IN THE COURT OF APPEAL OF NEW ZEALAND

CA253/05
[2007] NZCA 198

BETWEEN	DYSART TIMBERS LIMITED Appellant
AND	GREGORY NIELSEN First Respondent
AND	RODERICK WILLIAM NIELSEN Second Respondent

Hearing: 1 May 2007

Court: Hammond, Robertson and Arnold JJ

Counsel: C F L Godinet for Appellant
S P Bryers and A M Swan for Respondent

Judgment: 22 May 2007 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B There will be judgment for the appellants in the sum of $213,169.39 against the respondents, jointly and severally.

C The appellant will have interest on that sum from 5 February 2004, at 7.5% per annum, down to the date of this judgment. Thereafter the appellant will have interest at the statutory judgment rate (currently also 7.5%).

D The costs orders made in the High Court are set aside. The appellant will have costs in that Court on a 2B basis, and reasonable disbursements, if necessary as fixed by the Registrar.

E The appellant will have costs in this Court of $6,000, and usual disbursements.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction

[1] Dysart Timbers Ltd (Dysart) appeals against a decision of Ellen France J in the High Court (AK CIV 2004-404-1510 30 September 2005) rejecting its claim in contract for $213,169.39 plus interests and costs against Gregory Nielsen and Roderick Nielsen.

Background

[2] Pursuant to an agreement dated 15 August 1995, Dysart supplied Castlerock Group Ltd with building materials and services. Gregory Nielsen and Roderick Nielsen were directors of Castlerock Group. They gave personal guarantees that Dysart would be paid.

[3] Under this agreement Castlerock Group was to make payment on the receipt of tax invoices. However, by 15 July 1998, Castlerock Group had not paid $213,169.39 owing to Dysart. Dysart consequently put a "stop" on the Castlerock Group account. The Nielsens signed an acknowledgement of debt for this amount on 15 June 1999. They agreed to pay the sum owing in two instalments. However, Castlerock Group went into voluntary liquidation on 31 December 1999 and Dysart received no money from either the liquidator or the Nielsens. Castlerock Group was removed from the companies register on 31 December 1999.

[4] In February 2004, Dysart made demand on the Nielsens for the monies owing to it, plus interest and costs. The Nielsens responded by asserting that the debt had been "settled" in 2001 or 2002.

[5] Dysart issued summary judgment proceedings and a deed of purchase dated 2 April 2001 was then produced, by way of the only, and affirmative, defence.

[6] Under this deed of purchase, a company called Nidia Enterprises Ltd agreed to pay Dysart $340,000 to facilitate an overall settlement between Dysart and three other companies: Trimac (Mays) Ltd, Mays Road (Ellerslie) Ltd, and Castlerock Property Holdings Ltd (Castlerock Property). These companies all had an account with Dysart. The directors of Nidia Enterprises, John McDougall and Lyndon McDougall, were also the directors of Trimac.

[7] Castlerock Property had opened a credit account with Dysart in October 1999. It too fell into debt to Dysart. By 2 April 2001, Castlerock Property owed Dysart $35,197.77. The Nielsens were also directors of this company (and Mays Road (Ellerslie)), and Gregory Nielsen had given a personal guarantee of payment (for Castlerock Property).

[8] The deed of purchase contained a clause which is at the heart of this case. Dysart agreed, as part of the "settlement", that "no other sums are due from either the Castlerock or the Trimac companies or entities" (clause 5). The Nielsens say that by this clause, the prior claim against Castlerock Group was compromised. There is now therefore, in the Nielsens' view, no claim against them personally for their

secondary liability for the breach of the obligations of that company arising from their guarantees.

The Deed of Purchase

[9] We now set out the deed in full:

DEED OF PURCHASE

DATED this 2nd day of April 2001

1 **NIDIA ENTERPRISES LIMITED** (hereinafter called "The Purchaser")

2 **TRIMAC (MAYS) LIMITED** (hereinafter called "Trimac")

3 **DYSART TIMBERS LIMITED** (hereinafter called "the Creditor")

BACKGROUND

A. Trimac is a financier of Castlerock Property Holdings Ltd (hereinafter called "the Debtor").

B. The Creditor is a Creditor of the Debtor for goods and/or services supplied to the Debtor but invoiced to Mays Road (Ellerslie) Ltd, Castlerock Property Holdings, Trimac ("the debt").

C. The Purchaser has agreed to buy the debt from the Creditor in full and final payment for the debt due from the Debtor to the Creditor of $553,602.31.

OPERATIVE PART

1. The Creditor acknowledges that Trimac admits no liability for the payment of the debt or of any other monies that may have been incurred by the Debtor.

2. To facilitate settlement between the Creditor and the Debtor the Purchaser and the Creditor agree that the Purchaser shall make payment to the Creditor of the sum of $340,000.00 on or before the fifth day of April 2001 in full and final payment of all claims the Creditor may have against Trimac or the Debtor in respect of all and any debts.

3. The Creditor accepts the payment referred to in paragraph 2 above in full and final settlement of all and any debt and foregoes any rights, claims and remedies it may have against Trimac or the Debtor or any Guarantor.

4. The Creditor assigns and transfers all and any rights, claims and remedies it may have against Trimac or the Debtor or any Guarantor to the Purchaser.

5. The Creditor acknowledges and agrees that no other sums are due from either the Castlerock or the Trimac companies or entities.

6. Should the Creditor take any action against Trimac and/or the Debtor in respect of the debt then the Creditor shall contemporaneously upon the taking of any such action pay to the Purchaser all monies paid to it by the Purchaser hereunder.

7. Each party will keep the contents of this document, the fact of settlement, and any other matter related to this settlement strictly confidential and will not disclose any information relating to its content to any other person or organizations.

The High Court decision

[10] Ellen France J noted that the differences between the background portion of the deed and its operative part gave rise to an "oddity" (at [30]). While the background referred to a particular debt ($553,602.31), clause 5 was seemingly framed in very broad terms. The Judge considered that "[t]he probable explanation for this is that the deed as a whole reflects the parties' pragmatic view as to how to settle their dispute" (at [30]). That is, Dysart had taken what was offered under the deed, in the face of the risk of receiving nothing.

[11] More importantly, the Judge considered that the only tenable interpretation of clause 5 was that it applied to all Castlerock companies and entities and all Trimac companies and entities. She referred to the use of the word "the" before Castlerock and the use of this description instead of "the Debtor". Further, the Judge was of the view that the fact that Dysart had dealt with both companies at different times offered general support for her conclusion.

[12] Although Dysart had not suggested in the High Court that the Nielsens as non-parties could not rely on the deed, Ellen France J referred to s 4 of the Contracts (Privity) Act 1982 as giving the Nielsens the capacity to enforce the promise in clause 5. The section provides:

> **4 Deeds or contracts for the benefit of third parties**
>
> Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

The appellant's submissions

(i) Introduction

[13] Mr Godinet advanced two arguments. First, he said the High Court's construction of the deed was in error. He submits that the parties did not intend to settle the subject debt (that of Castlerock Group) in the deed and that the factual matrix and evidence adduced at trial did not support the High Court's construction. Secondly, he submits that the High Court erred in holding that s 4 of the Contracts (Privity) Act allowed the respondents to enforce the promise in the deed.

(ii) The construction of the deed

[14] The appellant argues that the specifics set out in the background portion of the deed colour the interpretation of the entire deed document. Mr Godinet focused on who the parties to the deed were: Nidia Enterprises, Trimac (Mays), and Dysart. He emphasised that no reference is made to the respondents, or to Castlerock Group. Castlerock Property, in contrast, is incorporated into the deed because Trimac was its financier. No similar connection existed for Castlerock Group.

[15] The appellant says the Castlerock companies or entities consist of:

(a) Castlerock Property Holdings;

(b) Mays Road (Ellerslie); and

(c) Those companies/entities having the respondents as directors or shareholders.

[16] The Trimac companies or entities consist of:

(a) Nidia Enterprises;
(b) Trimac (Mays); and
(c) Those companies/entities having Mr McDougall as a director or shareholder.

[17] If Castlerock Group had been included in the deed, the appellant asserts that the debt would have been increased by the amount claimed of $213,169.30 to a total of $766,771.61.

[18] Mr Godinet further noted that, at the time the deed was entered into, Castlerock Group had been removed from the companies register. In other words, it did not exist.

(iii) Contracts (Privity) Act 1982

[19] The appellant's argument on this point is essentially a conclusion. After restating the propositions advanced above, Mr Godinet said, "If Castlerock Group Limited is found not to exist/is not included in the deed then the respondents as guarantors cannot, it is submitted, rely on section 4 of the Act."

The respondents' submissions

[20] The respondents pitch the central issue as being whether the interpretation of the deed put forward by Ellen France J achieved the relevant commercial purpose, namely, Mr McDougall's control over the debt of the Castlerock companies and the Nielsens. Mr Bryers said:

> If, despite the Deed, Dysart remained free to pursue remedies against other Castlerock companies or entities, then the commercial purpose of the Deed would be undermined, as the Castlerock companies and the Nielsens would

> remain vulnerable to financial failure over which the McDougalls would have no control. The McDougalls did not know how many Castlerock companies there were and it was crucial to get all Castlerock companies and entities released.

[21] The respondents argue that the Judge was correct to adopt what they say is the natural meaning of the words "the Castlerock or the Trimac companies or entities".

[22] The respondents highlighted the appellant's inclusion of "those companies/entities having the Respondents as directors/shareholders", and argued that this category would encompass Castlerock Group. This would also be in keeping with Dysart's knowledge of Castlerock Group through prior dealings.

[23] Unlike the appellant, the respondents distinguished "company" (Castlerock Group) from "entities" (including the respondents as guarantors). "Entity", the respondents argued, is to be given a dictionary meaning to encompass "anything that is in existence".

[24] With regards to the "any guarantor" references in clauses 3 and 4, the respondents argued that, in light of clause 5, the word "any" must be emphasised (as opposed to a narrow interpretation pinning the guarantor to Trimac or Castlerock Property).

[25] In relation to the legal status of Castlerock Group at the time of execution of the deed (that is, its absence from the companies register), the respondents advanced four points:

(a) They suggested this argument was not put before the High Court;

(b) There is no evidence that either of the parties were aware of Castlerock Group's removal from the register, or that this affected their understanding of the deed;

(c) The mere fact of the removal would not affect the intention behind the deed, given that the Nielsens remained liable under their guarantee; and

(d) Section 4 of the Contracts (Privity) Act specifically applies "whether or not the person is in existence at the time when the deed or contract is made".

[26] The respondents said, with reference to the Contracts (Privity) Act:

> [I]f the interpretation of the Deed as found by the lower Court is upheld, it follows that the phrase "the Castlerock companies and entities" was intended to encompass Castlerock Group and/or the Nielsens and that either or both are persons "designated by name, description or reference to a class" … .

Discussion

(i) The relevant factual matrix

[27] This is a case in which there is no dispute that this short – and somewhat unhappily drafted – agreement is the entire agreement of the parties. It has therefore to be interpreted giving the words in it their everyday meaning, in the factual context as it was known to both parties at the time the contract was entered into. What the parties individually may have meant or intended is of no moment. A Court starts with the words used by the parties, but has to give a proper recognition to the context in which they were used. As Lord Hoffman said in *Jumbo King Ltd v Faithful Properties Ltd* (1999) HKCFAR 279:

> The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects it was intended to achieve.

And as this Court has said, even the absence of ambiguity does not preclude a consideration of the relevant factual matrix (*Ansley v Prospectus Nominees Unlimited* [2004] 2 NZLR 590 at [36]).

[28] The essential issue between these parties is whether this was a "closed" agreement: that is, whether companies or entities other than those mentioned in the deed, such as Castlerock Group, were not subject to it or whether it was more "open-textured". The appellant says that it was never its expectation that the deed extended to the Castlerock Group debt (and the supporting guarantees of its debt); the respondents say this debt was caught by a deliberate, and open-ended, "wash-up" clause.

[29] It is important to note the very restricted nature of the evidence before the High Court at the substantive hearing. Affidavit evidence had been filed on the unsuccessful summary judgment application. This included an affidavit by Mr McDougall in which he had deposed that clause 5 was broadened in the drafting stage, at his insistence, because he wished to be "absolutely sure" that the settlement "not only covered Castlerock Property Holdings Ltd, but also covered any other 'Castlerock' company and the Nielsens personally". But no application had been made to the trial Judge to allow that affidavit to be read at trial, and consequently Mr McDougall was not cross-examined as doubtless he would have been if the affidavit was in evidence. Evidence does not automatically "carry-forward" when adduced at a summary judgment hearing. If counsel for the respondents wished to refer to the affidavit at trial, then it would have been necessary to either gain the agreement of the appellant or obtain an order from the Judge, at trial, that the earlier material could be used as evidence at the substantive trial.

[30] In the result, Mr McDougall did not give evidence at the trial; indeed no evidence at all was given for the respondents. Ellen France J said they relied solely "on the words of clause 5" (at [29]).

[31] On the other hand, Mr Sapwell, who is Dysart's director, gave evidence for the appellant at trial. He said that:

> [Dysart] was simply asked to confirm that the debt owed by the three companies of $553,602.31 was correct – which it was. At no time were any discussions held with Lyndon McDougall regarding Castlerock Group Ltd (in liquidation) nor were any discussions held with Lyndon McDougall regarding the [Nielsens'] liability to [Dysart] as guarantor of the Castlerock Group Ltd account.

[32] The significance of this to the respondents' argument is apparent. Their central argument is that the whole purpose of clause 5 was to intercept any other debts the Nielsens might personally be responsible for. But that is no more than an argument. On the only admissible and relevant evidence, the "context" of this agreement was a "closed" discussion: what was being compromised for $340,000 was the debts of the three specific companies amounting to $553,602.31.

[33] It is true that Mr Sapwell was asked in cross-examination why clause 5 was added to the deed. He gave the somewhat confusing answer that this was at Mr McDougall's insistence: "[Mr McDougall] did not want us to have any comeback on him or his company because he was the financier who was going to give us the finance cover by this deed". But that adds nothing.

[34] It comes to this. There was evidence at trial from Mr Sapwell that Mr McDougall "came to the rescue" of the Nielsen interests because he wanted to assist them, for his own purposes. There is no doubt that Mr McDougall (through a company, Nidia Enterprises) agreed to "clear off" the debts amounting to $553,602.31 by paying Dysart $340,000. But the only admissible evidence as to the expectations of the parties came from Mr Sapwell, who said this was effectively a closed transaction, and did not extend beyond the specified companies.

(ii) The construction of the deed

[35] The respondents take the view that clause 5 should be interpreted very literally: anything that is or was a Castlerock company in the generic sense is barred from suit (as are secondary guarantors).

[36] The first point to note is that the agreement as a whole has to be considered, not just clause 5. The recitals ("background") are very important, for these are "agreed" facts. The "debt" under consideration is that stated in "B": it covers only two Castlerock companies (Mays Road (Ellerslie), and Castlerock Property). By "C", it is the debt of those companies (along with one other) in "B" which is to be purchased.

[37] The "settlement" is between Castlerock Property and Trimac (Mays). Castlerock Property is (by definition) the "debtor" in clauses 1, 2, 3 and 4.

[38] When, as it does, clause 5 refers to "the Castlerock … companies … or entities" we consider that is a reference to the Castlerock companies or entities covered by the deed. The function of clause 5 is in the nature of a confirmation by Dysart that those are the only debts owing by Castlerock Property or Mays Road (Ellerslie). This must have been important to the parties because of course Nidia Enterprises had to know what debt it was purchasing before it could decide on a level of discount; and Dysart had to know what it was compromising, and for how much. It is a very strained construction to turn clause 5 on its head, and to say that really it amounted to a security blanket for any other (unknown) claims there might have been, or be, against other Castlerock companies or guarantors.

[39] In short, the proper construction of "the Castlerock companies", is to the Castlerock companies mentioned in the deed itself. We say this even apart from the fact that Castlerock Group did not then exist (for the evidence does not establish that the parties knew of, let alone appreciated, the significance of that fact).

[40] We see no reason to strain to reach an interpretation such as the respondents seek to maintain where what is at issue is the establishment of a "bar" to an otherwise admitted liability. We would expect there to be clear words, of the type appearing elsewhere in the document, if the parties' intention had been to settle the admitted debt owed by the respondents under their guarantee in respect of Castlerock Group's debt.

[41] Given our view on liability, we need not canvass the privity issue further.

Relief

[42] We have taken the view that the only defence advanced to a judgment in favour of Dysart fails. This leaves the issues of quantum and interest. The trial Judge did not determine those issues, because she was not required to do so.

[43] The claim is on a guarantee, which is admitted by the statement of defence. The statement of defence acknowledged that on 15 June 1999 "the defendants agreed in writing to pay certain monies to [Dysart]". What the Nielsens were pointing to here is an acknowledgement that they would pay $120,000 upon the sales of certain units at Franklin Road, Auckland; and $93,169.39 (or $213,169.39 in all) upon the sales of other units in Sarawia Street, Auckland. Only the Nielsens signed that acknowledgement. It is clear evidence of the indebtedness, in the sum claimed.

[44] The promised monies were never forthcoming, and when formal demand was made on 5 February 2004, the riposte was incorrectly made that they were not owing.

[45] It is not possible on the limited evidence which was adduced at the hearing to determine precisely when the various debts were incurred. But in any event, on a claim on a guarantee, it is appropriate to run the claim from the date of formal demand, which was 5 February 2004.

Conclusion

[46] In the result, there will be judgment for the appellant in the sum of $213,169.39 against the respondents, jointly and severally.

[47] The appellant will have interest on that sum from 5 February 2004, at 7.5% per annum, down to the date of this judgment. Thereafter the appellant will have interest at the statutory judgment rate (currently also 7.5%).

[48] As to costs, the costs orders made in the High Court are set aside. The appellant will have costs in that Court on a 2B basis, and reasonable disbursements, if necessary as fixed by the Registrar.

[49] In this Court, the appellant will have costs of $6,000, and usual disbursements.

Solicitors:
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