IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

CIV 2016-483-40
[2017] NZHC 1091

BETWEEN	CHRISTINE ANNA ELIZABETH REGAN AND MARK JEFFEREY TUFFIN AS TRUSTEES OF THE WINCHESTER TRUST Appellants
AND	BRYCE BROUGHAM First Respondent
AND	RACHAEL CHRISTINA DEY Second Respondent

Hearing: 26 April 2017

Counsel: F A King for Appellants
J K Mahuta-Coyle for First Respondent
S A McKenna for Second Respondent

Judgment: 24 May 2017

JUDGMENT OF SIMON FRANCE J

Introduction

[1] Mr Brougham and Ms Dey were in a de facto relationship. They decided to purchase a business together and arranged a loan of $50,000 from a family trust associated with the Winchester Trust (the Trust). The loan was to the company the couple formed for the purposes of the venture – B and R Enterprises Ltd. The couple were the directors of the company.

[2] The loan was to be personally guaranteed either by Mr Brougham only, or by both Mr Brougham and Ms Dey. The loan was recorded on a standard form term loan agreement (the Agreement), which was the only documentation. The venture and the company failed, as did the relationship. The Trust brought proceedings

against Mr Brougham seeking to enforce the guarantee. He denied liability but joined Ms Dey as a party on the basis that if he was a guarantor, so was she as to half of the loan.

[3] Mr Brougham also counterclaimed against the Trust in relation to work he had done on a Trust property. The claim alleged either a constructive trust or sought a quantum merit award for work done.

[4] In the District Court everyone was unsuccessful:[1]

(a) it was held there was no enforceable contract of guarantee with Mr Brougham;

(b) that meant his claim against Ms Dey was no longer needed, but had it been a live issue, the Court rejected the claim that Ms Dey was also a guarantor; and

(c) the constructive trust claim failed because Ms Dey, as only one of two trustees, did not have control of the Trust. Accordingly, the other trustee could not reasonably be expected to yield an interest in the Trust property to Mr Brougham.

[5] The Trust appeals the decision rejecting its claim of an enforceable guarantee against Mr Brougham. Mr Brougham appeals the decisions that Ms Dey was not a co-guarantor (if he was one) and the rejection of the constructive trust claim. All parties defended the appeals that affected them.

[6] The essence of the guarantee dispute is that the Agreement between the Trust and the start-up company contemplated that the guarantors would sign a separate guarantee document which would set out all the terms and obligations of the guarantee. That never happened. Indeed, Mr Brougham was never asked to sign such a document and so he says he is not liable as a guarantor. There was never a contract that set out any of the essential terms.

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1 *Winchester Trust v Brougham* [2016] NZDC 18553.

[7] The Trust relies first on the Agreement which Mr Brougham signed as "guarantor", and says that document has enough in it to amount to a contract of guarantee. To succeed on that the Trust must establish compliance with s 27 of the Property Law Act 2007, which says that guarantee contracts must be in writing and signed by the guarantor. Obviously the Agreement is in writing and Mr Brougham has signed it. But if it contains none of the terms and obligations of the guarantee contract, can the guarantee contract really be said to be in writing?

[8] If the Trust fails on this then it submits that equity should intervene to prevent Mr Brougham from avoiding his agreed responsibilities. It could do this by requiring him to sign the deed of guarantee, or alternatively saying he is estopped from relying on non-compliance with s 27. The Trust relies on a series of cases where it says similar relief has been given.

Facts

[9] The Winchester Trust had two trustees – Ms Regan and Ms Dey, who is Ms Regan's daughter. Ms Dey undertook all the endeavour in relation to the loan arrangements. She and Mr Brougham were using a particular solicitor to assist with the business purchase. He had previously done work for Ms Dey. Ms Dey instructed him to also prepare the Agreement under which the Trust would advance the money. Ms Dey wrote:

> The agreement should reflect the following information:
>
> Lender: Winchester Trust
> Borrower: B & R Enterprises Limited
> Amount: $50,000
> Term: 10 years
> Interest Rate: 3 % above current floating rate – currently 5.850% p/a
> Default: I am assuming there is some sort of standard clause that can go in here, reflecting interest at default payments being at the current unauthorised overdraft rate, or a set interest rate for late payments of e.g.: 19.95%
>
> As we discussed a personal guarantee from both directors of B & R Enterprises Limited – being Bryce Brougham and myself Rachael Dey to accept a personal responsibility for $25,000 each.

[10] The Agreement was drafted using an ADLS Term Loan Agreement form. The front page of the Agreement as signed by the parties provides:

> We, the lender(s) specified below, agree to lend you, the borrower(s) specified below, the amount of the total advances referred to in the attached Annexure Schedule.
>
Lender(s) (We/us): Winchester Trust (Trustees – Rachael Christina Dey and Christine Anna Elizabeth Regan)	
Physical address:	c/- 42 Golf Road, Paraparaumu 5032
Postal address:	PO Box 471, Paraparaumu 5254
Fax:	
Email:	rachdey@xtra.co.nz

Borrower(s) (You): B & R Enterprises Ltd	
Physical address:	42 Golf Road, Paraparaumu 5032
Postal address:	42 Golf Road, Paraparaumu 5032
Fax:	
Email:	

Guarantor(s): Rachael Christina Dey and Bryce Brougham	
Physical address:	42 Golf Road, Paraparaumu 5032
Postal address:	PO Box 471, Paraparaumu 5254
Fax:	
Email:	rachdey@xtra.co.nz

> The terms and conditions that apply to your contract (other than those implied by law) are set out in the following documents:
>
> - this Term Loan Agreement;
> - the Annexure Schedule and Loan Conditions attached; and
> - each security interest.
>
> When we refer to this agreement, we are referred to all of these documents. When we refer to a table we are referring to the relevant table in the Annexure Schedule.

[11] Some preliminary comment on these provisions will assist. It can be seen that in the boxes for lender and borrower, each term is given a plain English equivalent – "us/we" and "you". This is significant to the appellant's case that the

Agreement is also a contract of guarantee because of the way "you" is then defined in the Agreement:

> Construction of terms: in this contract, unless inconsistent with the context …
>
> the word "you" includes all persons executing this contract regardless of how they may be described in this contract and the covenants contained and implied in this contract will bind each of you jointly and severally as the principal party in this contract.

[12] The clause expresses itself as applying to everyone who executed the agreement and Mr Brougham certainly did that. The appellant submits that therefore he has taken on the lender's obligations, but still as guarantor. It is submitted it can be implied into the contract that the guarantor's obligations will be the same as the lender's, but that the guarantor's obligations will be triggered only if the lender is in default.

[13] A final comment on this page of the Agreement relates to the guarantor box. On the form the box actually describes itself as applicable to two types of person – a guarantor and a covenantor. The covenantor option was struck out. It is of some interest to the current debate that elsewhere in the agreement there is a specific provision which sets out the obligations of a covenantor. It provides:

> 13. COVENANTOR
>
> Any person executing this contract as covenantor covenants with the lender that:
>
> (a) covenant to pay and comply: the covenantor will pay all the obligations and will comply with all covenants and terms on your part contained or implied in this contract;
>
> (b) covenantor not a surety: although as between you and the covenantor, the covenantor may be a surety only, the covenantor will in relation to the lender be deemed a principal party to this contract and may be so treated in all respects by the lender;
>
> (c) events that do not release covenantor: neither your liquidation nor the giving of time or any indulgence by the lender to you, nor the exercise or non-exercise by the lender of any of the lender's powers, nor any release or partial release or variation of any contract or security interest or arrangement with you, without (in any of the above cases) the consent of the covenantor, will release the covenantor from liability to the lender; and

(d) not released if a surety would be released: nor will the covenantor be released by any other act or omission of the lender or any other act, matter or thing which might release one liable as a surety only.

[14] A point of interest is that nowhere is there an equivalent provision concerning a guarantor.

[15] On the same page where the borrowers are to sign, the agreement contains further conditions which provide:[2]

> Agreement to repay
>
> You agree that:
>
> (a) *you* will repay all amounts that *you* borrow from *us* together with interest charges, fees, other charges and any default interest at the times and in the manner set out in the Annexure Schedule; and
>
> (b) the terms and conditions contained in the Loan Conditions apply to all loans that we make to *you* under this agreement.

[16] The document then continues:[3]

> Conditions precedent to advance
>
> Before we can make the first advance to *you* under this contract:
>
> (a) *you* must have signed this agreement together with all of the securities;
>
> (b) the conditions set out in the Annexure Schedule (if any) and any other pre-settlement requirements that *we* ask *you* to complete must have been completed to our satisfaction; and
>
> (c) *If any person is named in this agreement as a guarantor, the guarantor must have signed a deed of guarantee and indemnity in the form required by us and the conditions precedent to the acceptance of that guarantee (if any) must have been completed to our satisfaction. (emphasis added)*

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2 Emphasis added.
3 Emphasis added.

[17] Obviously the first clause contains the basic obligation to repay, and the second clause contains pre-conditions that have to be met before the lender is obligated to advance any money. In the obligation clause, the person who has to pay is "you". This corresponds to the clause on the prior page where the lender agrees to lend. In the pre-conditions clause, (c) is of most interest. It is the clause that shows the parties contemplated there would be a separate deed of guarantee. Plainly, it empowered the Winchester Trust not to advance any money to the lender until this was done. The Trust's constant position throughout the proceeding has been that it is a provision for its benefit and it was waived. The issue then becomes whether what it is left with is enough.

[18] Finally some comment is needed on the signing process. The Agreement made provision for four signatures – namely the two directors, Ms Dey and Mr Brougham, and the two guarantors, Ms Dey and Mr Brougham. The evidence established that the document was taken home by Ms Dey and that is where it was signed. No witnesses are required and there was no-one else present. However, it was not signed as contemplated. Ms Dey in fact only signed the once, in the slot assigned to a director. Mr Brougham signed twice. As it happens his two signatures appear on the two slots assigned to guarantors. It is, however, common ground he intended to sign once in each capacity – director and guarantor. Ms Dey said she only ever intended to sign as director. She says, and Mr Brougham denies, that this change was discussed at the time the document was signed. The Judge accepted the gist of Ms Dey's evidence on this.[4]

The Trust's appeal

[19] The first issue is whether the Agreement can stand on its own as a contract of guarantee. Along with the District Court, I consider the clear answer is no.

[20] It is first necessary to consider the effect of the definition of "you". Looking only at the definition, it appears to make everyone signing the contract a principal party. However, that interpretation is at odds with the rest of the document:

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4 *Winchester Trust*, above n1, at [60]–[61].

(a) it is only an interpretation provision;

(b) the term "you" in the body of the Agreement is specifically allocated only to the borrower;

(c) the detailing of the obligations of the covenantor would seem unnecessary if "you" applies to a covenantor who would be a principal debtor; and

(d) the requirement for a separate deed of guarantee would seem superfluous if signing this Agreement made one a principal party.

[21] A guarantor is classically a secondary debtor who promises to pay if the principal debtor does meet the borrower's obligations under the contract. A guarantee is to be distinguished from an indemnity which is an unconditional promise that the obligation of the third party will be met. Unlike with a guarantor, the indemnifier's obligation persists even if, for example, the principal debtor has a defence that negates liability. The indemnifier's obligation is independent of the liability of the principal debtor.[5]

[22] This traditional analysis of a guarantee is typically modified by lending institutions in their standard form contracts. A variety of clauses are used to improve the quality of the lender's position as regards the guarantor. One of those clauses is a principal debtor clause which Paget describes in these terms:[6]

> Generally, modern guarantee forms provide for the guarantor's liability to be both as principal debtor or primary obligor (or some such similar wording) and as surety. The intention of such 'principal debtor clauses' is to preserve the liability of the guarantor in the event that the principal debtor's obligation is for some reason unenforceable or discharged or, as with clauses of the type discussed in the preceding paragraph, where the guarantor's liability would be discharged if he was liable only as surety. In principle such clauses are effective provided that the words, on construction, cover the events which have happened. However their inclusion in a guarantee will not usually have the effect, without more, of converting the guarantee into a contract of indemnity.

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5 A Tyree and Others *Tyree's Banking Law of New Zealand* (3rd ed, LexisNexis, Wellington, 2014) at [10.41].

6 Malek and Odgers *Paget's Law of Banking* (14th ed, LexisNexis, London, 2014 at [18.33], footnotes omitted.

> The inclusion of a principal debtor clause may mean that a demand is not necessary to constitute the guarantee presently enforceable against the guarantor, even if the guarantee requires the guarantor to pay on demand.

[23] It can be seen, therefore, that it is possible to shape the liability of a guarantor in ways that run counter to the orthodox understanding of a guarantor. However, I cannot accept that is achieved, or intended, merely by defining "you" in these terms. If that were the intended effect, the document would be completely misleading in that it would induce the person signing as guarantor to believe there would be a separate Deed of Guarantee they could see before signing, and which would contain the terms of the guarantee, since they are not in the document. On its face, the Agreement also allocates "you" only to the borrower but then would be defining that term to apply it to everyone signing. And finally, without any other notice, this interpretation of "you" would change the status of a guarantor to a person assuming primary liability for the debt without even seeming to need any triggering default by the borrower or notice to the guarantor.

[24] For these reasons, and noting that the definition of you is qualified by "unless inconsistent with the context", I interpret "you" as not applying to a person executing the document as guarantor.

[25] Once the definition of "you" is put to one side, the appellant's case falls away. The Agreement clearly contemplates that any guarantee will be found in a separate contract. Consistent with this, and unlike for both the borrower and any convenantor, there are no operative clauses within the document imposing any obligation at all on a guarantor. Nowhere it is said what the guarantor is agreeing to, nor when that obligation might arise. I acknowledge that with a simple term loan arrangement the nature and extent of a guarantor's obligations may be easy to infer, but one would still expect clarity around matters such as when the guarantee will be triggered and what notice is required. Further, I do not accept that a consumer protection requirement such as s 27 of the Property Law Act 2007, which requires that a guarantee contract be in writing, is met by a document which merely describes a person as a guarantor, and which is then signed by the guarantor. The essential terms of a guarantee contract must be in writing and here they are not.

[26] Accordingly, I conclude the Agreement is not itself a contract of guarantee.

[27] I do accept that by signing as guarantor the signatory could be taken to be covenanting they will sign a deed of guarantee. It should be noted, though, that as the Agreement is structured, this is not a "sometime in the future" commitment where the expectation is the Agreement will take effect beforehand. Rather, it is worded as a pre-condition and implies the signatory will see a deed of guarantee and need to sign it before any money is advanced for which the signatory will be liable as a guarantor. It is for this reason, when coupled with the absence of the guarantee form as an attachment or otherwise described, that I query whether the signatory is covenanting to complete a deed of guarantee if, without any acknowledgement by the guarantor, the money is advanced first.

[28] Against those comments, one turns then to the proposition that equity should intervene. Mr King relied on several cases which come before and after the enactment of s 27 of the Property Law Act. *Inglis v Clarence Holdings Ltd* involved an agreement to lease.[7] The agreement required the parties to execute a lease in the form attached to the agreement. The lease was never executed, but the lessees entered into possession and carried out their business from the premises on the strength of the agreement to lease.

[29] The tenant was a company. The agreement was also signed by Mr and Mrs Inglis as "covenantors". Clause 16 of the agreement provided:[8]

> The covenantors shall give a personal joint and several guarantee as provided in the Law Society form of lease to a maximum of one years rental at the time, plus rates insurance and other outgoings required from time to time. The covenantors will provide a personal financial position to the satisfaction of CLARENCE.

[30] It can also be noted that the agreement to lease had attached to it, at the time it was signed, the full deed of lease which was to be signed in the future and which included the terms of the guarantee.

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7 *Inglis v Clarence Holdings Ltd* [1997] 1 NZLR 268 (CA).
8 At 270.

[31] The tenant abandoned the property leaving the lessor with considerable losses, which it sought to recover from Mr and Mrs Inglis. The Court of Appeal held that the principle in *Walsh v Lonsdale* applied, so that equity would treat as done that which should have been done.[9] A court would undoubtedly have ordered specific performance of the agreement to lease and that was applied to both the lessor and the covenantor.

[32] In my view the case is distinguishable. There the obligation to sign the deed of lease remained. Here the appellants position right throughout is that they had waived that obligation. Further, the background context is much different. The agreement to lease contained a specific provision setting out the obligations of Mr and Mrs Inglis (the covenantor provision). In addition, the specific details of the guarantee were contained in a document attached to the agreement to lease. These aspects emphasise the complete lack of any equivalent provisions in the present Agreement.

[33] *Inglis v Clarence Holdings* has been applied subsequent to the enactment of s 27 of the Property Law Act in *Chambers v Chatfield*.[10] It is this case the appellants contend is not distinguishable.

[34] *Chambers* also involved an agreement to lease. The lessor and lessee agreed to enter into a deed of lease. It does not appear the lease was appended, but the intended lease document was specifically identified. The agreement to lease also provided:[11]

> **11. Guarantee**
>
> Where the Lessee is a limited liability company, the personal guarantees and indemnities of each of the directors, and/or major shareholders of the Lessee Company as the Lessor requires (jointly and severally if more than one) shall be arranged by the Lessee to the performance of the terms and conditions of the Lease.

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9 *Walsh v Lonsdale* (1882) 21 Ch D 9 (CA).
10 *Chambers v Chatfield* [2016] NZHC 1871, (2016) 10 NZBLC 99–723.
11 At [7].

[35] In that case, Mr Chambers signed as lessee for the company and as "lessee/guarantor". A formal deed of lease was prepared and the uncontested evidence was that Mr Chambers had signed it, but it could not be located. The deed contained the detail of the guarantee. There was also evidence showing Mr Chambers subsequently identifying, in correspondence, circumstances in which "my [personal guarantee] will be released".[12]

[36] Edwards J reviewed *Walsh v Lonsdale*, *Inglis v Clarence Holdings* and s 27 of the Property Law Act.[13] Her Honour first concluded that cl 11 of that agreement to lease represented a covenant to procure a guarantee but not a contract of guarantee in itself. The clear intention was for a guarantee in the form set out in the nominated deed of lease to be executed. Consistent with *Inglis*, it was held that unless s 27 had altered matters, specific performance of the agreement would have been ordered and so equity would treat as having been done that which ought to have been done.

[37] Edwards J then rejected the idea that s 27 had changed things. What was being enforced was not a contract of guarantee but the agreement to lease and the covenant therein to enter into a guarantee. The enforcement of an agreement to lease is covered by different provisions of the Property Law Act 2007. Her Honour observed:[14]

> [49] In this case, the equities are even stronger, as Mr Chambers not only agreed to enter into a Deed incorporating the terms of the guarantee, but he appears to have either signed the Deed, or at the very least accepted that he is bound by its terms. It would be inequitable in those circumstances for Mr Chambers to now use s 27 to escape liability on the grounds that a signed Deed can no longer be found.
>
> [50] It is beyond argument that s 27 of the PLA changed the law as it relates to enforceability of guarantees. But I do not consider any of those changes mean that specific performance of the Agreement to Lease would not be granted in this case. None of the policy considerations behind the changes reflected in s 27 of the PLA are engaged in this case. This is not a case about an oral guarantee, or part performance being relied on to prove the existence of a guarantee. There is no uncertainty in terms of the guarantee, as it is clearly set out in the Deed itself.

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12 At [15].
13 At [23]–[36].
14 At [49]–[50], footnotes omitted.

[38] I do not consider *Chambers* assists the appellant here. I am not satisfied specific performance of the alleged covenant in the Agreement to enter into a deed of guarantee would be ordered. The terms of any guarantee here are not settled as they were in *Inglis* and *Chambers*. In that regard, *Chambers* is less clear than *Inglis* where there was a direct commitment by the signing covenantors to enter into an attached deed. In *Chambers* the deed was referred to, but not attached, and the commitment made by the signing "lessee guarantor" was not as direct; the obligation to obtain a guarantee was described as being one owed by the lessee, not the guarantor. In both cases it was specifically contemplated the entering into of the lease would be something that will be done in the future, and that the agreement to lease would be given effect to in the interim. Finally, in *Chambers*, a deed of lease was apparently actually signed by Mr Chambers, and separately there were acknowledgements by him, after the event, of the existence of the personal guarantee.

[39] The present case is some distance from these. The promise to enter into a guarantee, if that is the effect of Mr Brougham signing, was a promise to do so before the money was advanced. The Trust says it waived the requirement but now seeks specific performance of it. It is not argued that the pre-condition became a condition subsequent or that this was raised with Mr Brougham as guarantor. Further, as already noted, in my view there is insufficient certainty in the Agreement unlike in the agreement to lease documents in *Inglis* and *Chambers*, as to the terms of the guarantee to be signed so as to allow it to be enforced. What is it that ought to have been done that has not been? If a deed of guarantee was produced, how would it be assessed as being the guarantee Mr Brougham had agreed to enter into?

[40] Section 27 requires that a contract of guarantee be in writing and signed. For myself, at least within the context I am dealing with of a term loan, I have some doubts that s 27 is to be avoided by focusing on the prior agreement that allegedly contains a covenant to guarantee. It is at least arguable that the effect of equity, treating as being done that which ought to have, is to hold a defendant to a guarantee that contrary to s 27 is neither signed nor in writing. However, I do not need to consider the point further because I am satisfied the covenant here is not one which equity should enforce.

[41] The Trust's appeal is accordingly dismissed.

Mr Brougham's appeal against Ms Dey

[42] Given that Mr Brougham has not been found liable as guarantor, this cross appeal falls away and need not be determined.

Mr Brougham's appeal against the Trust

[43] In the middle of 2006, the trustees of the Winchester Trust were Ms Dey and her mother, Mrs Regan. Prior to there being a relationship between Ms Dey and Mr Brougham, Mr Brougham did building work on a property owned by the Trust. It is common ground that the work was billed by, and paid to, BOP Joinery Installers Ltd.

[44] After the couple formed a relationship in mid-2007, Mr Brougham continued to do work on the property. This aspect of the proceeding addressed the basis on which that work was done, and whether it had all been paid for. Mr Brougham contended he had not been paid for it, and advanced claims in contract or alternatively alleging a constructive trust. The contract claim was dismissed in short order and there is no appeal from that. The constructive trust claim was also dismissed and that is the subject of appeal.

[45] In order to prove a constructive trust, Mr Brougham needs to establish:[15]

(a) that he made contributions to the property;

(b) that he had a reasonable expectation, sourced in those contributions, of receiving an interest in the property; and

(c) that it is reasonable to expect the owner of the property, the Winchester Trust, to yield an interest to Mr Brougham.

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[15] *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 282.

[46] Addressing each in turn, it was common ground that during the relationship Mr Brougham had continued to do work on the property. It seemed to be disputed whether any of these contributions were unpaid. The Judge concluded he would have found there were unpaid contributions but to a much lesser extent than had been claimed.

[47] As to him having a reasonable expectation of an interest in the property, Mr Brougham claimed that Ms Dey had said he would. It was submitted this promise was reflected in a subsequent change in billing practices with a marked drop off in bills from the company. For her part, Ms Dey accepted there may have been a discussion of unpaid work, but denied she had ever offered Mr Brougham an interest. She said any unpaid work he did was just done by him to help her out. The Judge made no finding on this factual dispute. For my part, I observe it would seem rather odd for an established pattern of properly invoiced and paid work to change without good reason. The most likely reason is that Mr Brougham had come to believe he would be otherwise compensated.

[48] The third requirement is that it be reasonable to expect the owner, here the trustees of the Trust, to yield an interest. A difficulty for Mr Brougham is that there was no evidence that the other trustee, Mrs Regan, had ever made such a promise or induced an expectation in Mr Brougham. Ms Dey as one of the trustees might have done so, but trustees must act unanimously, and cannot delegate their functions. So on the face of it Ms Dey's actions could not bind the Trust.

[49] This issue has been addressed in a series of cases which have held that if the other trustees have abdicated their responsibility and allowed the remaining trustee to act unilaterally, the trustees cannot use the unanimity and non-delegation rules as a shield.[16] Otherwise they would be taking advantage of their own wrong.

[50] In the present case Judge Ross concluded Mrs Regan had not abdicated her responsibilities and that the claim must therefore founder against this third requirement.

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[16] *Vervoot v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hodgkinson Trust v Judd* [2016] NZCA 397, (2016) 4 NZTR 26–019.

[51] Mr Mahuta-Coyle repeals on appeal the factors said to point to a contrary conclusion:

(a) Ms Dey controlled the bank accounts without a co-signatory;

(b) Ms Dey had used that account for groceries;

(c) Ms Dey acted for the Trust in Tenancy Tribunal matters;

(d) Ms Dey made all the arrangements in relation to the Term Loan; and

(e) Ms Dey made all the decisions about the Trust Property being renovated.

[52] Mrs Regan denied that Ms Dey ran or controlled the Trust. She said that all matters were always discussed with her, and that it was Mrs Regan that provided the instructions concerning the guarantee. Mrs Regan also claimed she remained aware of what was happening at the particular Trust property in dispute, although she accepted less so after the practice of the company billing fell away.

[53] In his decision the Judge accepted Mrs Regan's evidence. This is a situation where I consider the appellate court should yield to the advantages of the trial Judge. I see no basis to say Mrs Regan was not involved. Ms Dey may have done a lot of the day to day running and the record keeping, but Mrs Regan said she was involved and the Judge believed that evidence. There was not really any contrary evidence, just alleged inferences based on Ms Dey's role.

[54] It follows that this appeal fails.

Costs

[55] Each of the principal parties have failed on their appeal. The appeal concerning the guarantee was by far the main issue in the appeal and the appellants should pay costs. However, any award should be reduced to reflect the unsuccessful

cross appeal. I award the first respondent 70 per cent of scale costs for a 2B appeal together with reasonable disbursements.

[56] The second respondent (cross-claim defendant) is entitled to an award of scale costs together with reasonable disbursements. I consider those costs should be borne by the appellant. Although I have not needed to determine the merits of the cross-appeal as between the respondents, it was by no means a hopeless or unnecessary appeal. The cross-appeal would not have been filed but for the appellant pursing its unsuccessful appeal.

[57] Given the various relationships between the parties, I prefer to make the appellant directly liable for the costs. The alternative would be to make the first respondent liable and allow him to add it as a disbursement to the costs due from the appellant, but I prefer the former approach. Accordingly:

(a) the appellant is to pay the first respondent 70 per cent of 2B scale costs together with reasonable disbursements to be fixed by the Registrar if needed; and

(b) the appellant is to pay the second respondent 2B scale costs together with disbursements to be fixed by the Registrar if needed.

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Simon France J