informed Mr He that he had withdrawn funds from NZPIL to repay advances from himself and Mr Chen as injected by them to fund the company's operations. The solicitors stated that Mr He was under the impression that the loan had been repaid and provided a detailed explanation for that view running to several pages.
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> [66] Despite this detail the letter makes no reference whatsoever to Mr He's claim the loan was to be rolled over subject to Mr He's commercial performance. Yet this assertion is central to Mr He's defence. If Mr He's claim is to be believed it is a most surprising omission.
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> [67] The letter is significant for other reasons.
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> (a) There is no reference to Mr He's present claim that he and Mr Chen were part of a joint venture. Indeed, the letter claims that the joint venture was between Chen Jnr and Mr He and that Mr Chen had agreed to fund the joint venture. This version is consistent with Mr Chen's evidence as well as other aspects of the extrinsic evidence discussed above.
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> (b) The letter refers to the loan being due for repayment in February 2011. If, as Mr He asserts, the loan had been

> rolled over by Mr Chen there would have been no fixed date for repayment. The acknowledgement that the loan was due for repayment " … back in February 2011 … " supports Mr Chen's account that the term of the loan was fixed for six months as reflected in the plain words of the document.

[21] The Judge concluded by giving his view that "it is significant that when first challenged and given the opportunity to explain the terms of the agreement with Mr Chen, Mr He, through his lawyers, did not refer to the other terms which he now claims were central to his agreement with Mr Chen".[8]

[22] The Judge went on to draw further inferences from the evidence adverse to Mr He's position:

(a) If the $300,000 was to be used as Mr He says, why were the second and third tranches of $100,000 not paid directly to NZPIL? The payment of the first advance of $100,000 to Mr He can be explained because at that time NZPIL had not been incorporated. But it was a week later (18 June 2010). All Mr Chen's funding of NZPIL from September 2010 was made direct to NZPIL.

(b) The draft general ledger supports Mr Chen's position. If the $300,000 had ceased to be a contribution by Mr He (because, after six months, it became Mr Chen's shareholder's advance), then NZPIL's accounts should show that NZPIL owed $300,000 to Mr Chen. Equally, NZPIL's records would show a corresponding change to Mr He's position. Nowhere does the general ledger show any such exchange.

(c) The acknowledgement of debt is the only written record of an agreement between Mr Chen and Mr He involving the advance of funds. The inference is that that is because the advance was distinct and different.

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8 At [68].

The argument on appeal

[23] Mr Sills submits that Moore J must have decided that the acknowledgement of debt was, on its face, a comprehensive record of the parties' agreement. Mr Sills submits that it could not be for a number of reasons.

[24] First, Mr Sills draws attention to the date on which the document was made. Mr Chen says the note was written on 16 August 2010 when he advanced the second payment.[9] Mr Sills argues that if Mr Chen is correct then the document would not be evidence of Mr He being indebted to Mr Chen for $300,000, having received only $200,000 and there being no obligation on Mr Chen to advance a further $100,000.

[25] Second, the document is only signed by Mr He and therefore does not evidence Mr Chen's agreement to any of the matters referred to in the document. In Mr Sills's submission, therefore, Mr He would not have been able to rely on the document to prevent Mr Chen from demanding payment of the monies before six months elapsed, or that interest was payable on the whole amount.

[26] Third, the document does not spell out the rights and obligations of each of the parties and does not cover the essential terms of the parties' arrangement. For example, the document does not explain how interest over "$200,000" would be calculated and applied given that the money was advanced in three separate tranches on three separate dates.

[27] Fourth, the circumstances in which the document was created do not suggest that it was intended to reflect the entire agreement of the parties. Mr He handwrote the document on the spot without careful consideration.

[28] On this analysis, Mr Sills submits that the burden of proof remained with Mr Chen to prove the terms of the loan agreement. He did not do that. He clung to the wording of the acknowledgement of debt.

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[9] Mr He says in his affidavit that the note was written on 20 August 2010 when he received the third payment and was, at Mr Chen's request, "backdated to 16 June 2010 to cover all three payments of $100,000". However the acknowledgement of debt is dated 16 August 2010 and, in any event, the first payment was made on 15 June 2010. Accordingly, we reject Mr He's version of events.

[29] In response to Moore J's point that there had been an earlier handwritten IOU (which was later destroyed) and that Mr He had not suggested it was negotiated on different terms to the acknowledgement of debt, Mr Sills submitted that there was no burden on Mr He to rebut any presumption. Rather, it was for Mr Chen to prove that the June IOU was evidence of the loan agreement, that the June note was on the same terms as the acknowledgement of debt and, as a result, the acknowledgement of debt was also evidence of the loan agreement.

[30] Mr Sills submits that Moore J erred in that he approached the issues from the point of view that Mr He was required to prove that the acknowledgement of debt was not the entire agreement between the parties. The submission is that the converse was the case and Moore J should have been inquiring as to whether Mr Chen had discharged his onus to prove that the acknowledgement of debt was the entire agreement between the parties.

[31] Mr Sills submits that in order to decide the conflicts of evidence between the parties, Moore J had to make findings of credibility. He did not do so overtly. Instead, he preferred, on an issue-by-issue basis, the evidence of Mr Chen.

[32] Mr Sills's written submissions on appeal go into detail in support of his submission that Mr Chen's evidence is confusing regarding the formation of the loan agreement and, therefore, not credible. This is to be contrasted, in Mr Sills's submission, with clear and consistent evidence from Mr He.

[33] Mr Sills repeats the submissions he made to Moore J to the effect that the subsequent conduct of the parties is consistent with the $300,000 being advanced to Mr He for the purposes of the joint venture. In particular, he points to there being no demand for repayment by Mr Chen once the six-month period expired on 15 January 2011. Demand was not made until the parties fell out in 2012.

Approach to appeal

[34] This appeal is by way of re-hearing.[10] Mr He, as the appellant, has the onus of satisfying us that we should differ from the decision reached by Moore J. We have the responsibility of arriving at our own assessment of the merits of the case but we may properly hesitate before concluding that findings of fact based on the assessment of credibility of witnesses are wrong.

Application for leave to adduce further evidence

[35] We deal first with an application by Mr He to adduce two bank statements as further evidence on appeal. Mr He says these documents show that Mr Chen did not lend NZPIL the amount he alleged because some of the funds Mr Chen claimed to have personally lent NZPIL came from different entities. As a result, Mr He claims that Mr Chen has received at least $387,605 more than he was owed by NZPIL. On this basis, Mr He argues that the account statements are relevant to his case on appeal because the "second limb" of his defence at trial was that Mr Chen had "repaid to himself" the $300,000 debt by withdrawing from NZPIL's bank account more than he had advanced to NZPIL.

[36] Mr He relies on r 45 of the Court of Appeal (Civil) Rules 2005:

> **45 Application for leave to adduce further evidence**
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> (1) The Court may, on the application of a party, grant leave for the admission of further evidence on questions of fact by—
>
> (a) oral examination in Court; or
>
> (b) affidavit; or
>
> (c) depositions taken before an examiner or examiners in accordance with rules 369 to 376 of the High Court Rules.
>
> (2) The parties and their counsel are entitled to be present at, and take part in, the examination of a witness.

[37] Rule 45 is drafted in different terms than its predecessor rule.[11] The Supreme Court has held, however, that the new version of the rule does not alter the well

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10 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
11 Court of Appeal (Civil) Rules 1997, r 24.

understood and firmly established principles which had developed under the previous rules.[12] Accordingly, this Court will only grant leave for the admission of further evidence on questions of fact if the evidence is fresh, credible and cogent. Evidence is not regarded as fresh if it could with reasonable diligence have been produced at the trial.[13]

[38] We agree with Mr Campbell that Mr He could easily have produced these bank statements at trial. As a director of NZPIL, Mr He had access to these documents and indeed produced many of NZPIL's bank statements for its other accounts with the same bank at trial. Moreover, as a matter of cogency, the amount that Mr Chen advanced to NZPIL is not relevant to whether the $300,000 advanced by Mr Chen to Mr He was or was not a personal loan.

[39] Accordingly, we decline Mr He's application to adduce further evidence. It is neither fresh nor cogent.

Discussion

[40] A key issue on appeal was where the onus of proof lay once both parties had accepted the authenticity of the acknowledgement of debt. Both parties referred us to the case of *Newmans Tours Ltd v Ranier Investments Ltd* where Fisher J said:[14]

> If the written document appears on its face to be a comprehensive record of an agreement, that in itself will be strong evidence that it was intended to be exhaustive. The more the suggested oral term is in disharmony with the wording of the written document, the more difficult it will be to persuade the Court that it was intended to survive the written document. But if, from whatever source, the Court is satisfied as to the parties' real agreement, it will give effect to that agreement regardless of the form in which it may have been expressed. In the end, the search is therefore for the objectively expressed intentions of the contracting parties.

[41] Thus the issue, as far as the onus of proof is concerned, is whether the acknowledgement of debt appears on its face to be a comprehensive record of an agreement between the parties. If it does then the onus fell on Mr He to rebut the presumption that the document accurately records the parties' entire agreement. If,

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12 *Aotearoa International Ltd v Paper Reclaim Ltd* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

13 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192.

14 *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC) at 81.

on the other hand, the acknowledgement of debt does not appear on its face to be a comprehensive record of an agreement then the onus remained with Mr Chen as the plaintiff to persuade the Court that Mr He owes him a debt on similar terms to those recorded in the document.

[42] To be a "comprehensive" record of the parties' agreement a document must record all the necessary and essential terms.[15] The acknowledgement of debt does this. It sets out the amount of the loan, the date by which Mr He must repay it, and the rate of interest. It even specifies that interest would only accrue in respect of $200,000 rather than the whole amount. We are therefore satisfied that the document appears on its face to be a comprehensive record of an agreement between the parties.

[43] It follows that we are unable to accept Mr Sills's submission that the document does not accurately record the rights and obligations of each of the parties and does not cover the essential terms of the parties' arrangement.

[44] We do not accept Mr Sills's first point that the document is not evidence of Mr He being indebted to Mr Chen for $300,000 because it was signed when Mr He had received only $200,000 and there was no obligation on Mr Chen to advance a further $100,000. Mr He acknowledged a personal debt of $300,000 and that became the position four days later. In those circumstances, we are satisfied that the document is clear evidence of Mr He being indebted to Mr Chen for $300,000.

[45] We do not regard the fact that Mr Chen did not sign the document as relevant. Mr He signed a document acknowledging a debt and Mr Chen sued on that document. Mr He has accepted the authenticity of the document. Whether or not Mr He would have been able to rely on the document to prevent Mr Chen from demanding early repayment or interest on the money is beside the point.

[46] There is some merit in Mr Sills's submission that the document does not clearly explain how interest would accrue in respect of only two of the three tranches

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[15] See for example *Watson v Whitehead* [2014] NZHC 2992 at [104] and *Tak & Co Inc v AEL Corporation Ltd* (1995) 5 NZBLC 103,887 (HC) at 103,892.

advanced to Mr He. But documents do not have to be perfect to be binding. If there are ambiguities then they can be resolved by applying the standard tools of construction of contracts.

[47] For reasons which we will refer to shortly, we are satisfied that the surrounding circumstances in which the document was signed do suggest that the document was intended to reflect the entire agreement of the parties. We see the fact that Mr He handwrote the document quickly on the spot as a neutral factor.

[48] Accordingly, having accepted the authenticity of the document, the onus fell to Mr He to prove:

(a) the acknowledgement of debt was only a part of the agreement;

(b) there was another part of the agreement whereby if Mr He could satisfy Mr Chen of his business competence the $300,000 would "roll over" and become a shareholder's advance thereby extinguishing Mr He's personal liability to Mr Chen.

[49] Justice Moore did not make overt findings of credibility. Implicitly, he must be taken to have rejected key aspects of Mr He's evidence.[16] Mr Sills submits that in order to decide the conflicts between the parties, Moore J was required to make findings of credibility. We do not agree, in this instance. The Judge directed himself to consider the rival contentions of the parties against the extrinsic evidence or matrix of fact. He followed that approach through the balance of the judgment. Any findings of credibility were made in that context, which is consistent with the accepted approach to contractual interpretation.

[50] We make the point, however, that where there is a direct conflict of testimony on the nature of the contractual arrangements in issue, and the Judge reaches a definite conclusion consistent with one account and inconsistent with the other, it is desirable for the Judge to give clear reasons for that conclusion.[17] Where the conclusion is based on credibility and incredibility of testimony, the Judge should

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16 *R v Scutts* [2015] NZCA 599 at [40].

17 *Church v Echuca Regional Health* [2008] VSCA 153, (2008) 20 VR 566 at [139]–[140].

make that clear. Where the conclusion is based on an objective analysis of extrinsic evidence, that too should be made clear. And likewise where the analysis involves a hybrid of both approaches. That is simply good practice because it makes explicit the basis for the Judge's conclusion and forestalls the sort of argument raised by Mr Sills in this case.

[51] It is evident that Moore J weighed the oral evidence of the parties against:

(a) the acknowledgement of debt document;

(b) the accounting records;

(c) the correspondence from Mr He's lawyers in answer to the demand for payment; and

(d) the areas where the parties agreed.

[52] We agree with Moore J's analysis and the conclusions he reached. We draw particular attention to the following:

(a) The acknowledgement of debt document is accepted by Mr He as having been drafted by him and signed by him.

(b) Mr Chen did advance to Mr He the $300,000.

(c) The money was advanced to Mr He personally and not deposited to the account of NZPIL.

(d) The fact that Mr He deposited $50,000 into the NZPIL account on 22 June 2010 does not found an inference that the $300,000 was advanced to him on trust for the joint venture. At best it simply reflects that Mr He was one of the joint venturers. The deposit was recorded as being to his credit.

(e) There is no evidence in the accounting records that the $300,000 was ever recorded as owing by NZPIL to either Mr He or Mr Chen. There was no reversal of credit to reflect the alleged rollover after the expiry of the six months probationary period.

(f) There is no evidence upon which weight can be given that NZPIL repaid the $300,000 advance to Mr Chen.

(g) Like Moore J, we find it very significant that the response by Mr He's lawyers to Mr Chen's demand for payment does not mention the central plank to Mr He's case; namely, that there had been a rollover which extinguished liability on the part of Mr He.

(h) Additionally, we note that this central plank was never put to Mr Chen in cross-examination. It should have been.

[53] Accordingly, we are left with a situation where a debt was alleged and proved. The case for collateral oral terms was not proved. In our view, Moore J did not err in his conclusion.

Decision

[54] The appeal is dismissed.

[55] Costs are awarded to the respondent for a standard appeal on a band A basis, plus the usual disbursements.

Solicitors:
B G Hong Law Firm, Auckland for Appellant
Nigel L Faigan, Auckland for Respondent