IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-714

BETWEEN	G P SPICER Plaintiff
AND	BOULCOTT DEVELOPMENT GROUP LIMITED Defendant

Hearing: 25 July 2011

Counsel: J.H. Coleman - Counsel for Plaintiff
S.M. Kilian - Counsel for Defendant

Judgment: 24 August 2011

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 24 August 2011 at 3.00 pm under r 11.5 of the High Court Rules.

Solicitors: Macalister Mazengarb, Solicitors, PO Box 927, Wellington 6140
Kilian & Associates Ltd, Solicitors, PO Box 300485, Albany 0752

Introduction

[1] The application before me is one brought by the plaintiff Mr Spicer as receiver of Urban Nelson Limited (UNL) seeking summary judgment from the defendant Boulcott Development Group Limited to be indemnified by the defendant for personal liability he has suffered under an Agreement for Sale and Purchase for Goods and Services Tax (GST).

[2] The application is opposed by the defendant.

Background Facts

[3] The plaintiff along with a Mr Kenneth Athel Howard (now deceased) were appointed receivers of UNL on 30 November 2005 by Financial Trust Limited pursuant to a Security Agreement dated 24 August 2004. Mr Howard then died and left the plaintiff as the sole surviving receiver of UNL.

[4] UNL is a company which has been struck off the Register of Companies, this having occurred on 23 December 2008. As I have noted above, it was in receivership but I understand that receivership has now ended. UNL, however, has not been placed into liquidation and simply remains as a struck off company.

[5] On 25 June 2007 the defendant which carries on business as a property developer entered into the Agreement for Sale and Purchase as purchaser with UNL (in receivership) as vendor for the purchase of land at Richmond, Nelson (the Sale Contract). The Sale Contract was signed by the plaintiff and by Mr Howard as receivers of UNL as vendors and by directors on behalf of the defendant as purchaser.

[6] The purchase price for the land was $3.5 million (inclusive of GST). The parties agreed (at the defendant's request) and the Sale Contract provided for the GST component of the purchase price (being $388,888.88), if possible, to be paid and satisfied by the defendant's input tax credit on the sale being off-set by the Commissioner of Inland Revenue (CIR) against the plaintiffs and/or UNL's output tax liability.

[7] To put it simply, it is undisputed that the parties agreed to the following:

- **[Purchase Price]** under sale contract of $3,500,000.00 = $3,111,111,12 **[cash price]** + 388,888.88 **[the GST component]**.

  Agreed.

- Purchaser pays cash price of $3,111,111.12.

- GST component of $388,888.88 paid by **offset** (if possible).

- That is, the defendant's input tax credit on the sale would be **offset** against UNL's output tax liability and thereby discharge it.

[8] The Sale Contract, in a reasonably complex provision drafted and provided by the defendant's solicitor, provided that this GST off-set arrangement would apply only if the CIR approved the arrangement ("in terms that are satisfactory to the vendor") by a particular date. It seems by mutual agreement this date was extended on several occasions and finally, the parties to the agreement had received the CIR's consent to this proposal. This consent, however, was specifically conditional upon the defendant having no outstanding tax obligations owing to the CIR.

[9] Final settlement under the Sale Contract between the plaintiff and the defendant took place around 19 October 2007. On that date it seems the defendant paid to the plaintiff an amount which would fully pay the total purchase price of $3.5 million (including the GST element). The plaintiff recognised that this payment had been made by mistake such that it had included the $388,888.88 GST tax fraction that the parties understood was to be paid by credit transfer through the taxation system and in this way to be made available to the plaintiffs.

[10] The plaintiff, immediately realising an "over-payment" of this $388,888.88 had been made, to his credit returned this to the defendant purchaser through its solicitor. This occurred it seems on 26 October 2007.

[11] The plaintiff receiver then proceeded on the basis that the agreed GST tax credit offset had occurred and his liability as vendor for GST output tax on the 2007 sale had effectively been received by the CIR. It was not until over 2 years later on 18 November 2009 that the CIR wrote to the plaintiff saying that the GST output tax on the sale of the land to the defendant had not been received and the CIR was holding the receiver liable for that GST.

[12] The CIR had refused to provide the offset implying that the defendant had outstanding tax obligations to which its input tax credit was applied and the defendant had refused or neglected to pay the GST component. Thus, the $388,888.88 remained outstanding and was attracting interest and penalties.

[13] The CIR then made demand on the plaintiff personally for the amount of the GST component, interest and penalties.

[14] The plaintiff, having been receiver of UNL, had become a specified agent of UNL in terms of s 58 of the Goods and Services Tax Act 1985 (GST Act) and was consequently personally liable to the CIR for the GST component on the sale contract as that transaction had occurred during the agency period. That personal liability of the plaintiff was not disputed here.

[15] Instead, the plaintiff has sought indemnity from the defendant for this liability under clause 17.1(d) of the sale contract which appears to give the plaintiff as receiver an indemnity against personal liability.

[16] Obviously, all these matters which appeared to arise some two years after settlement under the sale contract were of major concern to the plaintiff. Having agreed under the sale contract to pay a total purchase price for the property of $3.5 million, the defendant developer (after the refund of $388,888.88 on 26 October 2007 by the plaintiff) paid only the sum of $3,111,111,12. This was a short payment of $388,888.88, given that the CIR had refused to provide the GST tax offset. This refusal was not because of any fault on the part of the plaintiff but simply because of the defendant's default in meeting other outstanding GST tax obligations. In addition, in this case the defendant has presumably obtained the benefit of the

$388,888.88 GST input tax credit being directly offset by the CIR against its other GST liabilities. With this situation firmly in mind, it appears that discussions and meetings then took place between the plaintiff, the defendant and officers on behalf of the CIR. From the evidence before the Court it is apparent that at a meeting in January 2011 the defendant specifically confirmed to the CIR and the plaintiff that it would pay or properly secure the $388,888.88 GST directly to the CIR but it did not do so nor provide any security for this payment.

[17] As a result of this, on 22 February 2011 the CIR wrote to the plaintiff demanding payment of the outstanding GST of $388,888.88 which with use of money interest and late payment penalties had then grown to the sum of $807,741.53. It seems from material presently before the Court that as at 28 June 2011 this GST output tax amount has grown with penalties and interest to the sum of approximately $858,000.00.

Parties' Arguments and My Decision

[18] In the summary judgment application before the Court the plaintiff seeks the following orders:

(a) A declaration that the defendant is liable to the plaintiff under the indemnity in the sale contract for the GST liability, plus any use of money interest and late payment penalties that have accrued to the CIR up to the date of payment;

(b) An order directing the defendant to pay directly to the CIR, to the account of the plaintiff, this GST amount plus any use of money interest and late payment penalties that have accrued up to the date on which the defendant pays the CIR; and

(c) The plaintiff's solicitor/client costs on an indemnity basis.

[19] In response, the defendant has raised a number of what can only be described as technical defences in its opposition to the present application. As I understand the

position, this is the first time those defences have been raised as before this, the defendant had been negotiating with the CIR to pay the GST component, as I have noted at [16] above.

[20] Notwithstanding this, I now set out in full those specific grounds of defence raised in the defendant's Notice of Opposition to the present application. They are:

(1) The defendant has a defence to the plaintiff's claim by way of counterclaim in that:

(a) The defendant has no contractual obligation to the plaintiff.

(b) The clauses, in the sale contract relied upon by the plaintiff are not operative clauses, and are specifically determined to be non-operative by the terms of the sale contract.

(c) The defendant paid all monies owing to UNL under the sale contract.

(2) It would be unjust for the plaintiff to be granted summary judgment on a claim in which he has no legal standing and without bringing the defendants claims into account.

Summary Judgment Principles

[21] The application before me is one for summary judgment. It is brought pursuant to r 12.2(1) of the High Court Rules which provides:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) 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.

[22] The principles of summary judgment have been summarised relatively recently by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26]:

> [26] The principles are well settled. 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) 1 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).

[23] As a useful starting point in considering the application before me, I note the acknowledgement made at the hearing by Mr Kilian, counsel for the defendant, that it does not deny that it has a liability to the company UNL for $388,888.88 presumably on the basis that it has short paid this amount on settlement of the purchase, but it denies that it has any liability to the plaintiff as receiver for this or any other monies. Before me Mr Kilian suggested that this $388,888.88, effectively after the refund of this sum following settlement meant that it had not been collected by UNL as vendor under the sale contract. Its defence in the present claim, however, is that essentially it is not liable to the plaintiff receiver because the indemnity clauses in the sale contract do not apply here as the plaintiff has not complied with his obligations regarding the GST payment. I will address this defence shortly.

[24] In the meantime, on the face of matters before the Court there seems to be a clear acknowledgement by the defendant that it is liable here for at least a further payment of $388,888.88 to UNL and on this basis and my view there would seem to be a strong argument that the plaintiff's summary judgment application might at least in part succeed against the defendant here.

[25] That said I turn to consider the defences raised by the defendant as outlined at para [20] above.

(A) Has the Defendant fulfilled its Contractual Obligation to Pay the Money to UNL?

[26] The defendant's assertion that it has fulfilled its contractual obligation to pay all the money owing to UNL noted at [20](1)(c) above, in my view, is a mischievous one and seeks to use the plaintiff's integrity against him. While it is true that the defendant did initially pay the full purchase price of $3,500,000.00 it is clear that this was paid by mistake by the defendant as both parties at that time thought the GST component was going to be paid by offset.

[27] The plaintiff, realising the defendant's mistake, behaved honourably as I see the position and repaid the GST component to the defendant straight away. The defendant does not dispute that this money was repaid or the reason it was repaid. The defendant in its Notice of Opposition, however, alleges on the one hand that it paid the full purchase price to UNL and on the other says it has no contractual obligation to the plaintiff and now refuses to pay the sum returned to meet the GST liability. This leaves the plaintiff as receiver personally liable for not only this sum but substantial penalties and interest.

[28] I am satisfied here that, as a matter of fact (given the undisputed return of the GST component) the defendant has not fulfilled its contractual liability to pay UNL the full purchase price under the sale contract.

[29] The legal position is clear that time is not of the essence in contracts such as the sale contract here – s 90 of the Judicature Act 1908 and Laws of New Zealand Contract Law paragraph 284. The effect of s 90 is that the position in equity prevails. There is no stipulation in the GST clause in the sale contract here that time must be strictly complied with. And, as I see it, the surrounding circumstances here are inconsistent with time being of the essence. In my view, the parties in this case agreed to disregard the GST date that would have operated had time been of the essence and had the original conditional date of 29 June 2007 been intended to be strictly adhered to.

[30] Alternatively, there is a good argument here that the sale contract was varied or waived orally and/or by conduct of the parties such that an extension of time was agreed in which the purchaser could obtain the CIR's approval for the agreed GST offset provisions to be used to settle the GST component of the purchase price – see *Neylon v Dickens* [1978] 2 NZLR 35. That approval was ultimately given, albeit conditional and it lapsed when the condition was not satisfied. That left the defendant to promptly pay the GST shortfall amount which it failed to do.

Does the Defendant have a Contractual Obligation to Indemnify the Plaintiff under Clause 17(1)(d) of the Sale Contract?

[31] The defendant then alleges that it has no contractual obligation to the plaintiff as he was simply not a party to the sale contract. In my view this argument is quickly disposed of. The sale contract itself expressly gives rights to the plaintiff under the Contracts (Privity) Act 1982 as a non-contractual party (clause 17.1(e)). On this, s 4 of the Contracts (Privity) Act 1982 states:

> **"Deeds or Contracts for the Benefit of Third Parties**
>
> Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> Provided that this section shall not apply to a promise, which on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person."

[32] The defendant's argument here, as I understand it, is essentially that the defendant and UNL are the only parties to the sale contract and the plaintiff receiver only acted as agent for UNL and as such the defendant can have no contractual obligation to him.

[33] This contention of course as I see it is directly counter to the express wording of clause 17 of the sale contract. This clause 17 provides:

17. Acknowledgment and Indemnity

17.1 The purchaser and the vendor acknowledge and agree that:

(a) the vendor is in receivership;

(b) this agreement is executed on behalf of the vendor by the Receivers only in their capacity as the receivers and managers of the vendor, with the intent of binding the vendor but not to bind the Receivers personally;

(c) the purchaser agrees that any liability of the Receivers shall be limited to the assets of the vendor which are available for that purpose, to the extent that the Receivers shall not incur any liability in their personal capacities. In any event, it is acknowledged and agreed by the vendor and the purchaser that the Receivers shall not, under any circumstances whatsoever, be personally liable under this agreement;

(d) the purchaser and the vendor irrevocably indemnify the Receivers from and against all personal liability; and

(e) this clause 17.1 is for the benefit of the Receivers, and that a benefit (as that expression is defined and referred to in the Contracts (Privity) Act 1982) is hereby conferred upon the Receivers.

[34] Before me, the defendant appeared to be arguing that, as a matter or construction, the plaintiff is not able to be indemnified for his personal liability to pay the GST component under the contract due to the defendant's default. I reject this argument however. As a matter of construction, it is clear to me that the opposite is in fact the case. Clause 17 noted above draws a distinction between the personal liability of the plaintiff as receiver to the contracting parties under the sale contract [clause 17.1(c)] which is excluded, and personal liability of the receiver [which must be necessarily to others] for which there is an indemnity [clause 17.1(d)].

[35] Indeed, if the defendant's assertion were true there would be no need to insert paragraph 17.1 into the sale contract at all as the receiver would always have been able to sue as agent for UNL under the contract. Clause 17.1 clearly must have been inserted to indemnify the plaintiff as receiver for liability he incurred, necessarily resulting from the sale contract, which I am satisfied this liability is. It is a GST liability imposed on the sale to the defendants under this contract. Clearly, in my

view, clause 17.1(e) was inserted so as to prevent the very argument now raised by the defendant.

[36] I conclude that the argument implicit in the defendant's defence here is entirely misconceived. The whole point of an indemnity is to hold the promisee harmless against the claims of a third party: Laws of New Zealand Guarantees and Indemnities paragraph 244. The modern law of indemnity (following the fusion of the common law and equity) permits an indemnity to be enforced by the Court making an order that the promisor pay the third party directly: paragraph 255. That is precisely what is sought by the plaintiff here.

Is the Plaintiff able Legally to Bring this Claim?

[37] The defendant's next argument to attempt to avoid indemnifying the plaintiff here is another technical one. By this, the defendant contends that as the receivership is now at an end and UNL has been struck off the Companies' Register, the plaintiff has no standing and is not able to be indemnified under the sale contract for the liability he incurred while acting as receiver. This assertion, in my view, is entirely without merit.

[38] UNL is not a party to this proceeding and therefore, as I see the position, it is irrelevant that it has been struck off the Companies' Register. The fact that the receivership is now at an end is also not relevant to the claim. As a matter of contractual interpretation, the plaintiff is 'the receiver' referred to in the sale contract. He is suing for liability he incurred personally as the specified agent for UNL under s 58 of the GST Act. This liability was incurred during the receivership, is on-going and arises under the GST Act because of the role he occupied and because of the date on which this sale transaction took place. That liability needs to be satisfied irrespective of the fact that the period of receivership (agency period) is now at an end.

[39] Finally, although not specifically referred to in the defendant's Notice of Opopsition to the present summary judgment application, before me Mr Kilian for the defendant endeavoured to raise one further argument. This was to the effect that,

as the plaintiff had allegedly failed to comply with his obligations under the GST Act and pursuant to the GST provisions in the sale contract, therefore the defendant could not be liable under the indemnity clauses in that agreement. On this, the defendant's argument, as I understand it, is that the plaintiff failed to meet his statutory obligation under the GST Act and in particular under clause 12 of the sale contract to deliver a GST tax invoice at the time of supply and to account to the CIR for GST on the sale on the required date being the 28th day of the following month.

[40] Again, under the circumstances prevailing in this case, in my view these arguments are without merit and are quickly disposed of. Here, at the defendant's initial instigation, the parties had agreed on an alternative GST off-set arrangement (subject to the approval of the CIR) as set out in the detailed special condition added to the sale contract.

[41] Solely because of the defendant's own defaulting GST position and unbeknown to the plaintiff, the CIR's earlier consent to this arrangement was withdrawn and thus, the GST component of the purchase price that should have been paid by the defendant on settlement effectively was not.

[42] As a result of this, the plaintiff who was labouring under the understandable misapprehension that the GST off-set had properly occurred, has now incurred personal liability to the CIR for this $388,888.88 plus interest and costs. In my view this is entirely as a result of default on the part of the defendant, a default it, in fact, acknowledged as recently as January 2011 in the meetings between the parties and the CIR agents. The defendant, even on its own evidence, was clearly aware of this continuing GST payment default and the attendant imposition of late payment penalties and interest. In my judgment it must be held responsible to indemnify the plaintiff receiver from this liability.

Conclusion

[43] For all the reasons I have outlined above, I am satisfied that the plaintiff has done sufficient here to show that the defendant has no arguable defence to his claim against it. In my view this is a case where a robust approach to the plaintiff's

summary judgment application must be taken – *Bilbie Dymock Corporation Limited v Patel* (1987) 1 PRNZ 84 (CA). As I see it there is no merit in the technical defences which the defendant has endeavoured to raise here.

[44] For all these reasons the application before the Court by the plaintiff for summary judgment has succeeded. Orders are now made by way of summary judgment as follows:

(a) A declaration is now made that the defendant is liable to the plaintiff under the indemnity in the sale contract for the GST liability, plus any use of money interest and late payment penalties that have accrued to the Commissioner of Inland Revenue up to the date of final payment (this being assessed at the sum of $819,239.16 as at 28 March 2011); and

(b) An order is now made directing the defendant to pay promptly and without further delay and directly to the Commissioner of Inland Revenue, to the account of the plaintiff, this GST amount plus any use of money interest and late payment penalties that have accrued up to the date on which the defendant pays the Commissioner of Inland Revenue; and

(c) Costs and disbursements on this application are awarded to the plaintiff as the successful party. In the event that counsel are unable to agree on an appropriate amount for costs they may file memoranda on this issue sequentially which are to be referred to me and, in the absence of either party indicating they wish to be heard on the matter, I will decide the question of costs based on the material before the Court.

'Associate Judge D.I. Gendall'