EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT NORTH SHORE

CIV-2017-044-000939
[2018] NZDC 1995

UNDER	Part 12 of the District Court Rules
IN THE MATTER OF	An application for summary judgment
BETWEEN	RICHARD ALEXANDER PALLESEN and JOHN DOUGLAS PALLESEN as trustees of the PALLESEN FAMILY TRUST Plaintiffs
AND	NORMAN FRASER SMITH First Defendant
AND	DAVID RONALD ALEXANDER Second Defendant
AND	ANTHONY JOSHEP STEINER Third Defendant

Hearing: 1 February 2018

Appearances: M V Robinson and S L Hawksworth for Plaintiffs
J L W Green for First Defendant
G H J Brant for Third Defendant

Judgment: 8 February 2018

RESERVED JUDGMENT OF JUDGE A A SINCLAIR
[On application for summary judgment]

The application

[1] This is an application by the plaintiffs Richard Alexander Pallesen and John Douglas Pallesen as trustees of the Pallesen Family Trust, for summary judgment against the first defendant Norman Fraser Smith and the third defendant Anthony

Joshep Steiner.[1] The plaintiffs are suing on a guarantee recorded in a deed headed "Deed of Amendment and Restatement" dated 26 June 2013.

Background

[2] The plaintiffs and the three defendants were co-shareholders of Kiwi De Lux Lighting Limited ("the Company"). In or about August 2012 the plaintiffs advanced the sum of $250,000 to the Company. The defendants agreed to guarantee payment of this amount and entered into a deed headed "Specific Security Deed and Guarantee" dated 9 August 2012. Importantly, there was a specific limitation on the defendants' liability set out in paragraph 2.3 of this deed, which provided:

> **Limitation of Liability:** Notwithstanding any other term of any Transaction Document to the contrary the liability of each Debtor under this Deed shall be limited to the realised proceeds of the Collateral and:
>
> (a) the right of the Secured Party to recover the Guaranteed Indebtedness from each Debtor is limited to taking action to enforce the security granted by the Debtor pursuant to this Deed and by realising or otherwise dealing with the Collateral; and
>
> (b) the Secured Party may not bring proceedings against a Debtor personally to:
>
> (i) recover any part of the Guaranteed indebtedness or any other amounts payable by the Debtor to the Secured Party under the Transaction Documents; or
>
> (ii) obtain a judgment for the payment of money or damages by the Debtor;
>
> which cannot be satisfied out of the Collateral (except to the extent that there has been fraud, gross negligence or wilful misconduct by the Debtor).

The collateral provided as security for the advance were shares held by each of the defendants in the Company and any rights relating thereto.

[3] In 2013, it was agreed that the defendants would purchase the plaintiffs' shares in the Company. The plaintiffs agreed to advance an extra $150,000 to the defendants and $33,000 to the third defendant Mr Steiner to complete the purchase. The plaintiffs ceased to be shareholders in the Company on 24 July 2013.

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[1] Prior to the hearing a settlement was reached with the second defendant David Ronald Alexander and a notice of discontinuance of the claim against him was filed.

[4] On 26 June 2013 the parties signed a document headed "Deed of Amendment and Restatement" ("the Deed"). The recitals to this Deed recorded:

> F. In consideration for the Secured Party providing the New Loan to the Debtors and the Steiner Loan to Anthony John Steiner, the parties have agreed that, in addition to securing all indebtedness and obligations of KDLL to the Secured Party under the 2012 Loan Agreement and the Debtors' obligations under the guarantee of such indebtedness, the Security Deed shall also secure all indebtedness and obligations of the Debtor to the Secured Party under the New Loan and all indebtedness and obligations of Anthony John Steiner to the Secured Party under the New Loan and all indebtedness and obligations of Anthony John Steiner to the Secured Party under the Steiner Loan, and the limitation of liability under clause 2.3 of the Security Deed shall no longer apply.
>
> G. In connection with the above, the parties have agreed to amend and restate the Security Deed in the form set out in the Schedule to this deed.

[5] The relevant operative clauses in the Deed provide:

> 2 EFFECTIVE DATE, AMENDMENT AND CONFIRMATION
>
> 2.1 **Effective Date:** This deed is effective as of the date the conditions precedent in clause 3 have been satisfied in the sole opinion of the Secured Party (Effective Date).
>
> 2.2 **Amendment and Restatement:** With effect from the Effective Date:
>
> (a) the Security Deed is amended and restated in the form set out in the Schedule of this deed; and
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> (b) references in the Security Deed to "this Deed" shall be references to the Security Deed as amended and restated by this deed.
>
> 2.3 **Confirmation:** Each of the parties confirms and acknowledges that, except as expressly agreed in this deed, its obligations and covenants under, and the provisions of, the Security Deed continue and remain in full force and effect.
>
> 3 CONDITIONS PRECEDENT
>
> 3.1 The amendment and restatement in clause 2 is conditional on:
>
> (a) Receipt by the Secured Party of this deed duly executed by all parties:
>
> (b) Satisfaction of all conditions under the S&P Agreement; and
>
> (c) any other conditions precedent notified by the Bank or its legal advisors to the Debtors or the Debtors' legal advisors.

[6] Exhibited to the first affidavit of Richard Pallesen, is a copy of the Deed signed by each of the defendants and attached as a schedule to that document, is a copy of the Specific Security Deed and Guarantee which has been amended by underlining and strike out ("the Schedule"). Clauses which have been struck out are in red and words/clauses that have been added are in blue. Relevantly, clause 2.3 setting out the limitation of liability[2] has been struck out.

[7] The loan agreement between the Company and the plaintiffs dated 9 August 2012, provided that the repayment date was five years after the date on which the first advance was made. This agreement also provided that in the event of a default (which included the payment of interest), the plaintiffs could demand repayment of the full amount of the loan. A quarterly interest payment due on 1 June 2017 was not paid and the plaintiffs made demand on the Company for payment of the full amount then owing of $255,000. No payment was received, and on 14 June 2017 the plaintiffs made demand on the defendants as guarantors. The Company subsequently paid $5,000 on 23 June 2017.

[8] The amount owing at 5 July 2017 totalled $252,437.76 and proceedings for summary judgment were issued against the defendants for recovery of this amount pursuant to the Deed.

Summary judgment principles

[9] The plaintiffs apply for summary judgment under Rule 12.2(1) of the District Courts Rules 2014 which states:

> The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

The onus of proof is on the plaintiffs. They must prove on the balance of probability that the first and third defendants have no arguable defence.

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[2] Set out in [2] above.

[10] The applicable principles are well settled and are succinctly summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd*[3] as follows:

> [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; (1986) PRNZ 183 (CA), at p 3; p 185. 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; [1979] 3 WLR 373 (PC), AT P 341; P 381. 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).

Execution of the Deed

[11] On 26 June 2013, Mr Ellmers, who is described by Mr Pallesen as being one of his associates and was CEO of the Company at that time, was driving to Hamilton with the second defendant, Mr David Alexander. Arrangements were made for Mr Smith and Mr Steiner to meet them at [a car park] to sign the Deed.[4] The Deed was signed on the boot of the car.

[12] Mr Smith and Mr Steiner state that the document which they signed did not include the Schedule.[5] Mr Steiner describes the document as consisting of only four or five pages. He says that it was not thick enough to sign on the hard surface of the bonnet of the car so a book had been used to press on.

[13] Mr Smith and Mr Steiner both say that they had not seen the Schedule prior to being served with the current proceedings. Mr Steiner observes that he would have remembered the Schedule because of its distinctive form with coloured writing and

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[3] *Krukziener v Hanover Finance Ltd* (2008) 19 PRNZ 162 at [26].

[4] It appears that Mr Smith and Mr Steiner were travelling separately and it is unclear from the evidence whether they were all in attendance at the same time.

[5] Mr Alexander in his affidavit in opposition to the summary judgment, also said that the Deed of Amendment and Restatement was not signed in the form that appeared in Mr Pallesen's affidavit, and that it did not have any marked up schedule attached to it.

crossings out. The Deed which he signed did not have a document of this nature attached to it

[14] Mr Ellmers did not provide an affidavit. In his second affidavit, Mr Pallesen says that "he would be surprised" if the Schedule had not been attached to the Deed at the time of execution.

[15] In addition, Mr Smith says that the defendants saw the document for the first time when it was presented to them for signature in the car park. They were not given any opportunity to read it properly or to obtain legal advice. He says that the defendants were guaranteeing the additional $150,000. This amount has since been paid back and it was his understanding that the loan agreement for $250,000 reverted back to the original agreement signed in 2012. In a subsequent affidavit, he expresses his understanding somewhat differently. He says that he understood that the amended guarantee was only in relation to the $150,000 loan, and that the security for the $250,000 original loan would continue to be over the shares.

[16] Mr Steiner in his affidavit, says that Mr Ellmers had contacted him to arrange to meet him at the [carpark] to sign documents which Mr Ellmers had told him, related to the $150,000 and $33,000 loans. At the carpark, Mr Ellmers again said that the documents were for these loans. Mr Steiner states that he understood he would be personally liable to repay his share of the $150,000 which the defendants were borrowing together, and also be personally liable to pay $33,000 (and a further $20,000 previously advanced to him).

[17] Mr Steiner says that he is dyslexic. Mrs Steiner gave evidence confirming this. Mr Steiner explained that when documents were being discussed at board meetings for the Company, he would ask someone to read them to him. He states that the plaintiffs, Mr Ellmers, and the other defendants all knew of his reading difficulties. In his second affidavit, Mr Pallesen denies that he and his co-trustee Mr John Pallesen, had any knowledge of this issue.

[18] Mr Steiner states that he relied upon what Mr Ellmers said to him about the Deed namely, that it related to the $150,000 and $53,000. He did not receive any independent legal advice.

[19] The defendants had taken legal advice on the execution of the Specific Security Deed and Guarantee and this was known to Mr Pallesen. Notably, in his first affidavit, Mr Pallesen refers to this earlier deed, and states:

> …the Specific Security Deed and Guarantee granted by the defendants in respect of the Borrower's [Company's] obligations to the Trust, in which the defendants provided an acknowledgment that they were informed of the rights and obligations contained in the documents *and it was recommended that they take legal advice.* (Italix added).

Analysis

[20] Before considering the particular defences raised by either or both Mr Smith and Mr Steiner (non est factum, unconscionable bargain, breaches of the Fair Trading Act 1986 and misrepresentation), there are fundamental factual disputes which counsel for Mr Smith and Mr Steiner submit cannot be resolved on the evidence before the Court on this application.

[21] Mr Robinson submits that these factual disputes are not material. He contends that even if the Schedule was not attached to the Deed, the removal of the clause 2.3 limitation of liability was clearly recorded in the covering Deed and Mr Smith and Mr Steiner would have been in no doubt from this document that their liability for the $250,000 loan to the Company was no longer to be limited to the security of their shares. I do not agree. While there is reference to the limitation of liability clause in the recitals to the Deed, the amended Specific Security Deed and Guarantee attached as the Schedule is clearly an integral part of the document. Significantly, the operative provisions which the plaintiffs rely upon in their statement of claim, are contained in the marked-up Security Deed.

[22] Further, Mr Robinson contends that there was no obligation on the plaintiffs to explain the effect of the Deed and amended guarantee or advise the defendants to obtain legal advice. The parties were all commercial people and were shareholders and/or directors of the Company. That may well be proven to be the case. However,

it is noteworthy that Mr Pallesen states that the defendants were recommended to obtain legal advice on the execution of the Security Deed.[6] There are also related factual issues as to what was said by Mr Ellmers about the document presented to the defendants for signature, and whether he was aware of Mr Steiner's dyslexia.

[23] In summary, the only evidence before the Court as to what occurred when Mr Ellmers met with the defendants to sign the Deed is the undisputed evidence of Mr Smith and Mr Steiner.[7] On the basis of their evidence, I am not be satisfied that Mr Smith and Mr Steiner do not have an arguable defence to this claim. Factual issues have been raised which will require further evidence and will likely involve credibility findings having to be made. These issues can only be addressed in the context of a trial.

Result

[24] The application for summary judgment is dismissed.

[25] In *NZI Bank Ltd v Philpott*[8] the Court of Appeal recognised that in the majority of summary judgment cases, the appropriate course is to reserve costs until the claim is finally determined. I adopt that approach here and costs on the application are reserved accordingly.

[26] Mr Smith and Mr Steiner are to file and serve statements of defence within 25 working days of the date of this judgment. The matter is then to be set down for a first case management conference.

A A Sinclair
District Court Judge

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[6] It appears from a review of the Specific Security Deed and Guarantee and the Loan Agreement of 9 August 2012, that the conditions precedent included receipt by the plaintiffs of written confirmation of independent advice having been provided to each defendant as guarantors or waivers of independent advice having been provided.
[7] See also above n 5.
[8] *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403.