EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2014-092-003611
[2016] NZDC 20070

BETWEEN	YASIN MOHAMMED First Plaintiff
AND	BADRUL NISHA MOHAMMED Second Plaintiff
AND	SELECTION AUTO DIRECT LIMITED Third Plaintiff
AND	UBENDRA CHOY First Defendant
AND	KANTA WATI CHOY Second Defendant

Hearing: 18 August 2016

Appearances: S Khan and R L White for Plaintiffs
No appearance by or for First Defendant
Second Defendant in Person

Judgment: 11 October 2016

RESERVED JUDGMENT OF JUDGE B A GIBSON

Introduction

[1] These proceedings are centred on two claims arising from business dealings between the plaintiffs and defendants.

[2] The third plaintiff is a company owned and operated by Mr Mohammed, the first plaintiff. It operates a motor vehicle dealer's business. Its claim is against the second defendant, wrongly described in the statement of claim as the first defendant,

for $11,300 being monies owed to it under a written vehicle purchase agreement dated 1 February 2014 between the third plaintiff and the second defendant with respect to her purchase of a Mazda Demio 2011 motor vehicle. The third plaintiff maintains the agreed purchase price was never paid.

[3] The claim by the first and second plaintiffs against the defendants arises from an alleged agreement between the parties to purchase and operate a business named Club Raro for $110,000, the first and second plaintiffs agreeing to contribute $55,000 to the purchase price, and the first and second defendants the remainder. As well as the purchase price the parties agreed, it is alleged, to share the operating expenses of the business. The claim is for $48,624.91 being the shortfall arising from the first and second defendants' failure to pay their share of the operating expenses and most of their share of the initial purchase price. The first and second plaintiffs allege they advanced the balance of the defendants' share of the purchase price to them by a loan.

[4] The statement of claim dated 8 October 2015 alleges the defendants' share of the operating expenses and purchase price advance, which was advanced to them by the first and second plaintiffs by way of loan, amounted to $63,624.91 of which only $15,000 has been repaid, leaving a balance of $48,624.91 for which the first and second plaintiffs seek judgment.

[5] Judgment against the first defendant was obtained by default on 28 July 2016. The claim against the second defendant proceeded to hearing.

The motor vehicle claim

[6] The third party sells used motor vehicles. On 20 December 2013 it purchased a vehicle from G.M. Car Wholesalers Limited ("GMC") for $9,000. The terms of the purchase were the vehicle was supplied by GMC on a "sale or return" basis meaning that if the third plaintiff was able to sell the vehicle within three months, it could do so, paying GMC the price under the agreement with it, but if it was unable to sell the vehicle it was to be returned. Effectively it received the vehicle on consignment.

[7] Mr and Mrs Choy had recently returned from Fiji bringing a motor vehicle with them and approached the first plaintiff to see whether the vehicle could be made compliant, presumably as to fitness, for New Zealand road conditions. When it was found that it could not, Mr and Mrs Choy decided to purchase the Mazda Demio 2011 motor vehicle from the third plaintiff. A written agreement for sale and purchase of the vehicle was entered into on 1 February 2014 between the third plaintiff and Mrs Choy, the second defendant. The purchase price was $11,300 with the purchase price to be paid one month thereafter. The agreement specifically provided that title to the vehicle passed to Mrs Choy from the transfer date which by clause 8 of the agreement is recorded as being 1 February 2014. Mrs Choy had possession of the vehicle from that date.

[8] Mrs Choy defaulted on payment and no monies have been paid to the third plaintiff. The vehicle appears to have been on-sold by Mrs Choy although, at one point in her evidence in chief, she claimed it had been wrecked. She accepted in her evidence under cross-examination that she owed the monies but claimed that she had paid $15,000 to the first plaintiff in connection with the purchase of the nightclub business and those monies were owing to her, so that the amount owed for the vehicle could be deducted from that.

[9] The third plaintiff was not involved in the purchase of the nightclub or any advance made by Mrs Choy in respect of the same. Even if I were to accept that Mr Mohammed owed Mrs Choy $15,000, which I do not, it would not prevent the third plaintiff succeeding on its claim for the monies owed for the sale of the vehicle to Mrs Choy which she accepted she received. She entered into a written agreement providing for payment on 1 March 2014 and defaulted on payment of the whole of the purchase price. She no longer has possession of the motor vehicle.

[10] Regardless of the outcome of the separate claim by the first and second plaintiffs against Mrs Choy with respect to her and her husband's share of the purchase price and operating costs of the nightclub, the third plaintiff is entitled to judgment in the sum of $11,300 against Mrs Choy.

The nightclub claim

[11] At approximately the same time Mrs Choy decided to purchase the motor vehicle from the third plaintiff, Mr and Mrs Mohammed discussed the purchase of a nightclub with the Choys. Mr Mohammed had learned that the Choys had operated a nightclub business previously, and was aware from newspaper advertisements that a similar business was available for purchase on the Great South Road in Papatoetoe. The plaintiffs allege the discussions between the parties progressed to the point where they agreed to buy the nightclub business, which was known as Club Raro, together. I accept that evidence.

[12] A company was formed on 4 February 2014, YNC Enterprises Limited ("YNC") to be the vehicle of purchase of the nightclub. That company purchased the business for $110,000 by an agreement dated 31 January 2014 from S & D Haddad, $100,000 of the purchase price being ascribed to tangible assets, with $10,000 ascribed to intangible assets. A deposit of $10,000 was required to be paid and the possession date was 8 February 2014.

[13] Mrs Choy's defence was that the arrangement to purchase the nightclub was one made between Yasin Mohammed, the first plaintiff, and Ubendra Choy, her husband, from whom she said she was estranged, and only they were to be the purchasers. She said it was agreed she would be paid $70 weekly to manage the business for two days each week. That was the maximum amount that could be paid to her as she was in receipt of some form of state benefit, notwithstanding the fact that her husband, from whom she said she was estranged, still lived with her in what she said was the former matrimonial home.

[14] The first and second plaintiffs allege the agreement was that each couple would contribute one half of the purchase price. They were also to contribute equally to the payment of the deposit of $10,000 but this was paid by Mr and Mrs Choy. A receipt for that sum was given by BCRE Limited, a real estate agency which was a franchised member of the Harcourts Group, on 3 February 2014, with the receipt acknowledging payment of the deposit by the purchasers Y Mohammed and K Choy from the vendor's S & D Haddad.

[15] Consequently each couple was to contribute $55,000 to the overall purchase.

[16] On 5 February 2014 Mr Mohammed and his wife paid $50,000 towards the settlement of the business. Mrs Choy contributed $5,000 cash.

[17] Mr Mohammed said he was told by Mr and Mrs Choy that the balance of monies would be forthcoming when the monies from the sale of their property in Fiji were available. These monies, Mr Mohammed said, amounted to $370,000 and were available for Mr and Mrs Choy to collect in Fiji. Pending the monies being uplifted in Fiji by Mrs Choy, Mr Mohammed agreed to lend the balance of the monies required to effect the purchase and pay associated incidentals such as solicitor's fees and the first month's rent, until such time as the monies from Fiji became available thereby enabling the Choys to meet their half share. The loan would then be repaid. Accordingly on 5 February 2014, pursuant to this arrangement, there was an acknowledgment in writing that Mr Mohammed had advanced $50,000 being the loan necessary to enable Ubendra Choy, Mrs Choy's husband, to have a 50% share in YNC, with the agreement also recording the loan would be repaid "as soon as the property in Fiji is sold or other alternative".

[18] Further to the arrangement Mr Mohammed paid $45,000 to his solicitor's trust account on 10 February 2014 to enable the business purchase to proceed, those monies in effect being the balance of the contribution that was to have been made by the Choys.

[19] The plaintiffs also claimed $17,249.82 being expenses relating to the opening and start up costs of Club Raro. Mr Mohammed, in his evidence, said there had been an agreement with Mr and Mrs Choy to apportion those costs equally and they amounted to $8,624.91 for each couple. The overall contribution required for the defendants' share of the purchase of the business and the operating costs was $63,624.91. As Mr and Mrs Choy had only contributed $15,000 to the acquisition of the business, the first and second plaintiffs maintain they are entitled judgment for $48,624.91 being the remaining balance.

[20] Mrs Choy's defence was that these arrangements were arrangements entered into between the first defendant, Ubendra Choy, and the first plaintiff, Mr Mohammed, and had nothing to do with her. The plaintiffs had already obtained a judgment by default against Mr Choy who had not taken any further part in the proceedings. There was no dispute over the quantum claimed or the apportionment, save that Mrs Choy maintained she had contributed the $15,000 used in the purchase and $11,300 of those monies should be set off against the monies she owed the third plaintiff, notwithstanding the absence of any pleaded defence of set off or any nexus between the payment for the business and the sale by the third plaintiff of the motor vehicle to her.

Analysis

[21] The plaintiffs' claim is based on an allegation of an oral agreement between the first and second plaintiffs and the first and second defendants to purchase a nightclub business known as Club Raro. A company was used as the vehicle of purchase but the sole shareholders were Mr Mohammed and Mr Choy, the first defendant. They were also the directors of the company. Neither Mrs Choy, the second defendant, nor Mr Mohammed's wife held an interest in the company. This might be seen as consistent with the position taken by Mrs Choy, that the business was one between her husband and Mr Mohammed, and did not involve her in the sense of having a financial interest although she assisted her husband with various dealings with agents and solicitors necessary to enable the agreement to be put into effect, but I am satisfied it was intended the venture would involve both couples, hence the payment of the deposit by Mrs Choy to whom the receipt was addressed, and the payment by her of $5,000 each.

[22] When the Choys were unable to pay their half share of the purchase of the business a loan was made by Mr Mohammed. The document recording the loan was clumsily drawn and was clearly prepared without legal advice, but it recorded the loan was given to Mr Choy, the first defendant, not to both defendants. It was to be repaid as soon as property in Fiji was sold or some other alternative arranged.

[23] Mrs Choy signed the document. The document did not state that she signed it as a guarantor undertaking to be answerable for the debt. Although the plaintiffs' statement of claim alleges the loan was to both defendants to enable them to pay their share, the document is ambiguous in that it records the loan was "*given to Ubendra Choy*" while earlier noting that "*cash plus chq ... $50,000 to Mrs Choy*" with her signature appearing beside that part of the document. The money was withdrawn from Mr Mohammed's bank account and paid directly to Mr S Sharma, the solicitor acting for YNC on the transaction.

[24] Although the loan agreement was clumsily drawn, as I have mentioned, it was signed by Mrs Choy who also paid, as she accepted, $10,000, the deposit required under the agreement and also a further payment of $5,000 cash. Mrs Choy said her husband and Mr Mohammed were short of funds for the settlement. She disputed Mr Mohammed's evidence that she returned to Fiji for the purpose of collecting money for the settlement, saying she did not go back to Fiji that year. However the loan agreement clearly refers to the loan being repaid from the proceeds of sale of a property in Fiji. Accordingly I accept that Mr Mohammed was led to believe that was how the loan would be repaid.

[25] The loan document suggests that Mr Mohammed believed the advance was to both the first and second defendants. The typewritten words at the beginning of the loan document refer to *"$50,000 to Mrs Choy ..."* and she has signed the document at that place. Notwithstanding that it was expressed to be a loan to the first defendant I accept that it was expressed in that way as the vehicle of purchase, YNC, was a company of which the male members of the partnership, for that effectively is what it was, an agreement for the partnership to acquire and operate a nightclub, controlled the shareholding and held the directorships. However the loan was intended to be a loan to the Choys jointly, and was accepted as such, and I am also satisfied they agreed jointly to meet their one-half share of the operating expenses of the club. One-half share of the operating expenses amounted to $8,624.91 being council fees, alcohol, solicitor's expenses and such like. These were not disputed by Mrs Choy. Her dispute was based on liability and I find that she was liable with Mr Choy to meet her half share of the operating expenses as well as the loan of $50,000 made by Mr Mohammed to them.

Summary

[26] Accordingly the first and second plaintiffs are entitled to judgment against the second defendant. Judgment is for $8,624.91 being the half share of the expenses the first and second defendants agreed to pay, together with the sum of $40,000 being the loan of $55,000 less $15,000 being the payments made by the defendants to the first and second plaintiffs. Accordingly judgment is for a total of $48,624.91 together with interest at the prescribed rate pursuant to s 62B of the District Courts Act 1947.

[27] Further, the third plaintiff is entitled to judgment against the second defendant in the sum of $11,300 together with interest at the prescribed rate.

[28] The third plaintiff is also awarded the costs of and incidental to this proceeding, with costs to be on scale 2B of the District Courts Rules 2014.

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B A Gibson, DCJ

Addendum:

This judgment replaces one issued earlier today, which is recalled, and corrects errors at paragraphs [26] and [28] of the recalled decision.