IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2010-463-000333

BETWEEN	SOUTH CANTERBURY FINANCE LIMITED Plaintiff
AND	PETER MICHAEL BRADLEY First Defendant
AND	JEANETTE SUSAN BRADLEY Second Defendant
AND	DAVID DOMINIC RICE Third Defendant

Hearing: 1 April 2011

Appearances: TJG Allan for the Plaintiff
C T Gudsell QC for the Defendants

Judgment: 6 April 2011

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
06.04.11 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

Solicitors/Counsel:
T Allan, Grove Darlow, Auckland – tima@grovedarlow.co.nz
C Gudsell, Barrister, Hamilton – ctgudsell@xtra.co.nz

[1] By my judgment dated 3 December 2010 I dismissed the plaintiff's (SCF) summary judgment applications against the first and second defendants. I held there was an arguable defence of estoppel by convention raised upon evidence alleging that SCF secured the first defendant's (Mr Bradley) assistance and cooperation with a pre-liquidation development sale down in consideration of an undertaking not then to pursue recovery under guarantees given by the defendants.

[2] In my judgment I noted the Court would, if SCF requested, hear argument based on the separate defence offered by the second defendant (Mrs Bradley) but which was not able to be heard on 24 November 2010. SCF has since advised it wants the Court to hear argument on Mrs Bradley's separate defence based on a claim of common mistake.

[3] SCF has filed an appeal of my judgment dismissing its summary judgment claim.

Background

[4] At relevant times SCF was then Auckland Finance Limited, but it will be convenient to use the present name.

[5] Mr Bradley acknowledges a liability as a guarantor independent of his position as trustee of the Peter Bradley Family Trust (the Trust). As mentioned in paragraph [1] above, his defence proceeded upon the basis that any claim against him was not yet due.

[6] On 21 June 2010 I entered judgment against the third defendant, Mr Rice, upon SCF's claim that a sum of $17,132,002.23 inclusive of interest and costs, was due. The application for judgment was not opposed. I noted the liability of Mr Rice was only in his capacity as a trustee of the Trust and was limited to the value of the assets of the Trust.

[7] Initially Mrs Bradley filed her own notice of opposition to SCF's summary judgment application. In that she claimed that before she completed a guarantee of

borrowings by Featherstone Park Developments Limited (FPDL) from SCF, it was represented to her that she would not be required personally to guarantee the advance – rather that her guarantee was provided as a trustee of the Trust. She said she was not separately advised about being personally liable. She said the effect of the way the guarantee operated was not explained to her.

[8] A day or two before I heard SCFs summary judgment application on 24 November 2010 an amended notice of opposition was filed by the solicitors Mrs Bradley had recently engaged. The notice claimed that the loan agreement between SCF and FPDL did not require a guarantee from the Trust.

[9] The notice of opposition claimed that Mrs Bradley along with the other trustees, Mr Bradley and Mr Rice, signed a Deed of Guarantee and Indemnity (Deed of Guarantee) as a result of a common mistake due to:

1) She being advised by FPDL's legal advisor that the trustees of the Trust were required to sign documents relating to the advance to FPDL, including a Deed of Guarantee, because the Trust was a shareholder in FPDL.

2) That the Trust was not at any time a shareholder in FPDL because:

    a) The FPDL share register records that the Trust had never been a shareholder in FPDL.

    b) The Companies Register erroneously recorded the Trust was a shareholder in FPDL as a result of a mistake made by FPDL's accountant.

    c) Mr Bradley was the sole shareholder in FPDL at the time Mrs Bradley signed the Deed of Guarantee.

[10] Mrs Bradley's defence focuses on the original Loan Offer from SCF to FPDL wherein there is identified the purposes for which the funds were advanced,

including a sum of $1,570,000 to acquire the shareholding of Mr Henry in that company. Mrs Bradley's case is that an analysis of the security documents required to be executed before FPDL drew down the loans discloses that the Deed of Guarantee was signed by her because she was told that the Trust was a shareholder in FPDL. She says it was not the intention of the parties to the Term Loan Agreement between FPDL and SCF that the Trust, by and through its trustees, would either receive loan funds or purchase any shares in FPDL. Further, that the Trust neither received loan monies to purchase Mr Henry's shares, nor did it purchase any shares in FPDL.

[11] Mrs Bradley's case is supported by her affidavit and as well by affidavits from Mr P Bradley, Mr T Henry and Mr Stewart Wilson, FPDL's then accountant.

[12] In opposition to the common mistake defence three affidavits have been sworn by Mr Robert Wood a solicitor of the firm representing SCF in connection with the loan by SCF to FPDL.

[13] SCF's position is that the documentary evidence clearly establishes that there was no mistake by Mrs Bradley; that she and her co trustees borrowed the money in 2006, and in 2007 they repaid the money by refinancing. SCF also argues that a claim of mistake does not survive if there was no common mistake and in this case SCF says there was none because quite aside from any question of shareholding in FPDL, the trustees were required to give their guarantees.

The defence of common mistake

[14] The elements of common mistake in section 6(1)(a)(ii) Contractual Remedies Act 1977 (the Act) that must be established before a Court can grant relief under s 7 are:

> (a) ... in entering into that contract –
>
> ...
>
> (ii) All parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake ... and

(b) The mistake ... resulted at the time of the contract -

(i) In a substantially unequal exchange of values; or

(ii) ... an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportional to the consideration therefor; and

(c) Where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought .... is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.

[15] The elements are cumulative.

[16] Mrs Bradley asserts SCF and the trustees made the same mistake about why the trustees were called upon to provide guarantees.

[17] The term "mistake" is defined by s 2 of the Act as follows:

"Mistake" means a mistake whether of law or of fact".

[18] Mr Gudsell for Mrs Bradley submits the following mistakes have occurred:

a) The three defendants and the plaintiff mistakenly believed that the Trust was a shareholder in FPDL at the time the Deed of Guarantee was signed, when in fact the Trust was not at that time or at any other time a shareholder in FPDL;

b) There is a further mistake in that the recitals in the Deed of Guarantee in paragraphs A and B under the heading "Background" are incorrect. The Trust had not requested SCF to advance monies to FPDL nor agreed to execute a Deed of Guarantee to secure payment of those monies. Rather, Mr Bradley, in his personal capacity had requested the advance and agreed to provide a personal guarantee. There was, Mr Gudsell submits, no legal basis upon which a Deed of Guarantee could be required from the Trust.

[19] Mr Allan does not accept any basis of common mistake for he contends the evidence shows that the Trust was not only a shareholder in FPDL but was also an indirect borrower. The Companies Office Register disclosed the Trust owned 40 of 120 shares in FPDL. In that combination of circumstances the requirement of a guarantee of all borrowings from SCF was made.

[20] Mr Allan for SCF rejects roundly a claim that there was no legal basis from which a guarantee of the trustees could be required. He said that guarantees are commonly obtained from persons who may not be receiving a benefit from the borrowings. In any event in this case the trustees were receiving a benefit, directly and indirectly, but even if they were not, there is no legal basis for challenging the fact that they did provide guarantees.

What this case is about

[21] In broad terms it is about a factual analysis. It is also about the interpretation of agreements, deed of certificates, financial accounts and correspondence.

[22] The events connecting the trustees to SCF's lendings to FPDL and Mr Bradley can for present services conveniently be considered to have begun when Mr Bradley agreed to buy Mr Henry's 40 shares in FDPL. The analysis concludes with a review of the events on 18 – 20 July 2007 when the Deed of Guarantee was signed, and beyond.

Chronology

The purchase of Mr Henry's shares

[23] Mr Henry deposes that he and Mr Bradley verbally agreed in early 2006 about the sale of Mr Henry's shares in FPDL. In August 2006 Mr Bradley advised him he had funds of $1.5M towards meeting the payment due. An agreement was prepared by Mr Peter Brazier, solicitor of McCaw Lewis Chapman, Hamilton. The Heads of Agreement provided for the payment of $4M for the sale of Mr Henry's interest in FPDL and in two other companies to Mr Bradley. The agreement required

payment of $1.57M upon signing the agreement. The bulk of the balance due was to be paid as FPDL's subdivision development progressed.

[24] On 7 and 8 September Mr Bradley emailed Mr Murphy of Face Finance (a SCF subsidiary) regarding the drawdown of funds to purchase Mr Henry's shares. The arrangement required any payment to be debited to Mr Bradley's account with Face Finance. Payments totalling $1.5M were made to Mr Henry during the following week including the sum of $500,000 paid on 15 September 2006.

Loan contract between Mr Bradley and the Trust dated 28 September 2006

[25] That document records that the Trust as borrower and Mr Bradley trading as Lakeland Helicopters, as lender, entered into a loan contract pursuant to which Mr Bradley lent the Trust $1.57M on 15 September 2006 repayable upon demand provided demand was not made for one year.

[26] A copy of the signed loan contract was provided to SCF's solicitor Mr Wood on 18 July 2007 by Mr Neverman of McCaw Lewis Chapman at the same time Mr Neverman conveyed advice that the Trust was a shareholder in FPDL.

Loan Offer by SCF to FPDL in March 2007

[27] FPDL had approached SCF for finance to complete its residential property development in Hamilton. Efforts to secure that from ANZ had been approved initially but subsequently ANZ declined to assist.

[28] On or about 13 March 2007 SCF agreed to lend FPDL the sum of $12,340,000 "the Loan Offer". The purpose of the loan was stated to be:

> ... for the purpose of repayment of all existing project debt to the first mortgagee, Marac Finance Limited $7,550,000, complete purchase of shares from Tom Henry $1,570,000, complete the 95 lot subdivision known as St Petersburg Estate $3,000,000 and meet Establishment Fee on this facility $220,000.

[29] The loan offer permitted SCF the right to impose additional requirements before being obliged to make an advance. Mr Wood, SCF's solicitor has in his first

affidavit summarised in some detail his requests regarding the purchase of shares from Mr Henry, the payment for which was stated to be one of purposes of the Loan Offer.

SCF's request for information regarding who was purchasing Mr Henry's shares

[30] On 30 April 2007 at 9:17am Mr Wood sent an email to FPDL's solicitor Mr Neverman stating:

> 2. Who is purchasing Tom Henry's shares, is it Peter Bradley or a third party or are the shares being surrendered to the company?

[31] On 2 May 2007 at 12:12pm Mr Wood sent a further email to Mr Neverman, stating:

> 4. We need to view the contract for the purchase of the shares from Tom Henry... What time lines have you to meet with completing share purchase etc.

[32] On 14 May 2007 Mr Wood sent a letter to Mr Neverman enclosing documents for execution including a Deed of Guarantee. The Guarantee was required solely from Mr Bradley. The letter reminded Mr Neverman:

> Prior to settlement we will require.
>
> ...
>
> Agreement for purchase of shares from Tom Henry and copy of settlement statement.

[33] On or about 7 June 2007 SCF and FPDL entered into a Term Loan Agreement (the Term Loan Agreement). Following this the solicitors continued their correspondence.

[34] The Term Loan Agreement, as did the Loan Offer stated that the guarantor was to be Mr Bradley. There was no reference in those documents to Mrs Bradley, Mr Rice or the Peter Bradley Family Trust. It is clear at this time that SCF was not aware of those entities.

[35] On 25 June 2007 Mr Wilson, the Trust's accountant sent to SCF a copy of the Companies Officer Register showing the company's shareholders as Mr Bradley and the Trust. It is to be inferred that this information was not passed on to SCF's solicitor at the time.

[36] On 10 July 2007 Mr Wood wrote to FPDL's solicitors setting out the requirements for the loan transaction which included a request for a copy of the shareholder agreement between Mr Bradley and Mr Henry. That request included:

> (j) Copies of agreement for sale and purchase of shares and settlement statement from Thomas Henry;
>
> (k) Copy of shareholder agreement between Peter Bradley and Thomas Henry.

Disclosure of the Trust as the purchaser of Mr Henry's shares

[37] On 11 July 2007 the solicitors for FPDL wrote to SCF's solicitors advising:

> We enclose a copy of the company search for Featherstone Park Developments Limited, showing Thomas Henry has no involvement with the company as a shareholder. Accordingly please confirm that the documents referred to (j) and (k) of your letter are no longer required.

[38] The company search provided to SCF's solicitors disclosed 40 shares in FPDL were held by the first to third defendants.

[39] On 16 July 2007 Mr Wood wrote to Mr Neverman advising:

> With regard to the purchase of shares from Thomas Henry we still need the agreement for the purchase of the shares, a copy of the settlement statement, and the copy of the shareholder agreement between the parties.

[40] On 18 July 2007 Mr Neverman sent to Mr Wood copies of the following documents:

> 1. The Heads of Agreement between Mr Henry and Mr Bradley relating to the purchase by Mr Bradley of Mr Henry's shares and interests in three companies, including FPDL.

2. The Loan Contract between the trustees of the Peter Bradley Family Trust and Mr Bradley (trading as Lakeland Helicopters).

[41] As previously noted the Heads of Agreement referred to an agreement for the sale and purchase of Mr Henry's shares by Mr Bradley, and the Loan Contract, although making no reference to Mr Henry's shares, referred to a loan between Mr Bradley and the Trust for a sum of $1.5M.

[42] The Companies Office search earlier provided had recorded that the trustees were shareholders of FPDL.

The requirement for a Guarantee

[43] It appears clear a degree of urgency attached to completion of the loan documentation before release of the loan funds could be made.

[44] Mr Wood deposed it appeared to him that the Loan Contract between the defendants and Mr Bradley trading as Lakeland Helicopters was then shortly due for repayment, the advance having been indicated to be made on 15 September 2006 and was repayable after a period of 12 months. Mr Wood noted among a series of covenants a specific provision limiting Mr Rice's liability by virtue of him being an independent trustee.

[45] It was Mr Wood's understanding that the effect of the transaction was that the three defendants as trustees had borrowed from Mr Bradley the amount required to pay for the cash instalment of the purchase price for Mr Henry's shares. To him part of the SCF advance would be advanced to the Trust to repay the loan Mr Bradley had advanced to the Trust for the original purchase of the shares – albeit that the amount recorded in the Heads of Agreement as the initial payment was $1.5M as opposed to $1.57M.

[46] On 19 July 2007 at 4:00pm, Mr Wood sent to Mr Neverman "a Guarantee for the shareholders of Featherstone" and requested the name of the Trust the shares were held under. Mr Neverman replied on 19 July 2007 at 4:31pm, noting "Peter

Bradley Family Trust". He added he looked forward to receiving Mr Wood's instructions.

[47] Later that day at 5:05pm, Mr Wood emailed Mr Neverman advising:

> We require a guarantee from the new shareholders (copy now attached), and a deed of acknowledgment of debt between the company and the borrowers/shareholders to have been executed before drawdown...
>
> For the record, and we know you are in the same position, these requests are late in the proceedings because it is only now that we became aware of a new borrower/shareholder identity. Prior to yesterday we thought Peter Bradley was purchasing the shares himself.

[48] Before then SCF had not required a guarantee of the trustees or the execution of a Deed of Acknowledgment of Debt. Previously the Term Loan Agreement had required a guarantee from Mr Bradley in his personal capacity.

[49] At 5:37pm on 19 July 2007, Mr Neverman sent a facsimile to Mr Wood advising:

> We will prepare the Deed of Acknowledgment and Guarantee of documentation and forward this to you at the earliest opportunity.

[50] Mr Wood states that the guarantee of the Trust was required because it was an associated party to the borrower, FPDL. He deposes in his first affidavit:

> The fact that the Peter Bradley Family Trust was a shareholder in FPDL and, separately, the benefactor of part of the loan monies were important but independent factors in our requirement for the trustees' guarantee. [31]

[51] On the morning of Friday, 20 July 2007, Mr Neverman sent, via email, the following documents to Mr Wood:

1. At 8:31am, a copy of the signed Guarantee; and

2. At 8:46am, copies of the signed Deed of Acknowledgment of Debt, Trustee Resolution and Trust Deed.

Deed of Acknowledgment of Debt

[52] It records the trustees of the Trust as being the debtors, and FDPL as being the creditor. It contains the following:

> 3.0 **Background Facts:**
>
> 3.1 The Debtors acquired shares in the Creditor from Tom Henry by virtue of an Agreement for Sale and Purchase dated September 2006.
>
> 3.2 The Debtors paid to Tom Henry the sum of $1,500,000 on the 28 September 2006. The Debtors owe Tom Henry a further $70,000 to complete that transaction.
>
> 3.3 The Debtors used funds advanced from Lakeland Helicopters and secured by a Deed of Acknowledgement of Debt dated to pay the funds set out in 3.2 above.
>
> 3.4 The Debtors are required to repay the funds advanced at 3.3 above and pay the balance of funds to Tom Henry set out in clause 3.2 above amount to $70,000.
>
> 3.5 The Creditor has agreed to borrow money from [SCF].
>
> 3.6 The Creditor has agreed to advance part of the funds to be borrowed under 3.5 above to the Debtors amounting to $1,570,000 to pay the funds set out in 3.4 above.
>
> 3.7 The Creditor has requested [SCF] to credit Lakeland Helicopters' account at Face Finance Limited to the sum of $1,570,000 (the Principal Sum) to enable the Debtors to repay the amounts set out in 3.4 above.

[53] The document was prepared by Mr Neverman's firm. Mr Wood understood by it that the defendants were repaying Mr Bradley trading as Lakeland Helicopters, the funds Mr Bradley had originally lent to them to purchase Mr Henry's shares.

[54] Mr Wood deposes that at the time no one raised any objection to SCF's requirement for the Deed of Guarantee from the trustees of the Trust.

[55] Mr Wood asserts that he required by the Deed of Acknowledgment of Debt documentation of the money trail between FPDL and the trustees to ensure a record of the Loan Contract being repaid and so that the Deed of Acknowledgment of Debt formed part of the assets of FPDL over which SCF held security. He says that from SCF's perspective the Trust was benefiting from the loan by repaying its

indebtedness to Mr Bradley trading as Lakeland Helicopters who in turn benefitted by the defendants requiring the payment to go straight to Mr Bradley's creditor, Face Finance.

[56] On the morning of Monday, 23 July 2007, Mr Neverman emailed Mr Wood thanking him "for your special effort on Friday enabling the funds to be drawn down".

Deed of Guarantee and Indemnity and associated documents

[57] The form of this document was, together with an Acknowledgment of Guarantors and a Certificate of Trustees, forwarded by Mr Wood to Mr Neverman on 19 July 2007. By facsimile response Mr Neverman advised that McCaw Lewis Chapman would prepare the Deed of Acknowledgment and Guarantee documentation for return "at the earliest opportunity".

[58] Upon execution of the documents by the trustees, McCaw Lewis Chapman forwarded a copy of the solicitor's certificate to confirm their actions when the documents were executed.

[59] The Deed of Guarantee identifies Mr Bradley, Mrs Bradley and Mr Rice "as trustees of the Peter Bradley Family Trust" as the Guarantors.

[60] In the recitals under the heading 'Background' it is recorded:

> A. The Lender has provided or agreed to provide certain Secured Money to [FPDL] (the Debtor) at the request of the Guarantor.
>
> B. The Guarantor has agreed to execute this Deed to secure payment of the Secured Money and the performance of all other obligations of the Debtor to the Lender.

[61] Other relevant clauses provided:

> **2 GUARANTEE AND INDEMNITY**
>
> **2.1 Unconditional guarantee**: The Guarantor unconditionally and irrevocably guarantees payment of the Secured Money to the Lender and the performance of all other obligations of the Debtor to the Lender...

> **2.2** **Unconditional indemnity**: The Guarantor unconditionally and irrevocably indemnifies the Lender against any loss, liability, costs of expenses which the Lender may incur because:
>
> ...
>
> (h) **Representation untrue**: Any representation, warranty or statement of fact made, deemed to be made or deemed to be repeated by the Debtor or any Covenantor to the Lender, or any other information provided by the Debtor or any Covenantor to the Lender, proves to be untrue or incorrect in any way;

[62] The Deed of Guarantee confirms that any trustee of any Guarantor will be bound personally unless that trustee is an independent trustee.

[63] The signature of Mrs Bradley to the Deed is witnessed by Mr Neverman.

[64] In the Acknowledgement of Guarantors Mrs Bradley severally acknowledged and agreed:

> ...
>
> (a) We were advised by the Lender and our solicitor to obtain independent legal advice prior to the execution of the Documents and have each independently elected not to obtain such advice. In consideration of the Lender making available financial accommodation to the Borrower, we each hereby irrevocably waive any defence or counterclaim we may have against the Lender whether now or in the future in connection with the enforcement of the Guarantee by the Lender which may arise as a consequence of us electing not to obtain independent advice; and
>
> (b) The nature and effect of the Documents and this acknowledgement have been explained to us by our solicitor and we understand the terms and provisions of the Documents. In particular we acknowledge that:
>
> (i) we are each liable as a principal debtor...
>
> (c) We have had sufficient time to consider the Documents and we each confirm that we have not been pressured or coerced into signing the documents by the borrower, the lender of any other person.

[65] In the Certificate of Trustees document Mrs Bradley and the other trustees acknowledged that the Lender was intending to enter into documents and provide financial accommodation "to or at the request of the Trust in reliance upon, inter alia, this Certificate given by us".

Settlement of loan payment

[66] On 20 July 2007 Mr Wood wrote to SCF and advised that McCaw Lewis Chapman had requested that the sum of $1,570,000 of the drawdown sum of $10,591,609.53 was to be paid to Face Finance to discharge the indebtedness of Mr Bradley.

[67] The sum of $1.57M was paid to Face Finance. The balance was paid into the account of FPDL at the offices of McCaw Lewis Chapman.

Events post drawdown of loan funds

[68] These largely concern a number of meetings attended by representatives of SCF on the one part and Mr Bradley and FDPL's advisors on the other. In the course of those there was discussion regarding the sell down of FPDL's development. A number of sale contracts had been entered into but difficulties were anticipated for the settlement of those. In the outcome of those discussions I ruled on 3 December 2010 against SCF's summary judgment claim when I ruled there was an arguable case for a defence of estoppel by convention.

[69] FPDL's accountant, Mr Wilson was an attendee at one or more of those meetings. In the course of a discussion regarding FPDL's asset position Mr Wilson presented a copy of the 2008 / 2009 financial statements of FPDL. Those disclosed a loan to the Trust which as at 2009 stood at more than $208,000.

[70] In the days before I heard argument upon Mr Bradley's defence on 24 November 2010, Mrs Bradley's defence of common mistake had not been raised any earlier. Since, I have allowed the filing of additional affidavits from both sides to allow further evidence to be provided.

[71] Mr Wood has filed two, one each on 24 and 25 February 2011. At paragraph 3(c) of the former, he deposed:

> I was then advised [by McCaw Lewis Chapman's fax dated 18 July 2007] that $1.57M of the advance by [SCF] to FDPL would be advanced by way of loan by FPDL to the Trust and that the Trust would then repay its existing

> loan to Peter Bradley. A copy of my file note made on 19 July 2007 after 12:50pm is attached...

[72] The file note in question comprised the words:

> Difference. $1,570,521.00
>
> Face Finance Ltd

[73] It was written upon a letter from McCaw Lewis Chapman which stated only:

> The amount required to settle today is $10,581,312.53. Please lodge this sum to our trust account at ANZ, Hamilton Branch... as early as possible today and confirm the lodgement by fax.

[74] The letter was written by Ms Isaac of McCaw Lewis Chapman.

[75] In his affidavit dated 25 February 2011 Mr Wood deposed:

> ... To the best of my recollection I spoke to Mr John Neverman of McCaw Lewis Chapman about the issues raised, because it was Mr Neverman who forwarded the documents to me that raised the various issues that were not previously appreciated, and because I had been in regular communication with him over the course of the whole transaction and we had a working relationship of the details of the various issues. My recollection is that I did not have any discussion with Ms Isaac on these issues because her knowledge of the transaction was not as detailed as Mr Neverman's and I understood her role was one of attending to procedural matters involved with settlement of the transaction.

[76] Mr and Mrs Bradley each swore affidavits dated 10 March 2011.

[77] Mr Bradley deposes that he had not, in his capacity as a trustee of the Trust ever instructed Mr Neverman that the Trust had purchased the shares from Mr Henry. Nor would he because he paid for the shares which were then transferred to him when Mr Henry signed the share transfer in March 2007.

The other evidence in opposition to SCF's summary judgment application

[78] Mr Bradley said he had been to see Mr Neverman to sign loan documents in June 2007 but there had been no discussion at that time about the shares or the Trust being involved.

[79] Mrs Bradley deposes having no knowledge of Mr Neverman being instructed as solicitor by her or the trustees of the Trust in respect of the dealings with the matters referred to in Mr Wood's affidavits; that had she known the Trust was not a shareholder in FPDL she would never have signed the Deed of Guarantee. Her sole reason for signing that document was Mr Neverman's advice given in the mistaken belief that the Trust was a shareholder in FPDL.

[80] In his affidavit filed in support of Mrs Bradley's defence of common mistake Mr Bradley exhibits copies of emails he sent to Mr Murphy at Face Finance regarding the drawdown of funds to purchase Mr Henry's shares. They provided direction about how much was to be paid and when it was to be paid.

[81] He also exhibits a copy of a share transfer dated 1 March 2007 where it is recorded that Mr Henry's 40 shares in FPDL were transferred to him for a consideration of $40. He says he did not know why the consideration was stated to be $40.

[82] In his affidavit Mr Henry confirmed having received "directly from Peter Bradley" the sum of $1M on 8 September 2006 and $500K on 15 September 2006. The balance due to him was subsequently paid and meanwhile he received interest from Mr Bradley in accordance with their agreement. He says he was paid in full for his shares by Mr Bradley. Mr Henry confirms having signed a share transfer in relation to the sale of his FPDL shares to Mr Bradley.

[83] Mr Wilson, FPDL's accountant, deposed that since 2004 he had been involved and maintained the company books and company register for FPDL. He exhibited a copy of the share register noting it disclosed there were two transfers of shares recorded for FPDL since 2004. By the first Mr Bradley acquired the shares of a Mr Fairmaid in July 2006. By the second he acquired Mr Henry's shares.

[84] Mr Wilson deposed:

> I am aware that the Companies Office electronic register shows 40 shares in FPDL as being in the names of [Mr Bradley, Mrs Bradley and Mr Rice]. This is clearly incorrect and I have written to the Registrar of companies about this.

[85] Mr Wilson added:

> I note the Companies Office Register records that it was my office that electronically filed the Notice of Change of Shareholding in May 2007 recording that [Mr Bradley, Mrs Bradley and Mr Rice] as shareholders in FPDL. This was done in error by a member of my staff at the time. I believe that this error arose because my staff member was also dealing with MBOBS Limited, another entity associated with Peter Bradley... I can confirm that new procedures for the Companies Office ensure that these events now do not happen, this is achieved by double checking all Company Office transactions through two staff and ensuring all transactions are correctly documented.

[86] Mr Wilson then acknowledged that on 27 June 2007 he sent a letter to SCF advising as to the "current listing 'at the Companies [Office]' for the Company [FPDL Limited]". He says the letter was prepared and sent at the request of Mr Bradley's daughter.

[87] Mr Wilson states that the 2008 and 2009 financial statements record loans by FPDL to the Trust in those years to allow the Trust to meet mortgage commitments.

Considerations

[88] The key issue is whether Mrs Bradley has an arguable defence to SCF's claim.

[89] SCF's position is clear. There was no mistake on its behalf in requiring the guarantees of the trustees. The evidence discloses the existence of a Loan Contract between the trustees and Mr Bradley trading as Lakeland Helicopters. It refers to a loan to the trustees in the sum of $1,570,000 on 15 September 2006 which was repayable one year later. The 15 September 2006 was the same day that Mr Bradley paid the sum of $500,000 in addition to the $1,000,000 paid the previous week for the purchase of Mr Henry's shares.

[90] Although the Loan Offer by SCF to FPDL in March 2007, and the initial Term Loan Agreement documentation required the Guarantee of Mr Bradley only, SCF's solicitor, Mr Wood, had for some months since requested details concerning the purchase of Mr Henry's shares. Frequent requests were made for this information.

[91] Then on 11 July 2007 a copy of a Companies Office search of FPDL was sent by Ms Isaac of McCaw Lewis Chapman to SCF and Mr Wood. Ms Isaac requested whether SCF still required a copy of a shareholder agreement between Mr Bradley and Mr Henry.

[92] Mr Wood responded advising that a copy of the agreement for sale and purchase of shares was still required. On 18 July Mr Neverman from McCaw Lewis Chapman sent Mr Wood a copy of the Loan Contract (Trust/Mr Bradley) and as well a copy of the Heads of Agreement (Henry/Mr Bradley).

[93] The following day on 19 July and in response to a request from Mr Wood's office Mr Neverman supplied the name of the Trust in whose name the shares in FPDL were held. Mr Wood's response was to forward a copy of a Deed of Guarantee, an Acknowledgement of Guarantors, and a Certificate of Trustees containing SCF's requirements before any advance could be made.

[94] In response Mr Neverman advised the relevant documentation would be prepared. Following execution of it by the trustees the loan funds were paid in terms of FPDL's requirements including the payment of $1.57M to the account of Mr Bradley at Face Finance.

[95] Until 19 July 2007 SCF and Mr Wood were not aware of the Trust's connection to FPDL or to the extent of the purposes for which funding was sought from SCF.

[96] Mr Wood's assessment of the Loan Contract (Trust/Bradley) and the Heads of Agreement (Bradley/Henry) documents was that they were related; that funds were going to be required to repay to Mr Bradley the sum for Mr Henry's shares. He assumed those funds would be borrowed by the Trust to repay Mr Bradley. It follows that Mr Wood assumed the Trust acquired ownership of Mr Henry's shares. As Mr Wood put it:

> I understood the affect of the transaction was the Borrowers [the Trust] had borrowed the amount required to pay for the first instalment of the purchase price from Tom Henry's shares from the Lender, i.e. Mr Bradley. It appeared that part of the SCF advance would be advanced to the Peter Bradley Family

> Trust to repay the loan Mr Bradley advanced to the Peter Bradley Trust for the original purchase of the shares. [[27] first affidavit]

[97] When on 19 July 2007 Mr Wood obtained the name of the Trust concerned he sent to Mr Neverman at 5:05pm on 19 July 2007 by email the forms of documents required to be completed before the funds could be advanced the following day. Indeed the completed guarantee documents were emailed back to Mr Wood's office at 8:31am the following morning. Shortly after Mr Wood received from Ms Isaac the Deed of Acknowledgment of Debt, Trustee Resolution and a copy of the Trustee Deed.

[98] Those documents had been completed by McCaw Lewis Chapman. Signatures were witnessed by Mr Neverman. The documents were dated 20 July 2007. They record an arrangement for the purchase by the Trust of Mr Henry's shares in FPDL and the payment of the sum of $1.5M on 28 September 2006 to Mr Henry; that those funds were advanced from Lakeland Helicopters; that the Trust needed to repay the Lakeland Helicopters advance; and therefore the Trust requested loan funds be paid to the Lakeland Helicopters' account with Face Finance.

[99] The Deed of Guarantee and related documents were intended to bind the trustees to all obligations in connection with the total advance made to FPDL. Mr Wood noted:

> No one raised any objection to SCF's requirement for the deed of guarantee and indemnity by the trustees of the Peter Bradley Family Trust. [[41] first affidavit]

[100] Mr Wood's reasons for requiring the trustee's guarantee is explained:

> It was important to SCF to have an acknowledgement of that loan by FPDL to the Trust in the event that the plaintiff needed to appoint receivers at some future time. [[46] first affidavit]
>
> From SCF's perspective, the Peter Bradley Family Trust was benefitting from the loan by repaying its indebtedness to Peter Bradley trading as Lakeland Helicopters who in turn benefitted by the defendants requiring that repayment to go straight to Mr Bradley creditors, Face Finance Limited. [[47] first affidavit]

[101] The subsequent affidavits filed by Mr and Mrs Bradley suggested neither instructed Mr Neverman to prepare documents on behalf of the Trust. He acted for

FPDL. The Court is invited to infer that in his capacity as solicitor acting to document an advance by SCF to FPDL Mr Neverman has attended to execution of the Deed of Guarantee and related documents, including the preparation of a Deed of Acknowledgment of Debt between Mr Bradley and the trustees, having been alerted, albeit at the eleventh hour, to SCF's additional requirements of guarantees from the trustees.

[102] Mrs Bradley deposes she would not have signed the Deed of Guarantee had she known the Trust was not a shareholder in FPDL. She said her sole reason for signing that document was Mr Neverman's advice and the mistaken belief that the trust was as shareholder in FPDL.

[103] The Court's purpose is to determine if the affidavit evidence identifies an arguable defence to the summary judgment application.

[104] In opposition to an arguable defence claim Mr Allan submits:

(a) There was no common mistake.

(b) In any event the trustees are bound by their covenants in the Deed of Guarantee and related documentation.

[105] The first submission addresses the exercise of factual analysis. The second, a claim that even if there was a common mistake the clauses of the Deed of Guarantee, and in particular clauses 2.2(h) and 2.4 prevent a defence of mistake being raised. By those clauses the guarantor indemnifies SCF against any loss SCF may incur because of any representation warranty or statement of fact made by FPDL or a trustee proves to be untrue. It follows, submits Mr Allan, that such is a warranty to indemnify SCF if it has advanced funds to FDPL upon the basis of documents provided by trustees in which there is an acknowledgement by them of a beneficial interest in FPDL and separately by the receipt of some of those funds lent by SCF.

[106] I propose, first, to review the factual basis of the trustees' claim that there is an arguable defence available pursuant to s 6(1) of the Act.

Section 6(1)(a): Whether the parties were influenced by the same mistake when entering into their contract

[107] Mr Allan submits there was no mistake; that Mr Wood's perception of the Loan Contract and Heads of Agreement documents was correct – that they recorded an advance by Mr Bradley to the Trust to purchase Mr Henry's shares in FPDL. Mr Allan submits the Loan Agreement records a borrowing by the trustees which became repayable on 15 September 2007. The date of repayment coincided with FPDL's new funding arrangements. If there were any doubts about Mr Wood's perception of the events in September 2006 then comfort would have been drawn from the documents completed on or about 20 July 2007.

[108] Despite this it is my clear view that the foundation of an arguable case based upon a defence of common mistake, exists. An examination of the contractual documents throughout may well support SCF's position regarding their purpose and effect. Of more importance for present purposes is why the trustees' guarantee and indemnity was required at all. The answer does not lie in some general theory that guarantees are frequently provided even by persons who do not benefit materially by the arrangement for which a guarantee was given. Rather, the answer lies in this case in the reasons for requiring the guarantee at all. The trustees' guarantees were not required until the existence of the Trust and the trustees was known and that occurred on or about 18 July 2007.

[109] Until that time security documents had been drawn requiring the guarantee of Mr Bradley alone. Certainly Mr Wood had frequently requested evidence of the share sale transaction between Mr Henry and Mr Bradley. One can reasonably infer that he did this for the purpose of fixing guarantee obligations upon the shareholder or shareholders of FPDL and so it transpired. The guarantees of the trustees was required for those very same reasons that Mr Wood perceived namely that the Trust had acquired Mr Henry's shares and it was directly to benefit from a portion of SCF's advance to FPDL by being able to repay to Mr Bradley the funds that had been advanced to the Trust for the purpose of purchasing Mr Henry's shares.

[110] Mrs Bradley signed the Guarantee and related documents on 20 July 2007 believing they were required of her as a trustee of the Trust. Arguably both SCF and Mrs Bradley were influenced by a belief that the trustees were shareholders of FPDL. Had it been otherwise then it is reasonable to surmise Mrs Bradley's Guarantee as a trustee of the Trust would not have been required.

[111] In fact there is strong prima face evidence provided by FPDL's share register that the trustees have never been a shareholder of that company; that the Companies Office Register is incorrect.

[112] The Heads of Agreement provided for the transfer of Mr Henry's shares to Mr Bradley. After that Mr Henry completed a share transfer of his shares to Mr Bradley. Since, no other share transfer has been lodged with the company's share register.

[113] If on 20 July 2007 the parties contracted in the belief that the trustees were shareholders of FPDL, believing that to be so, then a mistake common to them both has arguably occurred. The best evidence before the Court is that the trustees were not shareholders of FPDL at any time. That wrongful belief has arguably influenced the decision of SCF to require the guarantees, and of the trustees to give those.

[114] The evidence is that the sum of $1,57M was paid to Mr Bradley's (Lakeland Helicopters) facility with Face Finance. There is evidence that Mr Bradley paid a similar sum to Mr Henry nearly a year earlier. It is arguable that notwithstanding what is recorded in the Loan Contract the evidence establishes in fact there was no debt between Mr Bradley and the trustees. Mr Bradley deposed he had proposed Mr Henry's shares were purchased by the Trust but that proposal was not completed. Mrs Bradley deposes having been aware of that arrangement but it appeared to her that such a proposal never eventuated. Also, there is no contractual documentation between the trustees and Mr Henry.

[115] In his assessment of the facts Mr Allan has focussed upon, indeed engaged, a critical examination of the documents signed around 20 July 2007. Whilst helpful, it

does not necessarily answer the question about what influenced the decision to require those documents at all.

[116] The second and third affidavits of Mr Wood respond to Mrs Bradley's claim that her Guarantee was requested because of a mistaken belief that the Trust was a shareholder of FPDL. Those later affidavits of Mr Wood suggest there was a broader basis for requiring the Guarantees namely to repay the trustees' loan of $1.57M to Mr Bradley. Mr Woods' affidavits appear to suggest he was advised by Mr Neverman that that was the purpose of requiring that sum of money to be paid to Mr Bradley's account at Face Finance.

[117] The evidence to support that assertion is equivocal in as much as it relies upon Mr Wood's own note made at the time.

[118] It matters not. For present purposes there is sufficient evidence to support a claim that the Trust never borrowed any money from Mr Bradley and it did not pay any to him either.

[119] The single event which appears to have led all parties on the path from which the various executed loan documents emerged was that occasion when FPDL's accountant Mr Wilson provided a copy of a Companies Office search. There is no question but that the evidence provided by the company's share registry assumes primacy over the information contained in the Companies Office Registry. Mr Wilson deposed that an electronically filed Notice of Change of Shareholding in May 2007 recording the trustees as shareholders in FPDL had been done in error by a member of his staff at the time.

[120] Mr Allan objects to this evidence on the basis of hearsay and says it should not be considered.

[121] Whilst I do not accept it, nor do I reject the evidence. The evidence strongly suggests the trustees have never been shareholders of FPDL. It follows that if there is a record on the Companies Office registered to the contrary, then an error has occurred.

[122] There is a reasonable basis from which Mr Wood drew his assumptions about the purpose of the 2006 documents. He assumed the Trust borrowed from Mr Bradley in order to purchase Mr Henry's shares. However, the loan document makes no mention of Mr Henry's shares as the purpose for which any loan might have been made. Also, the documents evidencing the transfer of shares from Mr Henry do not directly refer to the Trust at all. One asks why they would not if the Trust was to acquire Mr Henry's shares.

[123] There is strong prima face evidence that at all relevant times Mr Bradley held all of the shares in FPDL – and that the trustees have never held any. Mr Bradley has explained how the initial payment of $1.5M was made to Mr Henry using funds obtained from Mr Bradley's (Lakeland Helicopter's) revolving credit facility with Face Finance.

[124] As to how a mistake could have occurred regarding the belief by all that the trustees were a shareholder or that they would have benefitted from SCF's advance, I accept the submission of Mr Gudsell:

(a) The requirement for a guarantee from the trustees was imposed at 5:05pm on 19 July 2007. The Deed of Guarantee and Indemnity was prepared, signed and sent to SCF's solicitors prior to 9:00am the following morning. The loan was drawn down later that day. In short, the documentation was completed in a rush.

(b) Mr and Mrs Bradley state in their evidence they relied upon their professional advisors. Arguably they 'signed what was put in front of them'. The incorrect Companies Office Register, explained by Mr Wilson, along with the 'Loan Contract' has set everyone off down the wrong legal track, under extreme time constraints. Mistakes were made.

[125] Mr Gudsell further submits and I accept that the purpose of the Act is to allow the Court to step in and to unravel the legal consequences of same where appropriately stringent legal tests are met. This is arguably one of those cases.

[126] In *Ware v Johnson* [1] the Court, addressing the requirement that both parties be "influenced" by the mistake, commented:

> In my view this means no more than that both parties must necessarily have mistakenly accepted in their minds the existence of some fact which affects to a material degree the worth of the consideration given by one of the parties. That construction gives effect to the requirement that both parties be influenced by the mistake and is consistent with what Lord Thankerton said in *Bell v Lever Brothers Limited* [2] when he stressed that a mistake as to a fundamental quality is of no effect unless it relates to "something which both parties must necessarily have accepted in their minds as an essential and integral element of the subject matter", bearing in mind that "essentiality" is no longer the necessary ingredient.

[127] In the present case there is a reasonable argument of mutual influence in a matter essential to the agreement concluded by the parties.

Section 6(1)(b): Inequality of consideration consequent upon the mistake

[128] If a mistake provides for relief under the Contractual Mistakes Act then, as earlier noted in paragraph 14 herein, an applicant for relief needs show a substantially unequal exchange of values or the conferment of a benefit substantially disproportionate to the consideration provided for it.

[129] If it is reasonably arguable that the mistakes in question have occurred then it is equally reasonably arguable an unequal exchange of values, or a substantially disproportionate benefit has been conferred. If the Trust was not a shareholder in FPDL and if it did not receive any of the loan funds from SCF then arguably the Trust has received nothing as a result of the trustees agreeing to provide Guarantees for FPDL's borrowings.

[130] Clearly in this case the trustees did not voluntarily guarantee PFDL's obligations believing they had no interest in the company. Rather it is a case where Guarantees were provided on a certain basis which arguably has subsequently proved to be mistaken.

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[1] [1984] 2 NZLR 518, Pritchard J.
[2] [1932] AC 161.

Section 6(1)(c): Whether Mrs Bradley was obliged by either express or implied terms of the Deed of Guarantee to assume the risk of any mistake

[131] By this the last of the three cumulative elements required by s 6(1), Mrs Bradley must show that she is not obliged by the terms of the Deed of Guarantee or related covenants to shoulder any burden of the risk or the mistake that has occurred.

[132] It is common in commercial documents binding guarantors for those to contain covenants and obligations limiting options or opportunities for relief from obligations undertaken.

[133] In this case clause 2.2(h) of the Deed of Guarantee requires Mrs Bradley to indemnify SCF against any losses incurred due to representations made to SCF which prove to be untrue or incorrect.

[134] The obligations upon Mrs Bradley provided by clause 2.4(n) are cast even wider. That clause provides that she will not be released from any of her obligations to SCF if 'anything else happens which would otherwise release her from her obligations to SCF'.

[135] The latter provision appears to endeavour to close off any avenue of release from guarantor obligations which otherwise have not specifically been included in the Deed of Guarantee.

[136] Mr Gudsell submits that Mrs Bradley has not by these provisions or indeed by the Trustees Certificate, assumed any responsibility for the risk of a mistake in her assumption that she was bound to complete the Deed of Guarantee.

[137] In *Shotover Mining Co Limited v Brownlee* [3] at page 162 McGechan J stated:

> ... if the clause was intended to allocate risk of mistake pursuant to 6(1)(c), why does it not come out and say so? In a shadow world of implications, something can be drawn from an apparently studied silence.

[3] (High Court, Invercargill, CP 96/82, 30 September 1987).

[138] It might follow that due to the absence of the word mistake ‘in its clauses 2.2 and 2.4 and in the Trustees Certificate that SCF may have difficulty in proving Mrs Bradley assumed the risk of the very mistake which has arguably occurred in this case.

[139] In their submissions counsel referred me to a number of authorities touching upon the question of whether or not contractual clauses prevented relief being claimed on the basis of a mistake made. It is clear from those authorities that decisions about whether or not a covenanting party has assumed the risk of that mistake being made could only be undertaken after appropriate factual enquiry.

[140] Mr Allan has submitted there is an overwhelming case to show that Mrs Bradley was the author of her own mistake and if it was a common mistake it was induced by her and that by this application she is seeking to take advantage of her own carelessness.

[141] Whether that is so or not is a matter for further enquiry and not from assumptions made.

[142] Also, and it seems clear:

(a) The requirement of Mrs Bradley’s guarantee was made by SCF in circumstances where it perceived the trustees to be shareholders of FPDL and to be entitled to the benefit of some of the funds advanced to that company.

(b) If the trustees were not shareholders of FPDL and did not benefit directly or indirectly from SCF’s advance then arguably Mrs Bradley’s guarantee would not have been required or indeed offered.

(c) If the trustees were not shareholders of FPDL and did not benefit directly or indirectly from SCF’s advance then it is hard to see what purpose at all there would be in Mrs Bradley’s guarantee.

Conclusion

[143] Mrs Bradley has established to a sufficient standard an arguable case to SCF's summary judgment claim, in particular because:

(a) She and SCF may both have assumed that the trustees were shareholders in FPDL and might indirectly have benefitted from SCF's loan by receiving funds to repay Mr Bradley's advance to enable them to acquire Mr Henry's shares.

(b) If the trustees were neither shareholders nor potential beneficiaries of SCF's advance then they have received nothing in consideration of their guarantee in circumstances where their guarantee had been provided in an expectation of a significant benefit being conferred thereby.

(c) In the particular circumstances of this case it is arguable Mrs Bradley's guarantor covenants to SCF did not transfer to her the assumption of risk of the mistake that may have occurred.

[144] On the basis of these conclusions I would have dismissed SCF's summary judgment application against Mrs Bradley.

Costs

[145] These are reserved.

Associate Judge Christiansen