IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CIV-2018-019-000726
[2018] NZDC 25694

BETWEEN	JAMES & WELLS PARTNERSHIP Plaintiff
AND	MY BOX NZ LIMITED First Defendant
AND	ROXANE VIOLETTE MARGARITA JOSSE Second Defendant
AND	KRISHNELL VON ROY REDDY Third Respondent

Hearing: 10 December 2018

Appearances: J Hazel for the Plaintiff
K Bond for the Second Defendant

Judgment: 11 December 2018 at 4.00 pm

RESERVED JUDGMENT OF JUDGE R L B SPEAR

[Applications for Summary Judgment
between Plaintiff and Second Defendant]

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[1] The claim by the plaintiff is essentially for outstanding legal fees of $60,276.14, together with interest and costs.

[2] The plaintiff is a law firm and acted for the first defendant, My Box NZ Ltd and the third defendant Krishnell Reddy in respect of proceedings brought against them by Sky Network Television Ltd.[1]

[1] *Sky Network Television Ltd v My Box NZ Ltd* [2018] NZHC 2768 (25 October 2018).

[3] The plaintiff applied for summary judgment in respect of all three defendants in respect of those outstanding legal costs. That application was dealt with initially by Judge Menzies at a hearing on 15 October 2018. The second defendant, Ms Josse had by that time filed a Notice of Opposition to the summary judgment application. However, no steps were taken in opposition by the first and third defendants.

[4] In a decision given by Judge Menzies on 18 October 2018,[2] he found that the first and third defendants did not have a defence to the claim. Curiously, summary judgment was entered against the first defendant for $30,138.07, being half the outstanding costs, together with interest and for that same amount against the third defendant. I say it is curious as the first and third defendants were clearly jointly and severally liable for the debt. However, counsel confirmed to me that in fact the plaintiff sought summary judgment against each of the first and third defendants for only half the amount outstanding rather than the full amount. Be that as it may, the hearing before me relates to the claim against Ms Josse for the full amount of the outstanding costs and she, of course, opposes the summary judgment application.

[5] Not only has James & Wells sought summary judgment against Ms Josse, she has also applied for summary judgment to be entered against James & Wells.

[6] Summary judgment can be entered[3] against a defendant if the plaintiff satisfies the Court that the defendant has no defence to any cause of action in the Statement of Claim. In slight contrast, summary judgment can be entered against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's Statement of Claim can succeed against that defendant.

[7] In respect of a claim by a plaintiff against a defendant, the approach required is as summarised in the decision of the Court of Appeal in *Krukziener v Hanover Finance Ltd:*[4]

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[2] NR 2018 NZDC 21441.
[3] Rule 12.2 DCR 2014.
[4] *Krukziener v Hanover Finance Ltd* (2008) NZCA 187 at [26].

> ... 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 Yong 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).

[8] The position is however different when a defendant seeks summary judgment against a plaintiff as it is incumbent on the defendant to show that all the plaintiff's causes of action against that defendant will fail. In this respect, a defendant's summary judgment application is similar to a striking out application but for the fact that summary judgment also allows for affidavit evidence to be provided. The Court is entitled to have regard to the evidentiary material filed in the proceeding rather than having regard just to the pleadings.

[9] At all material times, Ms Josse was the sole director and shareholder of My Box. That company was in the business dealing with the importation and selling of digital media devices in New Zealand. Mr Reddy was the managing director of My Box.

[10] Between 26 July 2017 and 30 April 2017, James & Wells provided legal services to My Box and Mr Reddy in respect of the High Court proceedings brought against them by Sky for breaches of the Fair Trading Act. The three invoices rendered by James & Wells in relation to this proceeding amounted to $65,669.47 including GST, in respect of which $8,500 was paid on account leaving an amount of $60,276.14.

[11] The application for summary judgment by James & Wells and similarly the application for summary judgment by Ms Josse relate primarily to the issue as to whether Ms Josse is liable for James & Wells' legal costs. While Ms Josse was the sole shareholder and sole director of My Box, she was not sued by Sky and denies that

in any way she guaranteed the payment of James & Wells' costs or that she should otherwise be held liable for them. The claim by James & Wells against Ms Josse is based first that she is contractually liable for those fees or that that she is estopped from denying liability. More exactly, James & Wells pleads against Ms Josse:

(a) Liability on the basis of the breach of contract on the basis that Ms Josse is "jointly or severally" liable with My Box and Mr Reddy for their failure to pay those costs because:

(i) She was the sole director and shareholder of My Box and had a responsibility to ensure it paid the plaintiff's invoices when they fell due;[5]

(ii) She directed, authorised or otherwise procured My Box's failure to pay the invoices or acted in the common design with My Box and Mr Reddy to so fail;[6]

(b) Estoppel on the basis that she:

(i) Made representations that she could and would pay invoices for work carried out by the plaintiff;

(ii) Encouraged the plaintiff to rely on those representations;

(iii) Failed to abide by those representations;

(iv) Caused detriment to the plaintiff because it undertook legal work for My Box and Mr Reddy.

[12] The evidence establishes that Mr Cain, a senior associate in the litigation team at James & Wells met with Ms Josse and Mr Reddy at James & Wells' offices on 24 July 2017 to discuss the High Court proceedings that had been commenced by Sky against My Box and Mr Reddy. Mr Cain deposes that he was informed by Mr Reddy

[5] Statement of Claim, para 18.2.
[6] Statement of Claim, para 18.3.

that he (Mr Reddy) was the general manager of My Box and that he had founded My Box but that he was not a director or a shareholder of that company. He introduced Ms Josse as My Box's director and shareholder. Mr Cain deposed further that on 26 July 2017, following that meeting, he emailed a confirmation of instructions letter to My Box and Mr Reddy that contained the following:

> Invoices for our work for you are payable by 20th of the month following issue. We may charge interest in our outstanding invoices. Further details are set out in our Terms of Engagement (reference to a hyperlink).

[13] The required deposit was paid on 14 August 2017 as required by the confirmation of instructions letter. Mr Cain further deposed that on 24 August 2017:

> My Box returned a completed account application form to James & Wells to enable **My Box and Mr Reddy to be established as clients in the firm's database**.
>
> (emphasis added)

[14] In short, there is no dispute that James & Wells did indeed undertake the work reflected by its invoices and that the claimed for amount of $60,276.14, being the outstanding fees owing to James & Wells, is indeed outstanding in respect of the legal work undertaken for the defence to the Sky proceedings.

[15] Mr Hazel accepted that Ms Josse did not execute any documentation or make any express representation to James & Wells that she guaranteed payment by My Box or Mr Reddy for the legal fees incurred in respect of the Sky proceedings. Mr Hazel indeed referred the Court to Court of Appeal decision in *Mahon v Crockett*[7] as authority for the proposition that in a contractual context before a litigant can establish personal liability (as distinct from corporate liability):

(a) The litigant must first establish that there was a contract; and

(b) "The litigant must establish that the contract unequivocally contemplated the company officer or agent accepting a personal liability apart from any liability that might exist on the part of the

[7] *Mahon v Crockett* (1999) 8 NZCLC 262, 043 (CA)

> company with which he or she was associated. This is a question of fact but must be determined against the assumption that separate corporate personality is intended to result in limited liability".[8]

[16] With respect, the principal extracted from *Mahon v Crockett* is hardly novel and indeed is well established. Mr Bond for Ms Josse indeed referred to its origins as being from as far back as the decision of the House of Lords in *Salomon v A Salomon & Co Limited* [1896] UK HL 1, and the leading New Zealand case of *Trevor Ivory Limited v Anderson*,[9] in which case the Court of Appeal held that for a company director to be personally liable for actions taken by him or her on behalf of a company, he or she must have assumed personal responsibility and further, that "something special is required to justify putting a case in that class".[10]

[17] The only documentation signed by Ms Josse in respect of the contract between James & Wells and My Box/Mr Reddy was on a James & Wells account application form, hearing date 22 August 2018, and signed by both Ms Josse and Mr Reddy under the following notation:

> I have received a copy of the James & Wells Terms of Engagement and I/my company understand and will abide by them.

[18] Ms Josse has signed the document but in her stated position as "Director". Mr Reddy has signed as "Manager".

[19] Mr Hazel argues that as Ms Josse did not cross out the "I" next to "my company", she "agreed to be personally bound by James & Wells' terms as well as agreeing to her company My Box being bound by the terms that were ultimately breached by My Box and her".

[20] I do not consider that Ms Josse's signature to that account application form establishes personal liability on her at all. It is abundantly clear that she signed the document in her capacity as director of My Box rather than in her personal capacity.

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[8] *Mahon v Crockett* (1999) 8 NZCLC 262, 043 (CA) at [9].
[9] *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 at 524 (CA).
[10] *Trevor Ivory* at 524.

There is nothing special here that elevates Ms Josse from her position as director of My Box to the point where there is personal liability on her for the debt incurred by My Box.

[21] Mr Hazel indeed acknowledged that the documentation involved with the establishment of the account with James & Wells, including the letter of engagement and suchlike, was all in respect of My Box and Mr Reddy, who were indeed the defendants to the Sky proceeding. There is no documentation either of a formal nature or even of an informal correspondence type nature that establishes a contract between James & Wells and Ms Josse in respect of those legal fees nor is there any evidence of an oral acceptance of personal liability been given by Ms Josse.

[22] There is simply no evidence that Ms Josse became contractually bound to James & Wells in respect of those fees.

[23] The second and alternative claim is that Ms Josse should be held to her "promise" to meet those costs. The Court of Appeal has identified the following elements required to establish such an estoppel:[11]

(a) A belief or expectation (here, on the part of James & Wells) has been created or encouraged by words or conduct (of Ms Josse);

(b) To the extent an express representation is relied upon it is clearly and unequivocally expressed;

(c) The representee (James & Wells) reasonably relied to its detriment on the representation; and

(d) It would be unconscionable for the representor (Ms Josse) to be permitted to depart from the belief or expectation.

[11] *Wilson Parking NZ Ltd The Fanshawe 136 Ltd* [2014] NZCA 407 at 44.

[24] The argument for James & Wells is that while Mr Reddy did most of the talking at the initial meeting with Mr Cain, the failure on the part of Ms Josse to contradict any of Mr Reddy's statements as to the ability of My Box and himself to meet the legal fees to be incurred, led Mr Cain to understand that "by her silence Ms Josse was agreeing that there would be no problem meeting James & Wells' invoices, where the payment was to come from My Box's funds, Mr Reddy's or her own.[12]

[25] It is further argued that Ms Josse gave Mr Cain no reason at all to believe that there was any concern about the ability of My Box or Mr Reddy (or herself) to meet James & Wells' costs. Mr Hazel also argued that this expectation or belief was augmented by Ms Josse's signing the account application form in respect of which he contended that "she personally agreed to abide by James & Wells' terms".

[26] In short, it is difficult to understand how a senior associate in a large, specialised and well-regarded firm such as James & Wells could have been led to believe or expect that, by saying nothing, Ms Josse accepted personal liability for the debts of My Box and Mr Reddy. Furthermore, that her signature on the account application form, specifically identified as made by her in her capacity as director (obviously of My Box), rendered her personally liable for the debts to be incurred by My Box. I find it particularly difficult to accept that Mr Cain could have been left with any expectation at all, much less a belief, that by saying nothing and by signing the account application form in her capacity as director, Mr Cain would have accepted that this was effectively a personal guarantee on the part of Ms Josse to meet the legal expenses incurred by My Box. Indeed, Mr Cain himself refers to the "clients" being My Box and Mr Reddy and so liability on the part of Ms Josse could only arise in the event that she gave a personal guarantee to this effect. I will return to this notion of a personal guarantee.

[27] An even more extraordinary proposition appears at paragraph 33 of the plaintiff's submissions in its contention that there was "an express representation" on the part of Ms Josse:

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[12] Para 30, plaintiff's submissions.

> As has been stated, Ms Josse also signed James & Wells account application form and personally agreed to abide by James & Wells' terms. In so doing, Ms Josse clearly and unequivocally represented that, if My Box could not pay invoices rendered by James & Wells, that she could and would pay all such invoices in a timely manner.

[28] That submission flies in the face of the reality of the evidence tendered in this case even on the most strained view of that evidence. Indeed, in the course of argument, Mr Hazel responsibly acknowledged there was no express representation made by Ms Josse at any time.

[29] Mr Bond for Ms Josse referred to a decision of the High Court in *Albany Timber*.[13] That case related to a cause of action based on a negligent misstatement where it was alleged that the director of the defendant company assured the plaintiff that the invoices rendered to the company would be paid. The High Court held in that case that, even accepting that such an assurance was expressly made, that was still insufficient to meet the "assumption of responsibility" test to establish personal liability on the part of that defendant director.

[30] While that case related to a claim based on negligent misstatement, it has parallels here and it was surely a stronger case in which to argue for the director's personal liability than as posed by James & Wells' contention that Ms Josse's silence coupled with her signature as director on the account application form was sufficient to establish personal liability.

[31] However, what completely destroys the argument for James & Wells in this respect is the further argument advanced by Mr Bond with reference to s 27 of the Property Law Act 2007:

> **27 Contracts of guarantee must be in writing**
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> (1) This section applies to contracts of guarantee coming into operation on or after 1 January 2008.
>
> (2) A contract of guarantee must be—
>
> (a) in writing; and

[13] *Albany Timber Distributors Ltd v Tan & Anor* (HC Auckland, CIV-2006-404-1336, 11 May 2007, Associate Judge Sargisson).

(b) signed by the guarantor.

(3) Subsection (2) does not require the consideration for a contract of guarantee to be in writing or to appear by necessary implication from a writing.

(4) In this section, *contract of guarantee* means a contract under which a person agrees to answer to another person for the debt, default, or liability of a third person.

[32] Mr Bond's argument is that the claim based on either contract or estoppel is effectively an attempt on the part of James & Wells to circumvent s 27 and the specific requirements for a guarantee. Without question, James & Wells treated My Box and Mr Reddy as its clients and not Ms Josse. Accordingly, however it is dressed up, James & Wells is effectively seeking to enforce what it claims to be a guarantee that the legal fees incurred by James & Wells in respect of its instructions from My Box and Mr Reddy would be paid if necessary by her. That is the thrust of case for James & Wells.

[33] Mr Bond argues that James & Wells is attempting to circumvent s 27 with this proceeding and that it should not be permitted to do so. Mr Bond refers to an observation made by the House of Lords when dealing with the equivalent English provision to s 27, that:[14]

> Parliament, although obviously conscious that it would some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious.

[34] Mr Bond's argument is that this dicta explains why there are very good policy reasons for guarantees to be in writing and signed by the guarantor and that a claim in estoppel (or in contract) should not be permitted to circumvent that statutory provision.

[35] Whether or not Equity would ever allow s 27 to be circumvented is an issue that does not have to be resolved here. The claim by James & Wells that Ms Josse should be estopped from denying liability and held to what is claimed to be a promise of a personal guarantee on her part is simply untenable on the evidence adduced in this case. However, there is no evidence that such a promise was made nor that Ms Josse

[14] *Actionstrength Ltd v International Glass Engineering* [2003] 2 AC 541 at 20.

conducted herself either by words or deeds that could have reasonably led Mr Cain and thus James & Wells to the belief that Ms Josse accepted personal liability for the legal costs incurred by My Box.

[36] The application by James & Wells for summary judgment against Ms Josse is dismissed.

[37] Equally, the application for summary judgment by Ms Josse against James & Wells is allowed as none of the causes of action in James & Wells' statement of claim can possibly succeed.

[38] As to costs, they are in favour of the second defendant on a 2B basis unless counsel seeks to have costs determined on a different basis in which case memoranda will be required within 14 days by counsel for that party and within a further 14 days by counsel for the responding party.