IN THE COURT OF APPEAL OF NEW ZEALAND

CA95/2008
[2009] NZCA 86

	BETWEEN	BERTRAND JEAN LOUIS GACHOT Appellant
	AND	CHRISTOPHER ALEXANDER SANSON Respondent

Hearing: 5 March 2009

Court: William Young P, Hammond and Ellen France JJ

Counsel: D L Marriott and I Finch for Appellant
P B Churchman for Respondent

Judgment: 23 March 2009 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] The single issue on this appeal is whether the appellant, Mr Gachot, personally guaranteed a debt of Razzmattaz Pty Limited ("Razzmattaz") to Parval Marketing Limited ("Parval").

[2] In the High Court, the respondent, Mr Sanson, successfully sued as the assignee of the debt and guarantee from Parval: HC AK CIV 2006-404-7231 11 February 2008.

[3] Mr Gachot's appeal is entirely factual. The appellant maintains that Asher J, the High Court Judge, was "wrong" to reach the view that Mr Gachot had given a personal guarantee.

[4] We take the view that the Judge was not in error and that the appeal should be dismissed. The burden of this judgment is to indicate concisely why we have reached that view.

Background

[5] This claim was the left-over rump of what began life as a trademark dispute. Mr Gachot is the principal of HMM International Limited ("HMM"), a company incorporated in Gibraltar which supplies an energy drink called HYPE. Razzmattaz was the chief distributor of HYPE for Australasia. Parval was involved in the marketing of HYPE in New Zealand as a sub-distributor of Razzmattaz. It had been set up by Mr James Parker. He was later assisted by his father, Mr Len Parker, aged 52, who also lent financial support.

[6] Although the trademark claim was ultimately discontinued, in an amended statement of claim in the trademark proceedings, Mr Sanson added a second cause of action against Razzmattaz, HMM and Mr Gachot regarding the alleged assignment of a debt and guarantee from Parval to Mr Sanson.

[7] In broad terms, Mr Sanson's allegation was that Razzmattaz had agreed to "buy back" two export containers of HYPE, the amount owing being $190,544.48 to Parval ("the debt"). This had occurred in a context in which the containers had originally been supplied by Razzmattaz to Parval, but Razzmattaz was about to launch the product in Australia and was short-stocked, whereas Parval had an over-supply.

[8] It was alleged that Mr Gachot and HMM agreed to guarantee the debt. There was then an assignment of the debt from Parval to Easy Factors International Limited ("EFIL"), a debt factoring company, and then an assignment to Mr Sanson.

[9] This chain of events produced disputes of a character which routinely attend such transactions, such as whether there was a valid assignment of the guarantee, who had to be joined in the proceedings, and the like. All of those issues have fallen away or been disposed of. The only issue on which we are asked to pronounce is whether the High Court Judge was, on the facts, correct to hold that Mr Gachot personally guaranteed the debt of Razzmattaz to Parval. We were not asked to consider whether there was a sufficient memorandum to enable the guarantee to be enforced.

The provenance of the guarantee

[10] Mr Sanson claimed that on or about 24 May 2006, Parval agreed to supply two export containers of HYPE to Razzmattaz. An invoice for $190,544.48 was issued (and subsequently factored under an agreement with EFIL).

[11] Although Razzmattaz was originally to pay for the HYPE before it was sent, Razzmattaz sought extended credit terms to which Parval agreed. Parval's evidence was that it shipped the two containers on the basis of promises to pay cash made by Mr Butler, the principal of Razzmattaz. Mr Butler subsequently denied this.

[12] In any event, when the containers arrived in Brisbane, they were not released and they stayed on the wharf. Parval did not wish to release the containers to Razzmattaz until it was paid.

[13] It was in this context that the guarantee at issue is said to have been spawned.

The evidence

[14] Following several endeavours to contact Mr Gachot about the unfortunate commercial situation which had arisen, Mr Parker sent him an email on 19 June 2006 which included the following statement:

> My major concern at the moment is the latest disagreement our companies have had with [Mr Butler] requesting to buy two containers of stock which was packed & sent to Australia 2.5 weeks ago with the trading terms to be payment up front which Razzmattaz clearly stated was the case which we have documented. These containers have now sat on the Wharf in Brisbane incurring daily costs of $150.00NZ per day without payment from Razzmattaz for over 1.5 weeks.

[15] Mr Gachot responded to that initiative by agreeing to speak to Mr Butler and saying, "we should work this out for the best interests of all".

[16] That same day, Mr Butler purported to cancel the Parval distributorship agreement by written notice, doubtless in an attempt to pressure Parval to release the containers.

[17] On 20 June 2006, Mr Parker emailed Mr Gachot to advise him of Mr Butler's termination of the distributorship agreement.

[18] The central point of contention in the evidence was the contents of a telephone conversation which took place between Mr Parker and Mr Gachot on 20 or 21 June 2006. It is in this conversation that the alleged oral guarantee is said to have come into being.

[19] Mr Parker said that Mr Gachot offered a trial 16-week distributorship agreement to replace the terminated agreement. He also said that he would guarantee payment in respect of the two containers. Mr Parker was unable to recall the exact words used. But he was adamant at trial that Mr Gachot promised to guarantee the debt.

[20] Mr Parker's evidence was encapsulated in the following statement by him, when he was asked what arrangements were being put in place on 20 or 21 June:

> Mr Gachot I guess you could say, he is passinate [sic] about his brand, he didn't want this cause of action to ever go this way I believe, but he would always say that he would sort it out, move on. He did guarantee the deal. He also agreed to the 16-week trial period but none of it ever came to fruition.

[21] The High Court Judge, based on his impression of Mr Parker in his Court (where he was also extensively cross-examined), formed a favourable view of Mr Parker's evidence generally, and on the critical guarantee issue.

[22] In relation to Mr Gachot's evidence, Asher J held (at [29]):

> The general thrust of Mr Gachot's evidence was to say that he confirmed that he would "sort things out", without going so far as guaranteeing payment. He appeared in cross-examination on occasions to accept that he used the language of guarantee. He said, for instance, "what I did was I guaranteed to sort it out".

[23] The Judge concluded (at [34]):

> I can only say that overall I found Mr Parker's evidence of the agreement to guarantee wholly convincing, and that Mr Gachot, while correct in his acknowledgement of an agreement to sort out the problem for Parval, was wrong in his evidence that his promise was in some way qualified.

[24] Further, in his assessment of the evidence, Asher J found that "the central reason that the Parkers agreed to let the containers go to Razzmattaz was that Mr Gachot promised that he would pay them for the containers if Razzmattaz failed to do so" (at [32]).

[25] Mr James Parker sent an email to Mr Gachot and Mr Butler on 21 June 2006. He said:

> Hi Guys,
>
> As an act of good faith on the current situation we have decided to release the containers from Australia on the conditions listed.
>
> That Bertrand & Hmm International will confirm in an email that they will stand by Parval Marketing in what ever the case regarding payment for the stock in Australia.

> That Razzmattaz will acknowledge the total invoice amount which is the sum of $190,544.48 is to be paid in full on the 20th of July 2006 as per invoice 00000136. Razzmattaz is also to acknowledge that half of all port fees will be paid and Parval to pay the other half. Razzmattaz as agreed will pay all shipping costs to Australia.
>
> We have considered our options on this situation very carefully and believe it is in the best interest of Hype Energy for the stock not to be returned to New Zealand.
>
> If I can have return emails from Razzmattaz & also Hmm International I will release the containers ASAP.
>
> Regards
>
> James Parker

[26] Although there is some ambiguity as to this email, it was consistent with the evidence given by Mr Parker at trial. Mr Gachot did not write back challenging what was recorded in the email. His evidence as to why he did not does not appear very plausible. His failure to respond immediately with a challenge to what was recorded is especially significant given a later email sent by Mr Gachot (see [28] below) which Mr Gachot admitted in evidence was written in reference to Mr Parker's 21 June email.

[27] The commercial relationship between Razzmattaz and a still unpaid Parval deteriorated further. On 2 September 2006, there was a further email exchange between Mr Parker and Mr Gachot. In relation to the guarantee, Mr Parker wrote:

> Bertrand as talked about the guaranteed payment from those containers to [Mr Butler] by you will need to be addressed on Monday as it is costing our company more money again ($10,000 + in legal fees) to try and retrieve our money. I think this discussion needs to be brought to light as this is now overdue by 3.5 months.

[28] Mr Gachot responded:

> I did guarantee you that in case Razzmattaz didn't fulfil payment of these two containers. We would. And we will. However it would first to be proved to an independent arbitrator that you have not been paid directly or indirectly. [Mr Butler] has assured me that the issue would be sorted very shortly and yes that would have us very relieved.

[29] It will be observed that the email correspondence in September is distinctly confirmatory of the view that we take of what had occurred in the June telephone

conversation and subsequent emails between the parties. That is, Mr Gachot had every interest in seeing that the promotion and marketing of HYPE remained on foot; he did not want to see that venture fail; he had conveyed to Mr Parker that one way or another things would be sorted out, but, in the event that the deal did not come into line commercially, that he would stand behind the debt. It made sense for Mr Gachot to say that he was not going to be called on personally until it was clear that things had not been sorted out commercially, and that it had been established that the debt had not been met.

[30] It is also useful to intrude two further factual elements here arising out of the September correspondence, which we think are significant. First, Mr Parker had again suggested to Mr Gachot that he had assumed a personal liability. Again there was no denial of Mr Parker's proposition. Secondly, Mr Gachot's correspondence of 2 September acknowledges that there was a guarantee of payment for the containers rather than a guarantee that replacement containers would be sent to Parval.

The High Court judgment

[31] The High Court Judge correctly approached the evaluation of the evidence in a case such as this, where there is an allegation of an oral agreement for a guarantee.

[32] The Judge first paid close regard to such documentary evidence as there was.

[33] He also had oral evidence before him from Mr Parker and Mr Gachot. He preferred the evidence of Mr Parker.

[34] Thirdly, the Judge rightly had regard to the context in which the dispute had arisen and the likely impact of that context on what had occurred.

[35] In the Judge's view, therefore, the traditional three-legged stool was present: in his view the documentary evidence, as far as it went, favoured the allegation of an oral guarantee, as did what he made of the witnesses in his Court and the commercial probabilities.

The basis of the appeal

[36] Mr Gachot's appeal amounted to a wholesale challenge to Asher J's fact-finding and assessment of the evidence. We do not criticise that. The Supreme Court of New Zealand has made it plain in *Austin, Nichols and Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 that an appellant is entitled to come to this Court and demonstrate, if he or she can, that the Judge was "wrong" in his or her assessment of the evidence. That is an important aspect of general appeals by way of rehearing. At the same time, an appeal of this character must always be decidedly optimistic where a High Court Judge has formed a favourable view of the critical oral evidence of a claimant, and it is supported by other factors (as it is here).

[37] At heart, Mr Marriott's submissions reduced to two propositions. First, that Mr Gachot made no guarantee personally to pay the debt. Secondly, if the Court should find that there was a guarantee to pay the debt, that it was given by Mr Gachot on behalf of HMM rather than him personally. As it transpires, the High Court found against the allegation as to the position of HMM and there is no cross-appeal on that point, so in this Court the issue narrowed solely to the position of Mr Gachot.

[38] Mr Marriott argued that there was nothing more than a series of proposals that never hardened into a contract. He further said that the finding of a personal guarantee by Mr Gachot was inconsistent with the evidence that at all material times Parval (and Mr Parker) was dealing with Mr Gachot only in his capacity as the managing director of HMM. All the relevant emails were sent to or received from Mr Gachot's HMM contact email address. It is said that the use of this address was clear evidence that Parval's dealings with Mr Gachot were in his capacity as an officer of HMM, as it was only in this capacity that Mr Gachot had any influence over the activities of Razzmattaz. The only email from Mr Gachot which refers to a guarantee was that which also used the language "we would" and "we will", which he said is a clear reference to HMM. It was suggested that an allegation that Mr Gachot had said he would guarantee payment of $190,544.48 in circumstances when he did not even know the amount at issue at the time that the purported guarantee was made (in the June 2006 telephone conversation) was quite unlikely. A

key aspect of Mr Marriott's submissions was that, given the containers were released on 21 June, any guarantee must have been given on or prior to that date. Further, Mr Marriott complained that Mr Parker's evidence contained vagueness as to sequences and exact wording (and it did) and that this had to be of real significance. Mr Marriott also complained that the factual comparison as to the relative positions of HMM and the worth of Mr Gachot as being a man of substance was not founded on any evidence. Mr Marriott enlarged on all these matters in close detail before us.

Evaluation

[39] Appeals of this character are difficult. The case is an odd one. The evidence overall is somewhat hazy, on both sides. A court has to decide the issue before it, on the balance of probabilities, on what is in court.

[40] In this Court, we are not retrying the case. We must pay proper regard to the advantages the Judge had with respect to what was said by the witnesses before him. It is for the appellant to show that the Judge was "wrong". We have taken that proposition seriously, and the evidence, warts and all, was gone over closely before us in a way which at one time might not have been so readily allowed in this Court.

[41] The appellant's central problem is that the Judge formed a favourable view of Mr Parker as the witness before him. He accepted that in the oral conversation Mr Gachot had conveyed that he would stand behind this transaction, though we think that was qualified by the notion that Mr Gachot expressed the hope it could be "sorted out" and that the dispute would go away, so that the parties could move on. Of course, Mr Gachot would not then be called upon personally. That makes commercial sense, in the particular circumstances. Further, it conforms to the language which was used in the later exchanges of emails. We also think that in the context of this case, it is highly significant that when a challenge was first mounted to Mr Gachot that he had assumed this form of liability, there was not an immediate response of: "I never assumed any such liability".

[42] It is true that some of the factors relied upon by the Judge for concluding that Mr Gachot accepted a personal liability might be thought to be of little or even no

weight. For instance there is no evidence that Mr Parker had any idea of the financial positions of Mr Gachot and his company. As well, the fact that Mr Gachot did not write the 2 September email expressly on behalf of HMM itself is of limited significance. On the other hand, Mr Gachot, as a former Formula One racing car driver and winner of the famous Le Mans 24 hour race could fairly have been regarded by the youthful Mr Parker as a larger than life figure whose guarantee might have seemed more tangible than just the guarantee of HMM. Importantly, Mr Parker's 21 June email is unequivocal as to the personal undertaking of Mr Gachot. Mr Gachot's email of 2 September was accepted by Mr Gachot as referring back to the 21 June email. On this basis, the most natural way of reading the word "we" in that email is as a reference to the two parties named in the 21 June email, ie Mr Gachot and HMM.

[43] On the question whether there was a firm contract between Mr Gachot/HMM and Parval, the most natural reading of the emails and interpretation of what happened is that there was a contract entered into in the telephone discussion which preceded the critical 21 June email under which the two containers would be released on the terms specified in the email. The confirmation from Mr Gachot and HMM could come either before or after the release of the containers (as Mr Marriot accepted in oral argument) although the conditions involving Razzmattaz naturally had to be satisfied before the containers were released (as they eventually were). This analysis of what happened is consistent with the 2 September email. Other issues associated with the termination of the distributorship arose while this contract was being implemented and were addressed. But there is no commercial reason for seeing those issues as superseding the core oral agreement.

[44] Trial judges have to make the best they can out of the often rough and ready dealings of businesspeople. The Judge held, on his assessment of the in Court evidence, and on the balance of probabilities that Mr Gachot had assumed this liability. It has not been shown that the Judge was wrong.

Conclusion

[45] The appeal is dismissed.

[46] Mr Churchman indicated, broadly, what his clients costs were likely to be. As it transpires the usual award closely approximates that figure. The appellant must pay costs to the respondent as for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
James & Wells, Auckland for Appellant