IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CIV-2012-416-258
[2013] NZHC 692

BETWEEN	CHESTER WAYNE HAAR Appellant
AND	EASTLAND TYRES LIMITED Respondent

Hearing: 5 March 2013

Appearances: D J Sharp for Appellant
A McIlroy and A M Simperingham for Respondent

Judgment: 9 April 2013

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.00 pm on 9 April 2013

Solicitors:
Burnard Bull & Co, Gisborne
Woodward Chrisp, Gisborne

Introduction

[1] The appellant was formerly a director and shareholder of Gisborne Haulage Ltd, a commercial transport company. In March 2008, Gisborne Haulage began dealing with Eastland Tyres Ltd, from which it purchased truck tyres and vehicle maintenance services. On 5 August 2008, the appellant and Gisborne Haulage completed an application for a Credit Account, (the Agreement) to which was attached Eastland Tyres' Terms and Conditions of Trade. The documents included a guarantee by the appellant of Gisborne Haulage's account with Eastland Tyres.

[2] Until about August 2009, Gisborne Haulage was up to date in its payments to Eastland Tyres, but it fell into arrears thereafter. Various repayment arrangements were negotiated but not adhered to. In September 2010, Baycorp was instructed to recover the amount then outstanding.

[3] Gisborne Haulage is now in liquidation. Eastland Tyres sued the appellant on his guarantee for its outstanding debt of $24,835.92 together with collection costs of $10,092.93. Proceedings were commenced in the District Court. After a defended hearing, Judge Marshall held that Eastland Tyres was entitled to recover the amount outstanding from the appellant.[1]

[4] In this appeal from the District Court judgment, Mr Sharp argues that Judge Marshall was wrong to hold that Eastland Tyres was under no express or implied duty to register an existing security or to take additional securities for the ultimate benefit of the appellant in his capacity as guarantor.

The Terms and Conditions

[5] The appeal turns on the construction and effect of two clauses in the Agreement, which provide respectively:

> **11. Personal Property Securities Act 1999**

[1] *Eastland Tyres Ltd v Haar* DC Gisborne CIV-2010-016-579, 1 October 2012.

11.1 Upon assenting to these terms and conditions in writing the Buyer acknowledges and agrees that:

(a) These terms and conditions constitute a security agreement for the purposes of the PPSA; and

(b) A security interest is taken in all Goods previously supplied by the Seller to the Buyer (if any) and all Goods that will be supplied in the future by the Seller to the Buyer during the continuance of the parties relationship.

11.2 The Buyer undertakes to:

(a) sign any further documents and/or provide any further information, such information to be complete, accurate and up-to-date in all respects, which the Seller may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register.

...

12. Security & Charge

12.1 Notwithstanding anything to the contrary contained herein or any other rights which the Seller may have howsoever:

(a) Where the Buyer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Buyer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.

(b) Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.

The clause 11 point

[6] Clause 11.1(a) provides that the terms of the Agreement constitute a security agreement for the purposes of the Personal Property Securities Act 1999. Under that Act a security interest is perfected by registration. It is common ground in this case that the security agreement was never registered. Mr Sharp's argument is that the respondent's failure to register breached an equitable obligation owed by Eastland

Tyres to the appellant to perfect its security interest by registration in order to protect the value of the appellant's subrogation rights.

[7] There is no doubt that equity recognises a duty owed by a creditor to a guarantor to perfect a security granted by the principal debtor for the debt, so that it is available in the exercise of a guarantor's subrogation rights where the guarantor makes payment of the principal debt. The equitable duty extends to a duty to perfect by registration any securities obtained from the principal debtor as security for the guaranteed debt.[2]

[8] Mr Sharp placed principal reliance upon the appellate judgment of the Court of Queen's Bench in *Wulff v Jay*, where a creditor had neglected to register a bill of sale, with the result that the value of the security was totally lost upon the insolvency of the principal debtor. Cockburn CJ explained that:[3]

> ... Cases have been cited and authorities have been referred to in Story's Equity Jurisprudence, which abundantly establish that which is a common and well-known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay. That is now a well-known proposition. Here, by registering the bill of sale, and by afterwards availing themselves of the power which they possessed to take possession, the plaintiffs might have secured the payment of the debt to themselves, or by protecting the securities and holding them in their hands they could have made them over to the surety when the surety was willing, or was called on, to pay; but by omitting to do what was necessary in order to place themselves in that position, and by allowing bankruptcy to supervene so as to enable the trustee under the bankruptcy to take possession of these goods adversely, it is clear that they have placed the surety in a position very detrimental and prejudicial to the surety; and for that the surety ought to have, according to the general doctrine, a remedy.

[9] Eastland Tyres accepts that it did not perfect its cl 11 security interest by registration, but it does not follow that the appellant is automatically discharged from liability. As is plain from the judgments in *Wulff v Jay*, a guarantor is discharged in

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2 *Wulff v Jay* (1972) LR 7 QB 756; *Yorkshire Bank Plc v Hall* [1999] 1 All ER 879 at 893; *New Zealand Bloodstock Leasing Ltd v Jenkins* (2007) 3 NZCCLR 811 at [67].

3 *Wulff v Jay*, above n 2, at 762.

circumstances where the security is unperfected only to the extent of the resulting loss.

[10] Here, Eastland Tyres had a security interest under cl 11.1(b):

> ... in all Goods previously supplied by the Seller to the Buyer (if any) and all Goods that will be supplied in the future by the Seller to the Buyer during the continuance of the parties relationship.

[11] Eastland Tyres supplied truck tyres and maintenance services. Only the truck tyres could have provided an effective security. There is no evidence about the value of the tyres owned by Gisborne Haulage from time to time, or the existence of any prior competing interests. It is quite impossible to say whether the neglect of Eastland Tyres to perfect its security over the tyres by registration has resulted in any loss to the appellant, or if it has, what the amount of that loss may be. The first ground of appeal must accordingly fail.

[12] Judge Marshall seems to have rejected the appellant's defence under cl 11 on the basis that nothing in the clause imposed a duty on Eastland Tyres to take a registered security over the assets of Gisborne Haulage, noting correctly that cl 11 is confined only to tyres and goods associated with servicing trucks.[4]

[13] However, as I understand it, Mr Sharp's cl 11 argument is quite separate from his cl 12 point. I consider that, while Eastland Tyres was in breach of its equitable duty to perfect the security interest arising under cl 11.1, the appellant cannot rely on the breach because he is unable to establish the extent of any injury or damage.

The clause 12 point

[14] The appellant's second argument concerns the effect of cl 12. On its face, it confers on Eastland Tyres a discretion to take further securities from either Gisborne Haulage or the appellant, but Mr Sharp argues that in equity, a duty was imposed upon Eastland Tyres to take and perfect such securities as were available. That duty was owed to the appellant as guarantor but not to Gisborne Haulage.

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4 *Eastland Tyres Ltd v Haar,* above n 1, at [12] and [16].

[15] For a time, Gisborne Haulage paid its accounts when due, but problems emerged late in 2009. In or about December 2009, Ms Jones, a director of Eastland Tyres, met with representatives of Gisborne Haulage in order to discuss that company's escalating financial difficulties. At that time, Ms Jones was told that Gisborne Haulage had no assets available to serve as further security for the outstanding debt. Mr Sharp argues that the request for security in December 2009 was made too late, that the obligation to take additional security arose at the outset, and that Eastland Tyres' failure to do so discharges the appellant from liability on his guarantee.

[16] For that proposition he relies upon the opinion of the Privy Council in *China and South Sea Bank Ltd v Tan Soon Gin*.[5] That was a different case. There, a creditor had made an advance on the security of mortgaged shares. The debtor defaulted on the date for repayment but, although the shares were then still worth more than the loan, the creditor did not exercise its power of sale under the mortgage. After the shares had become worthless the creditor demanded payment of the principal sum and interest from the surety and brought an action against him. The debtor argued that he was discharged by reason of the creditor's failure to realise the security at a time when it was sufficient to meet the outstanding liability. That was a conventional case which turned on the principle that a creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full, when the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.

[17] As was said by Lord Templeman, delivering the opinion of the Privy Council:[6]

> No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline.

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5 *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536.

6 At 545.

[18] But that is not this case. There is nothing in the *China Bank* case, or for that matter in *Wulff v Jay*, to support Mr Sharp's proposition that, (notwithstanding the permissive language of cl 12), Eastland Tyres was under an equitable duty to take, not only some further security, but all available securities from both Gisborne Haulage and the appellant. The existence of any such duty is in my view completely negated by cl 12.1(b), which expressly conferred on Eastland Tyres a right to elect whether or not to proceed with the taking of any securities. To adopt the language of Lord Templeman, no creditor could carry on the business of lending if, notwithstanding an express power to elect to take further securities, a lender found itself obliged to do so or risk the loss of its guarantee. Such an outcome would require clear supporting authority. There is nothing in the cases to which Mr Sharp refers to support his argument. The second ground of appeal must also fail.

Result

[19] The appeal fails and is accordingly dismissed. The respondent is entitled to costs, calculated on a band 2B basis, together with reasonable disbursements to be fixed by the Registrar.

C J Allan J