IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000584
[2016] NZHC 2844

BETWEEN	PRIMARY WOOL CO-OPERATIVE LIMITED Plaintiff
AND	JOHN ROBERT STEVENS Defendant

Hearing: 21 November 2016

Appearances: M Riordan for Plaintiff
A Riches and V Nichols for Defendant

Judgment: 28 November 2016

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

Introduction

[1] The plaintiff, Primary Wool Co-Operative Limited (PWC), made advances to a company called Bruce Woollen Mill Limited (BWM) between 24 February 2014 and 17 October 2014. On the latter date BWM and PWC entered a loan agreement and on the same day BWM granted to PWC a General Security Agreement (GSA) over all its property. As well, the defendant, Mr J R Stevens, who is a director of BWM, signed a guarantee of the indebtedness of BWM to PWC, limited to $200,000 plus costs.[1]

[2] On 5 October 2015 Iain Nellies and Paul Jenkins were appointed as receivers of BWM by the J R and P J Stevens Trust, a family trust associated with Mr Stevens which held a second ranking security over the assets of BWM ranking behind the GSA in favour of PWC.

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[1] There is ambiguity in the general security agreement in relation to whether the liability of Mr Stevens also includes interest. PWC does not claim interest in the statement of claim.

[3] Under clause 6 of the loan agreement and clause 19 of the GSA it is provided that a default occurs in certain circumstances, one of which is the appointment of a receiver of BWM. Both documents provide that if a default occurs the security holder, PWC, may call up the balance of the secured monies. Both documents provide that notices that are required to be given must be given. By ss 128 and 129 of the Property Law Act 2007 a notice requiring remedy of the default within a period of 10 working days was required to be given. Notice was given under these sections to BWM on 23 February 2016, and this was served on Mr Stevens on 24 February 2016. Neither complied with the notice.

[4] In this proceeding PWC seeks payment by Mr Stevens of the sum of $200,000, together with the expenses attendant on recovery. PWC applies for summary judgment.

Principles relating to summary judgment

[5] Under r 12.2(1) of the High Court Rules the Court may give judgment against a defendant on a summary basis if a plaintiff satisfies the Court that the defendant does not have a defence to a cause of action in the statement of claim on which a plaintiff relies. The onus of establishing this position rests on the plaintiff. The classic exposition of this principle is in *Auckett v Falvey*:[2]

> On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position of having to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

[6] Evidence on applications for summary judgment is given by way of affidavit. It is necessary, therefore, to keep in mind the approach the Court is to take to evidence given in this way, summarised in *Pemberton v Chappell*:[3]

> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There

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2 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986 at 2.
3 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4.

> may however be cases in which the Court can be confident – that is to say, satisfied – that the defendant's statements as to matters of fact are baseless. The need to scrutinise affidavits, to see that they pass the threshold of credibility, is referred to in *Eng Mee Yong v Letchumanan* [1980] AC 331, 341 and in the judgment of Greig J in *Attorney-General v Rakiura Holdings Ltd* (Wellington CP23/86, 8 April 1986).

[7] In *Attorney-General v Rakiura Holdings Ltd* the Court said:[4]

> In a matter such as this it would not be normal for a Judge to attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them. On the other hand, in the words of Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331, at 341 E, the Judge is not bound:
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> > "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

[8] In this case, the onus remains on PWC to satisfy the Court under r 12.2 of the High Court Rules that Mr Stevens does not have a defence to its claim. The test is whether there is a real question to be tried. The Court must be left without any real doubt or uncertainty.[5]

The plaintiff's case

[9] The plaintiff's case is relatively straightforward and in a number of material respects is not in dispute. Mr Stevens does not dispute that an advance of $200,000 was made by PWC to BWM and that he guaranteed its repayment. He does not dispute that neither BWM nor he has repaid this sum or any part of it. He does not dispute that he received a notice calling on him to do so based on an event of default by BWM in appointment of a receiver. In this case, therefore, the point has been reached where PWC is able to pass an evidential onus onto Mr Stevens, as on the basis of the documents produced to the Court it is entitled to recover from Mr Stevens the sum which it seeks.[6]

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4 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC) at 14.

5 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26] citing *Pemberton v Chappell*, above n 3.

6 *Auckett v Falvey* above n 2.

The defendant's case

Further facts

[10] The evidentiary response of Mr Stevens, however, discloses a more complex set of facts than emerge from the loan and security documents. They involve a number of parties.

[11] PWC owns a little under 5 per cent of another company called Wool Equities Limited (WEL). This resulted from an issue of 1,600,000 shares to PWC by WEL. WEL owns 60 per cent of the shares in BWM. When PWC took a shareholding in WEL, WEL appointed two directors to the Board of BWM, Mr M B de Lautour, and Ms A Walsh. They joined Mr Stevens on the Board. Mr de Lautour was at that time, and had been since 1984, a director of PWC.

[12] The order in which relevant events occurred was this. First, WEL issued shares to PWC by resolution on 12 September 2014. Secondly, PWC made its final advance of $200,000 to BWM on 17 October 2014 and the documents described in paragraph [1] were executed.

[13] Thirdly, on 6 December 2014 Mr de Lautour and Ms Walsh were appointed to the Board of BWM. Although the appointment was on the nomination of WEL, Mr Stevens says that Mr de Lautour was appointed by WEL at the behest of PWC to protect PWC's interest in the business of BWM, as secured lender. Because PWC did not own shares in BWM it could not appoint directors to the BWM Board itself. Mr de Lautour became managing director of BWM. Mr Stevens says that his view and understanding was that Mr de Lautour's position on the BWM Board was "purely to safeguard the interests of [PWC] in these proceedings". This evidence is not disputed by PWC.[7]

[14] When BWM granted a general security to PWC, arrangements were made for that security to take first priority and for an existing security in favour of the J R and P J Stevens Trust to be relegated to second priority.

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[7] I take Mr Stevens' reference to "these proceedings" to be the financial transactions, not the present case which was not in contemplation at that point.

[15] Notwithstanding the bolstering of the board of directors and the injection of additional borrowed money, by September 2015 the financial position of BWM was far from satisfactory. The minutes of a meeting of the directors on 25 September 2015 show that the directors were considering alternative ways to respond to its financial position. They record that Mr Stevens was of the view that Mr Nellies, a chartered accountant with expertise in insolvency, should be appointed as a business consultant for two weeks to evaluate opportunities for involvement of a third party presumably as a buyer of all or part of the company. Mr de Lautour is recorded as being of the view that a receiver should be appointed. Evidently a statutory demand had been issued against BWM by the Inland Revenue Department in recent days. The minutes record that Mr Stevens, presumably speaking on behalf of his trust as a secured creditor, was not prepared to put BWM into receivership as he believed that the business:[8]

> could be going concern under a 3rd party focusing on Export and LLM. The funds $750K expected by Iain Nellies will not cover IRD and GSA's and Shalimar as appointer of the receiver would be responsible for indemnifying the Receiver charges.

[16] The reference to "$750K" appears to be a reference to Mr Nellies having been involved on an advisory basis and indicating that figure might be obtained on realisation of the business. Shalimar is another major creditor.

[17] The minutes also record that PWC was not prepared to instigate a receivership. The position, therefore, was that despite Mr de Lautour's view, none of the secured creditors was prepared to appoint a receiver. As a result the directors passed a resolution placing BWM into liquidation and appointing Mr Nellies as the liquidator. Mr Stevens voted against this resolution.

[18] Shortly after that the directors evidently found out that this course of action was not open to them. The minutes of a Board meeting of BWM on 2 October 2015 disclose the directors' realisation that the power given to directors to appoint a liquidator under the Companies Act 1993 did not apply to BWM, as it does not have a constitution. The directors note that if the company were to go into liquidation,

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8 Minutes of BWM Board meeting on 25 September 2015.

this would have to be by way of shareholders' resolution, or an unmet statutory demand leading to a court appointment.

[19] The minutes of this meeting disclose further details about the financial position of BWM. Two statutory demands issued by creditors had expired. Mr Nellies was present at the meeting, and it is evident that there were extensive discussions, both in his presence and after he left the meeting, of options open to the directors. The final result, however, is recorded thus:

> John Stevens agreed to file the papers for the Receivership by the Stevens Trust calling in their GSA today. This action is agreed by all the Board in the best interest of employees and stakeholders, and very much appreciated.

That occurred on 5 October 2015.

Argued defences

[20] Mr Stevens says that he has three defences to PWC's claims.

A.

[21] As noted, the default in terms of both the loan agreement and the GSA, on which PWC relies for its right to call up the balance of the secured monies and enforce Mr Stevens' guarantee, was the appointment of a receiver of BWM, a step taken by the trustees of the J R and P J Stevens Trust. Although he was instrumental in bringing it about, Mr Stevens challenges the appointment of the receiver and argues that this gives rise to a defence to this claim. Counsel says that PWC consented to the appointment of the receiver and led Mr Stevens to believe that PWC would not rely on this as an act of default under the loan agreement and the GSA. As a result PWC is estopped from now asserting that the receivership is an act of default.

[22] In his affidavit filed in opposition to this application Mr Stevens discusses events at the Board meeting on 2 October.[9] After noting that at the Board meeting on 25 September he had not been prepared to put BWM into receivership as he believed it could have been sold to a third party as a going concern, resulting in funds being

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[9] See [18] and [19] above.

realised which would have been available to pay outstanding debts, he gives evidence in relation to the next meeting in the following terms:

> 32. The next meeting of the Board was on Friday the 2nd of October 2015, the Minutes of which are ***attached*** and marked as **Document 6**. While the largest debt was held by the Plaintiff, there was concern by Bay De Lautour that this would be adverse for publicity, given that it was a co-operative as it would show to their shareholders that they are throwing their weight around in the industry to place smaller companies into receivership.
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> 33. Bay specifically requested that I utilise my family trust General Security Agreement, to place the company into receivership.
>
> 34. I therefore agreed to file the papers for receivership by calling in the General Security Agreement. The Minutes of the meeting including Bay record "*this action is agreed by all the Board in the best interests of employees and stakeholders and very much appreciated*".
>
> 35. Ian Nellies, of Insolvency Management Ltd, was therefore appointed as receiver from the 5th of October 2015.
>
> 36. Given I had previously expressed my concern about receivership and desire to sell it to a third party, I had been convinced to place it into receivership by the Plaintiff. At no point was I concerned that an act of default could have occurred under the General Security Agreement.

[23] Mr Riches, counsel for Mr Stevens, argues that he was under extreme pressure to appoint a receiver at the meeting of 2 October, contrary to the stance he took on 25 September. This pressure came from Mr de Lautour who, he says, was acting on behalf of PWC which was the first ranking secured creditor of BWM. Mr Riches says that the evidence shows an arguable case that PWC, acting through Mr de Lautour, led Mr Stevens to believe that the appointment of a receiver by his Trust would not be relied on by PWC as an act of default under its security documents. Counsel argues that Mr de Lautour has changed his position in reliance on this and that PWC is therefore estopped from relying on the appointment of the receiver as an act of default under its securities.

[24] There are at least three difficulties standing in the way of a defence on this basis. The first and most obvious is that it does not accord with the evidence Mr Stevens himself gives. The closest he comes to dealing with the effect of the appointment on the securities is in the sentence "At no point was I concerned that an act of default could have occurred under the General Security Agreement". This is a

description of his state of mind at the time that he made the decision to ensure that his family trust appointed the receiver. It is not evidence about anything that Mr de Lautour may have said. He does say that he was convinced to place BWM into receivership "by the plaintiff" by which, based on the argument of counsel, he is referring to Mr de Lautour as PWC. That statement does not refer in any way to any basis upon which the appointment of a receiver would not be an act of default under the security documents. The evidence simply does not support the contention made in submissions.

[25] Secondly, the minutes of the meetings of 25 September and 2 October show the directors grappling with a very adverse financial situation. On 25 September they went so far as to pass a resolution placing the company into liquidation and appointing Mr Nellies as a liquidator. When they found that this course was not open to them, they reviewed the position at length on 2 October. The review included a discussion of options available to the BWM Board which included proposing that the shareholders appoint a liquidator, making an urgent application to the Court for appointment of a liquidator on fair and equitable grounds, and closing the company, giving notice to the staff and, again, applying to the Court to liquidate the company. The discussion in relation to appointing a receiver, as a final alternative, notes that this step would give confidence to staff that they would receive all financial entitlements, and also give an opportunity to explore the possibility of obtaining a new investor and setting up a different manufacturing model. But immediately after these discussions are recorded, the paragraph I have quoted above at [19] is set out in the minutes.

[26] It is clear from this record of the meeting of 2 October that the directors discussed options for the future of the company and then selected the option which they, as a group, considered to be in the best interests of the company including the best interests of its staff. In the financial circumstances outlined in the minutes this is a decision which might reasonably be expected from a board of directors.

[27] Nothing in the minutes supports the contention now made by Mr Stevens.

[28] Thirdly, when the decision to appoint a receiver was made, Mr de Lautour was acting in his capacity as a director of BWM. He was not acting in his capacity as a director of PWC. There is no evidence that he had any authority from PWC to take any step on that company's behalf as its agent. There is no evidence that PWC passed any resolution either to place BWM into liquidation or to support that step. The evidence shows that Mr de Lautour was one of three directors who resolved that receivership of BWM was in the best interests of employees and stakeholders. PWC did not wish to be the secured party which took the step of appointing a receiver, because it believed this would be bad publicity, given that it is a cooperative, and it would have, as Mr Stevens puts it, "showed their shareholders that they are throwing their weight around in the industry to place smaller companies into receivership".[10]

[29] I find that the evidence does not raise an arguable defence that PWC is estopped from claiming repayment of part of BWM's debt by Mr Stevens under his guarantee.

B.

[30] The second submission made on behalf of Mr Stevens rests on the proposition that the appointment of the receivers was invalid, with the result that PWC could only claim a right to repayment on the basis of a separate and subsequent default, namely the appointment of a liquidator to BWM. It is said that as new notices under ss 128 and 129 of the Property Law Act have not been issued, the appointment of liquidators is not an event which can now be relied on as a basis for monies owing under the security documents becoming due.

[31] As I accept that PWC can rely on the appointment of the receiver as an act of default for the reasons given, the basis for this submission is not made out. PWC simply relies on the appointment of the receiver as its act of default and has issued notices under the Property Law Act accordingly. It does not rely on the later appointment of liquidators by the Court.

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[10] Mr Stevens' affidavit of 29 August 2016 at para 32.

C.

[32] The third basis on which Mr Stevens says he has a defence to PWC's claim is derived from the actions of the receivers in realising the assets of BWM. Those assets principally comprised a large number of items of plant and equipment, along with accounts receivable, but it is the hard assets of the company which are in issue. These were the assets used by BWM in its operation as a yarn manufacturing business.

[33] The starting point for argument put forward on behalf of Mr Stevens is that the receivers breached their duty to Mr Stevens under s 19 of the Receiverships Act 1993. This provides that a receiver who exercises a power of sale of property in a receivership owes a duty to sureties, who may be called upon to fulfil obligations of the grantor, to obtain the best price reasonably obtainable at the time of sale. In short, Mr Stevens says that the receiver did not obtain the best price reasonably obtainable. This would have been achieved by selling the assets to various buyers on a breakup basis, but the receiver opted to offer all the assets for sale to a single buyer.

[34] The second premise is that Mr de Lautour put pressure on the receiver to act in this way. Mr Stevens says:[11]

> The Plaintiff was applying pressure on the receiver, threatening to enforce their General Security Agreement if he sold the assets piece by piece or place them on the international market. His ability to obtain the best reasonable price was prevented and hamstrung by the actions of the Plaintiff, in intentionally attempting to reduce the price it [sic] could be realised.

[35] I will examine the receivers' actions first. Mr Stevens contacted an Australian firm called Ramsay McDonald, which had given value estimates to him earlier in relation to the equipment, and asked to have a representative of that firm come over to New Zealand to inspect the plant and give a likely range of prices. Mr Stevens says this could have been done at a cost to the receivers of around $2,500 - $3,000.

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[11] At para 60.

[36] Mr Nellies' response to this proposal was sent on 25 February in the following terms:

> The major issue I have is the expense and incurring the same if PWC are choosing to exercise their rights under the PLA over the assets. I don't think that they have thought through this strategy as outlined earlier. At this stage I am mindful of the costs and looking to get debtor payments in as I have PAYE overdue that I would like paid before the liquidation hearing.

[37] Mr Stevens then wrote to the receivers, on behalf of his family trust which had appointed them, on 1 March in the following terms:

> The receiver of the Bruce Woollen Mill has progressed with the receivership where no realistic offers have been received for the plant and equipment as a whole.
>
> There has been some local interest for parts of the equipment but all are conditional and do not include the lot.
>
> The intent has always been to keep the plant operating in New Zealand and preferably Milton. However we have reached the stage where the equipment needs to be realised for the best value possible.
>
> Ramsey [sic] McDonald Australia are prepared to come across and assess the equipment and estimate a cash out realisation. The cost is [$]2.5K for this.
>
> This would then give us a basis to either proceed or not with an international sale.
>
> As second ranking GSA holders I require this process to proceed and bring them across to complete the assessment.
>
> A preliminary discussion has identified that the likely cash out will be in the vicinity of [$]750 to [$]800K after costs.
>
> We need written permission from Primary Wool Co-Operative to proceed which should not be unreasonably withheld.

[38] Mr Nellies did not proceed as asked. Rather, in June he entered an agreement to sell all the equipment as well as the company's intellectual property, customer base and miscellaneous items of stock for $350,000 plus GST. The buyer was PWC.

[39] Along with this post-receivership conduct on the part of PWC and Mr de Lautour, Mr Stevens also ties in the latter's conduct in relation to the appointment of a receiver, which I have discussed earlier. For the reasons given there,[12] I find that

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[12] At [25]-[28] above.

criticisms of Mr de Lautour's conduct at that point are not made out. I therefore put those aspects of the argument to one side when considering the events which occurred in relation to the sale of the plant.

[40] Neither Mr de Lautour nor any other person on behalf of PWC gave evidence in reply to the affidavit of Mr Stevens.

[41] On 7 June 2016, shortly before the receivers sold the assets to PWC, the first six monthly report of the receivers was prepared and issued. In relation to disposal of the remaining property owned by the company the receivers reported:

> The receivers marketed the mill and its assets for sale; however no offers were received of a sufficient value to be able to be accepted by the secured creditors. It has been the desire of the secured creditors to preserve the industry and sell the assets in one parcel. The receivers still continue to liaise with parties over the sale of the assets.

[42] There were two secured creditors, PWC and the Stevens Family Trust. Plainly Mr Stevens, who going by his orchestration of the appointment of the receiver, is either in control of the Stevens Family Trust or has significant influence over it, would not have been one of the secured parties referred to by the receiver. It must, therefore, have been PWC. This is independent evidence supporting Mr Stevens' view that the receiver came under the influence of PWC when deciding how to sell the assets. The consequence was that rather than proceeding by a means which, on the limited but uncontradicted evidence presently before the Court, may well have achieved a greater net sale price, the receiver actually sold all the plant, equipment and some stock to PWC for a sum which did not provide to the receiver enough money to meet BWM's liability to its secured creditors. This claim followed.

[43] The result, seen from Mr Stevens' perspective, was that:

- He had obtained information from an international broker that, sold on a piece by piece basis, the plant should realise in the order of $750,000.

- The receivers declined to incur the modest expense of having Ramsay McDonald send a representative to assess the plant and give a more detailed estimate.

- The reason for this is that Mr de Lautour wished to have the plant sold in New Zealand as a going concern.

- PWC, of which Mr de Lautour is a director, then bought the plant as a going concern at a figure under half the sum which Mr Stevens says could have been obtained for it on a piece by piece basis, on the international market to which it would have been offered by Ramsay McDonald.

- The result is that PWC now calls on him to pay as guarantor the shortfall owed by BWM to PWC, a situation brought about entirely by Mr de Lautour bringing pressure to bear on the receivers on what they should do, and by their bending to that pressure and breaching their duty under the Receivership Act.

- Mr Stevens puts this down to some sort of personal vendetta, to use his words, against him by the directors of PWC.

[44] Given that none of the evidence to which I have referred on this issue has been disputed by PWC I take it, for present purposes, to be correct. It is sufficient for me to find that Mr Stevens has established that he has an arguable claim against the receivers for breach of their duty to him as a guarantor of the liability of a secured creditor.

[45] However, this is not of itself an answer to whether Mr Stevens has liability to repay part of BWM's debt to PWC, as guarantor. If the receivers breached their duties to Mr Stevens, they did so in their professional capacity as receivers, and in that capacity are the agents of the company in receivership. They are not the agent of the secured creditor PWC. Mr Riches submits, however, that the fact that a debt remains owing by BWM to PWC has been solely caused by PWC's own actions in refusing to allow the receiver to sell the plant for the best obtainable price, so that it

could privately profit by buying all the assets at what Mr Riches says is, on the face of it, an extremely low price.

[46] It is easy to see how Mr Stevens may feel aggrieved by the events which have occurred. From the time that an event of default under the security documents occurred he has been at risk of his obligation under his guarantee being called on. It seems he went to some lengths to obtain estimates of value, for the receivers, as well as a sale methodology which may have produced a better result than that which was obtained. While he was doing that his creditor, PWC, was arguably influencing the decision of the receivers on how they should proceed, for reasons which the receivers say was "preserving the industry". That goal, whatever it may mean, was evidently PWC's intention, and the immediate effect of PWC's actions was that it managed to buy all the assets of BWM at a price well under that which, on the evidence before the Court, could have been achieved by a different method of sale. Mr Stevens sees it as PWC profiting from the receivership whilst leaving him exposed. As counsel described it, PWC could have been repaid its debt from the assets of BWM being realised by a different sale method, but elected instead to follow a process to recover their debt from Mr Stevens which allowed them to buy the assets of BWM under value.

[47] Mr Riches did not enunciate the basis upon which the events which occurred might result in Mr Stevens no longer being liable to PWC under his guarantee. He phrased it in terms of PWC having caused its own loss by influencing the receiver in such a way that sufficient was not obtained from the sale of BWM's assets to clear its debt to PWC, and then taking advantage of the consequence of that influence. However, as this claim is brought under a written loan agreement which, on its face, establishes liability on the part of Mr Stevens, it is necessary to analyse in more detail whether the events which occurred would arguably give rise to a defence at trial, as a matter of law.

[48] In *Black v Ottoman Bank Ltd*, the Privy Council enunciated a general principle that a surety would be discharged if there had been:[13]

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[13] *Black v Ottoman Bank Ltd* (1862) 15 Moo PC 472 at 483, citing *Dawson v Lawes* (1854) 23 LJ Ch 434 (VC Ct) at 441.

> … some positive act done by [the creditor] to the prejudice of the surety, or such degree of negligence as in the language of Vice Chancellor Wood in *Dawson v Lawes*, "to imply connivance and amount to fraud".

[49] This principle is discussed in *Westpac Securities Ltd v Dickie*.[14] The Court of Appeal traced the origins of the principle, including reference to *Black v Ottoman Bank Ltd*. The Court then cited a passage from *Bank of India v Trans Continental Commodity Merchants Ltd*, in the English Court of Appeal.[15] After citing a passage from the judgment under appeal, Robert Goff LJ then said:[16]

> With that statement of principle I find myself in agreement, subject to the comment that I would perhaps have preferred to state it the other way round, that is to say that there is no general principle that "irregular" conduct on the part of the creditor, even if prejudicial to the interests of the surety, discharges the surety, though there are particular circumstances in which the surety may be discharged, of which the instances specified by the learned Judge provide certainly the most significant, and possibly the only, examples. I say that simply because I do not wish to be thought to be shutting the door upon any further development of the law in this field by rigidly confining the circumstances in which a surety may be discharged to the specified instances, though I freely recognize that I am unaware at present of any others. But that merely irregular conduct on the part of the creditor, even if prejudicial to the interests of the surety, does not discharge the surety, there can in my judgment be no doubt.

[50] In *Westpac Securities Ltd v Dickie* the Court of Appeal went on to reject the defence put forward to liability under the guarantee given by Mr Dickie to Westpac Securities Limited, but it did not demur from the application of the principle in appropriate cases. Indeed, the principle has been applied or considered in New Zealand in a number of cases and may be seen to be established, and applicable depending on the facts of each case.[17]

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14 *Westpac Securities Ltd v Dickie* [1991] 1 NZLR 657 (CA) at 663.

15 At 663-664, citing *Bank of India v Trans Continental Commodity Merchants Ltd* [1983] 2 Lloyds Rep 298 (CA) at 301-302.

16 *Bank of India v Trans Continental Commodity Merchants Ltd* above n 15, at 301-302.

17 *Watts v Marac Finance Ltd* HC Hamilton A8/85, 14 July 1988 at 19; *DFC Financial Services Ltd v Roberts* (1989) 4 NZCLC 65,391 (HC); *Equiticorp Financial Services Ltd v Jasper Holdings Ltd* HC Auckland CP1399-31, 30 November 1992; *BNZ v Boyce* HC Christchurch CP30-93, 29 June 1993; *Piyamitr Co Ltd v De Witte* HC Auckland CP497-96, 2 May 1997; *Amalgamated Builders Ltd v Nile Holdings Ltd* HC Invercargill M13-00, 24 May 2000; *Wiltshire Investments Ltd v Halstead* HC Auckland CIV-2005-404-6473, 2 June 2006; *Krtolica v Westpac Banking Corporation* [2008] NZ CCLR 24 (HC) at [113].
For a comprehensive discussion on the application of this principle see also James O'Donovan and John Phillips *Modern Contract of Guarantee* (2nd ed, Sweet and Maxwell, London, 2010) at [8-106] – [8-114].

[51] Approaching this issue in the same way as the Court of Appeal in *Westpac Securities Ltd v Dickie*, namely by reference to the dictum of Robert Goff LJ in *Bank of India v Trans Continental Commodity Merchants Ltd*, I find that Mr Stevens has established a sufficient evidentiary foundation to show that he has an arguable defence to liability under the guarantee. Accepting, in terms of his Lordship's statement, that there is no general principle that irregular conduct on the part of a creditor, even if prejudicial to the interests of a surety, will discharge the surety from liability, I find that in the particular circumstances of this case the basis for a defence is made out. There is evidence to show that PWC caused or connived at the default of the receivers, who by then represented the principal debtor BWM, in a way which could have, and arguably did, prejudice the interests of Mr Stevens.

[52] Mr Stevens says in evidence that he believes the directors of PWC had a grudge against him. If that were so, that might also amount to evidence that PWC acted in bad faith towards him, but on the evidence before me I find Mr Stevens' view to be no more than an assertion, there being no evidence to support it beyond his statement. In contrast, his evidence in relation to PWC engaging with the work of the receivers in an attempt to govern the way they went about complying with their duty under s 19 of the Receiverships Act is substantiated by the record of the receivers themselves, as recorded in their first report, and of course is borne out by their declining to spend a comparatively modest sum in order to properly investigate the marketing of the hard assets of BWM internationally and on a piece by piece basis.

[53] For these reasons I find that an evidentiary foundation has been laid for a defence to liability under the guarantee given by Mr Stevens to PWC.

Outcome

[54] The application for summary judgment is dismissed.

[55] In this circumstance the general rule is that costs will be reserved, to be assessed at the conclusion of trial.[18] Mr Riches asks that costs be ordered in his client's favour, given the considerable expense he has been put to by this application.

[56] I do not think that is a sufficiently compelling reason to depart from the general principle. The finding that summary judgment cannot be entered is based on the evidence as it stands. It relies on a finding that there is sufficient evidence to show that Mr Stevens may arguably have a cause of action against the receivers, and sufficient evidence to show that, arguably also, PWC may have been complicit in that breach (if established) by defining the way in which the receivers should go about execution of their duty. At trial that evidence may result in a defence of the claim, but the complexity of the situation, which can be seen from the terms of this judgment, is such that there is a significant amount of additional factual material, including documentary records, which will need to be investigated before a more conclusive answer can be arrived at.

[57] In these circumstances it is appropriate that costs be reserved, and I so order.

J G Matthews
Associate Judge

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[18] *NZI Bank Ltd v Philpott* [1990] NZLR 403 (CA).