IN THE COURT OF APPEAL OF NEW ZEALAND

CA50/2011
[2011] NZCA 679

BETWEEN	RICHARD CHARLES HIEBER AS EXECUTOR OF THE ESTATE OF RUDOLF JOHN HIEBER Appellant
AND	PATRICK JOHN REDDINGTON, LETITIA MAUDE REDDINGTON AND MICHAEL JOHN FOLEY AS TRUSTEES OF THE P & L TRUST Respondents

Hearing: 13 October 2011

Court: Chambers, Ronald Young and Andrews JJ

Counsel: F M R Cooke QC for Appellant
W G C Templeton and A V Shrinkarenko for Respondents

Judgment: 21 December 2011 at 4:00 PM

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C The proceeding is remitted to the High Court for trial on the issue of quantum.

D Costs on the appeal are to lie where they fall.

REASONS OF THE COURT

(Given by Andrews J)

Table of contents

Introduction

[1] In November 2009 the respondents, the trustees of the P & L Trust, issued proceedings against the appellant, Richard Hieber, to enforce obligations under a guarantee of a lease given by Mr Hieber's late father, Rudolf Hieber. Rudolf Hieber died on 10 April 2008, and Richard Hieber is the executor of Rudolf Hieber's estate. At the same time as they issued proceedings, the P & L Trust applied for summary judgment in respect of part of their claim, namely, a claim for outstanding rent, outgoings, and interest (the unpaid rent claim). Summary judgment was not sought in respect of the P & L Trust's further claims for loss suffered on the sale of the leased property (the capital loss claim) and for damages for distress.

[2] The P & L Trust's application for summary judgment was heard in the High Court at Auckland before Associate Judge Doogue. In his judgment given on 17 December 2010, his Honour entered judgment against Richard Hieber for liability, but directed that a trial should be held on the issue of quantum.[1]

---

1 *Reddington v Hieber* HC Auckland CIV-2009-404-7254, 17 December 2010.

[3] Richard Hieber has appealed against the decision as to liability. The P & L Trust has cross-appealed against the Associate Judge's refusal to enter summary judgment as to quantum on the unpaid rent claim.

Background

[4] At this stage, it is appropriate to give only a brief overview of the factual background. The facts relevant to particular issues on appeal will be set out in more detail when those issues are considered.

[5] On 31 March 2004 the P & L Trust settled the purchase of a commercial property at Greenpark Road, Penrose, Auckland. The property was formerly owned by Rudolf Hieber and Andrew Hieber, as trustees of the R J Hieber Trust (a family trust settled by Rudolf Hieber) (the Hieber Trust). The property was leased to RMS Shopfitters Ltd (RMS). The shares in RMS were owned by RVB Investments Ltd (RVB). A submission was made that the shares in RVB were owned by Hieber family interests.

[6] RMS remained as lessee after the purchase. A key issue in the negotiations between the P & L Trust and the Hieber Trust was the provision by Rudolf Hieber of a personal guarantee of the obligations of RMS. Mr Hieber was prepared to provide a guarantee, but on limited terms. Following correspondence between the parties' solicitors, agreement was reached that a guarantee in standard terms would be incorporated as the Third Schedule to the lease. It provided that Rudolf Hieber guaranteed payment of the rent and performance of the covenants in the lease by RMS, and indemnified the P & L Trust against any loss suffered in the event of the lease being disclaimed or abandoned. However, a further clause (cl 48) was inserted in the lease, to acknowledge the parties' agreement as to the limit on the guarantee.

[7] Rudolf Hieber lived out of New Zealand. The guarantee was signed by his attorney, Mr Robert Narev, a consultant in the firm of solicitors acting for the Hieber Trust.

[8] In early 2008, Rudolf Hieber became seriously ill. At about the same time, RMS fell into financial difficulties. On 28 March 2008, RMS was placed in voluntary administration under Part 15A of the Companies Act 1993 (the Act). The administrators held a watershed

meeting, pursuant to s 239AT of the Act, on 5 May 2008. Mr and Mrs Reddington, two of the trustees of the P & L Trust, attended the meeting.

[9] On 19 June 2008 the administrators wrote to the P & L Trust, requesting that the lease be terminated on 30 June 2008. The administrators referred to the provisions of a Deed of Company Arrangement (DOCA), said to have been executed by the administrators on 5 May 2008. The solicitors for the P & L Trust responded to that letter, saying that its "contents are duly noted".

[10] Sometime during 2008, 50 per cent of the shares in RMS were sold. Ownership of the remaining 50 per cent was retained by RVB.

[11] In the second half of 2008, attempts were made by the administrators and the P & L Trust to re-let the property. These were not successful. The property was sold on 15 May 2009. Between 1 February 2008 and 2 September 2008, payments were made towards the rent and outgoings, either by the administrators or by (or on behalf of) Richard Hieber. The P & L Trust claimed that, as at 12 June 2009, $331,855 was owed on the unpaid rent claim, being outstanding rent up to the date the property was sold (15 May 2009), outgoings, and interest. In November 2009, the P & L Trust issued proceedings against Richard Hieber, as executor of Rudolf Hieber's estate, claiming in total $1,620,617.93 pursuant to the guarantee, comprising:

Outstanding rent, outgoings and interest to 12 June 2009	$331,855.00
Cleaning and removal costs	10,242.50
Loss on resale	1,100,000.00
Expenses on sale	83,225.00
Damages for distress	50,000.00
Legal and accounting costs of enforcing rights under the Lease and Guarantee	45,295.43
	$1,620,617.93

[12] The P & L Trust applied for summary judgment on the unpaid rent claim ($331,855), cleaning and removal costs ($10,242.50), and a portion of the legal and accounting costs of enforcing its rights under the lease and guarantee ($29,699.43). The total for which summary judgment was sought was $371,796.93.

[13] Richard Hieber opposed the application for summary judgment on several grounds, which were rejected by the Associate Judge. While the Associate Judge was satisfied that judgment should be entered for the P & L Trust on liability, he was not satisfied as to quantum and directed that the issue of quantum should be tried separately. It is not necessary to set out the Judge's reasoning, as Mr Cooke QC, who had not appeared in the High Court, pursued on Mr Hieber's behalf different arguments from those advanced in the High Court.

Appeal issues

[14] The following grounds of appeal were identified in Richard Hieber's amended grounds of appeal:

(a) On its proper interpretation, the guarantee given by Rudolf Hieber had ceased to be of any effect after his death.

(b) The P & L Trust consented to or acquiesced in the voluntary administration of RMS (in particular, by signing a DOCA agreed at the watershed meeting of creditors), and were not therefore required to consent to a subsequent sale of the shares in RMS.

(c) The P & L Trust had waived the requirement that they consent to any change of ownership of RMS, or to consent to any sale of the shares in RMS, or any claim not to be bound by the DOCA.

(d) It was not appropriate, in all the circumstances of this case, to enter summary judgment for liability.

[15] The amended grounds of appeal require this Court to consider the following questions:

(a) Was Rudolf Hieber's guarantee discharged on his death?

(b) Did the P & L Trust vote in favour of the DOCA?

(c) Did the change in shareholding of RMS discharge the guarantee?

(d) Did the P & L Trust accept RMS's repudiation of the lease, with the consequence that the guarantee should be treated as discharged?

(e) Does acquiescence preclude the claim by the P & L Trust?

[16] The cross-appeal by the P & L Trust requires the Court to consider whether the Associate Judge erred in entering summary judgment only for liability. In the event that the P & L Trust succeed on the cross-appeal, the Court is required to determine the amount for which summary judgment should have been entered.

[17] We consider the above issues in turn.

Was the guarantee discharged upon Rudolf Hieber's death?

[18] Clause 48 (the guarantee) was as follows:

> **Guarantee of Rudolph John Hieber**
>
> 48. Rudolf John Hieber has entered into this Deed of Lease as guarantor of the obligations of the Tenant RMS Shopfitters Limited. However, the parties acknowledge that this is a limited guarantee. If as is provided for in this Lease, the ownership of RMS Shopfitters Limited should change or should the Deed of Lease be assigned from RMS Shopfitters Limited to a third party then the guarantee granted by Rudolf John Hieber shall automatically lapse on the date of change of ownership or the date of assignment.

[19] Clause 35 is also relevant. It provided, as relevant to this appeal:

> **Assignment Or Subletting**
>
> 35.1 THE Tenant shall not assign sublet or otherwise part with the possession of the premises or any part thereof without first obtaining the written consent of the Landlord which the Landlord shall give if the following conditions are fulfilled:
>
> ...
>
> 35.4 WHERE any Tenant is a company which is not listed on the main board of a public stock exchange then any change in the legal or beneficial ownership of its shares or issue of new capital whereby in either case there is a change in the effective management or control of the company is deemed to be an assignment of this lease.

[20] Mr Cooke's submissions raised two issues although, as presented, one tended to shade into the other. The first is whether, on its proper interpretation, the guarantee was terminated because the guarantor, Rudolf Hieber, had died. The second issue is whether a "change of ownership" had occurred as a result of Mr Hieber's death, so as to cause the guarantee to "automatically lapse". We consider these questions separately.

[21] On the first issue, while accepting that the death of a guarantor does not by itself lead to the termination of a guarantee,[2] Mr Cooke submitted that the guarantee agreed by Rudolf Hieber and the P & L Trust was limited, and was intended to be in place only for so long as he was the substantive owner of the business which held the lease, and was responsible for, and had control over, the tenant. He submitted that it was intended that Rudolf Hieber's liability would end when he no longer had such control. That control ended upon his death.

[22] On behalf of the P & L Trust, Mr Templeton submitted that there was no express statement in the guarantee to the effect that it was not intended to survive Rudolf Hieber's death. If that had been the parties' intention, the guarantee could have been worded to reflect it. He submitted that the well-established legal position as to personal guarantees in leases applied, so the guarantee was not discharged by Rudolf Hieber's death.

[23] We do not accept Mr Cooke's submission. In *Lloyd's v Harper*, Lush LJ said in respect of a guarantee of a lease:[3]

> Now it will be found, I think, that guarantees may, for the purposes of this case, be divided into two classes, the one in which the consideration is entire, and the other in which the consideration is fragmentary, supplied from time to time, and therefore divisible. An instance of the first is where a person enters a guarantee that in consideration of the lessor granting a lease to a third person he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that of necessity runs on throughout the duration of the lease. The lease was intended to be a guaranteed lease, and it is impossible to say that the guarantor could put an end to the guarantee at his pleasure, or that it could be put an end to by his death contrary to the manifest intention of the parties.

[24] There is no provision in the guarantee to the effect that it was to terminate upon Rudolf Hieber's death. We accept Mr Templeton's submission that if the parties had

---

2 *Laws of New Zealand* Guarantees and Indemnities at [196].
3 *Lloyd's v Harper* (1880) 16 ChD 290 (CA) at 319.

intended to include such a provision, they could have done so. Further, there is nothing in the evidence from which we could read such a provision into the guarantee. To the contrary, it is clear on the evidence that the P & L Trust did not want to be in the position of being without a guarantee. We conclude that the guarantee was not discharged upon Rudolf Hieber's death.

[25] Regarding the second issue, Mr Cooke submitted that the guarantee was discharged on Rudolf Hieber's death because of the limitation in the guarantee to the effect that it would "automatically lapse" on a change of the ownership of RMS. He submitted that "ownership" must mean beneficial ownership or control, and that there could be no dispute that Rudolf Hieber's death had resulted in a change in the beneficial ownership of RMS, and a change in the effective management and control of RMS.

[26] Mr Cooke submitted that the phrase "if as is provided for in this Lease" only applied where there was a change of ownership by way of a sale of shares. Where there was a sale of shares, the guarantee would cease to be effective only if cl 35 were complied with. He submitted that Rudolf Hieber's death had resulted in a change in the beneficial ownership of RMS, but not by a sale of the shares. Accordingly, compliance with cl 35 was not required, but the change of ownership resulted in Rudolf Hieber being released from the guarantee.

[27] Mr Cooke submitted that to interpret the phrase "if as provided for in this Lease" as setting a pre-requisite for a valid assignment, or deemed assignment, of the lease in the present case would be to read a substantial amount into what was a "passing phrase".

[28] Mr Templeton submitted that the guarantee should be interpreted on its plain words, such that Rudolf Hieber's liability as guarantor ceased only if there were a change of ownership (or an assignment of the lease) as provided for in the lease. He submitted that it would strain the plain words of the guarantee to interpret it as ceasing to apply after Rudolf Hieber's death, or as not applying to a change of ownership which occurred as a result of his death.

[29] We note, first, that there is no evidence that it was suggested at the time of Rudolf Hieber's death that that had brought about a change of ownership of RMS, or that the P & L Trust's consent was (or was not) required. Nor was it suggested that there was, at

that time, any actual change in the ownership of the shares. Notwithstanding that, let us assume for sake of argument the correctness of Mr Cooke's submission that Rudolf Hieber's death resulted in a "change of ownership" in that the beneficial ownership of RMS, and effective management and control of RMS, had passed to Mr Hieber's successors. Even if that is right, it does not assist the appellant. This is why.

[30] The guarantee provided that Rudolf Hieber could be discharged from it in the event of any change of ownership of RMS or assignment of the lease *only if* the change of ownership or assignment was "as provided for in this Lease". Clause 35 must, therefore, be considered. We do not accept Mr Cooke's submission that cl 35 only applies when a change of ownership has been by way of a sale of shares. The word "any" in cl 35.4 ("any change in the legal beneficial ownership") precludes such a conclusion, and there is nothing in the wording of the guarantee that would support restricting its application in the manner contended for.

[31] Nor do we accept Mr Cooke's submission that "if as is provided for in this Lease" is just a "passing phrase". The phrase is in clear terms, and was inserted in the lease after negotiations between the parties' solicitors. Before any change of ownership of RMS, or an assignment of the lease, could discharge Rudolf Hieber from the guarantee, the change of ownership or assignment was required to be "as is provided for in this Lease". Clause 35 sets out the pre-conditions for Mr Hieber being released from the guarantee, in the event of any change of ownership of RMS, however that arises. Clause 48 cannot be read in isolation from cl 35.

[32] Accordingly, we reject the submission that the guarantee was discharged upon Rudolf Hieber's death. If his death resulted in a "change of ownership" (which is not clear), then cl 35 was not complied with and accordingly there could be no release.

Did the P & L Trust vote in favour of the Deed of Company Arrangement?

[33] A deed of company arrangement is a deed that is executed by a company and its creditors providing for payments towards the creditors' debts.[4] Such a deed may be approved by a resolution of a majority in number, representing 75 per cent in value, of

[4] Companies Act 1993, s 239B.

creditors voting at a watershed meeting.[5] A deed binds all creditors in respect of claims arising on or before a specified cut-off day,[6] but does not affect the rights of an owner or lessor of property (in the present case, the P & L Trust) except so far as the deed provides otherwise and the owner or lessor voted in favour of the resolution to approve the deed.[7]

[34] RMS was placed in voluntary administration on 28 March 2008. The watershed meeting was held on 5 May 2008. A notice of meeting, administrators' report, and summary of the proposed deed of company arrangement were sent to one of the P & L Trust's trustees (Mr Foley, who is also the Trust's solicitor) on or after 28 April 2008.[8] Mr Foley sent copies of the documents to Mr and Mrs Reddington.

[35] Mr Reddington and Mrs Reddington did not receive the material from Mr Foley until well after the watershed meeting. On 5 May 2008 an accountant, Mr Burgess, rang Mr Reddington and suggested that the Reddingtons attend the watershed meeting. They attended to see who else was owed money, but did not believe the meeting concerned them, because they had a personal guarantee, and "we were covered". They recalled the general tenor of the discussions. Mr Reddington said that as they entered the meeting they were taken to a secretary, who had a piece of paper on which other people had signed their names. He said that there was nothing at the top of the paper to say what it was, and he assumed that it was an attendance record. They sat at the back of the meeting and did not participate. Both said they did not vote, at any point.

[36] Richard Hieber referred briefly to the watershed meeting in his affidavit opposing summary judgment. He said he was led to believe that the P & L Trust had voted in favour of the DOCA.

[37] Mr Cooke submitted that the DOCA was approved by creditors (including the P & L Trust) at the watershed meeting. Mr Cooke submitted that the P & L Trust's claim under the lease had been compromised by the terms of the DOCA. In accordance with the DOCA the administrators had paid the rent up to 30 June 2008, at which time the lease was terminated. He submitted that it was unclear what happened at the watershed meeting: that Mr and

---

5 Section 239AK(2).
6 Section 239ACT(1).
7 Section 239ACT(3).
8 This is the date of the administrators' report and summary of the proposed deed of company arrangement.

Mrs Reddington were confused and did not know what was going on. He referred to Richard Hieber's evidence that "he had been led to believe" that they voted for the DOCA.

[38] Mr Templeton, on the other hand, submitted that there could be no doubt that Mr and Mrs Reddington did not vote for the DOCA.

[39] We do not accept Mr Cooke's submission. Richard Hieber's evidence of what he was "led to believe" is insufficient to raise a challenge to Mr and Mrs Reddington's evidence that they did not vote for the DOCA (or at all). There is no evidence – for example, in the form of minutes of the meeting or voting records – that would cause the Court to consider whether Mr and Mrs Reddington's evidence should not be accepted. We accept that they did not vote in favour of the resolution to approve the DOCA.

[40] Section 239ACW(1) of the Act provides that the deed of company arrangement releases a company from a debt only if the creditor concerned is bound by the deed. As we have accepted that Mr and Mrs Reddington did not vote for the DOCA, the P & L Trust is not bound by the DOCA, and the liability of RMS is not compromised by the DOCA. Further, pursuant to s 239ACW(2), even if the liability of RMS had been compromised by the DOCA, the liability of Rudolf Hieber as guarantor would not have been affected.

Did the guarantee lapse automatically upon the change in shareholding of RMS in 2008?

[41] As noted earlier, 50 per cent of the shares in RMS were transferred from RVB during 2008. The evidence is not clear as to exactly when this was. The P & L Trust alleges at paragraph 10 of its statement of claim that this was "believed to be" in late 2008. Richard Hieber's evidence was that the shares in RWS were sold and the business transferred on 19 April 2008. The administrators' report to creditors dated 28 April 2008 records RVB as the sole shareholder of RMS. A printout of a New Zealand Companies Office search of RMS dated 28 August 2008 records RVB as the sole shareholder. A printout dated 8 October 2008 records 874,900 of the shares as being owned by RVB, and 875,100 as being owned by T D and S J Powell.

[42] Whenever the change of ownership of shares in RWS occurred, it was a deemed assignment. As such, under the guarantee in cl 48, Rudolf Hieber's guarantee would only

"automatically lapse" if the assignment were "as is provided for in this lease". The requirements of cl 35.1 had to be complied with, meaning that written consent of the P & L Trust was required. It was common ground that when the transfer occurred, written consent of the P & L Trust was not obtained. It was an unauthorised transfer, and accordingly the guarantee did not automatically lapse.

Did the P & L Trust accept RMS's repudiation of the lease, with the consequence that the guarantee should be treated as discharged?

[43] Here it is necessary to set out the evidence relating to the period after the watershed meeting of creditors. As noted earlier, the administrators paid rent from 4 April to 30 June 2008. On 19 June 2008, the administrators wrote to the P & L Trust, advising that they would be vacating the premises on 30 June 2008. They referred to cl 5.3 of the DOCA, which provided that, if requested by the administrators to do so, the lessors were to agree to the termination of the lease. They then asked that the lease be terminated on 30 June 2008.

[44] The administrators then advised that a claim for unpaid rent for the period up to 4 April 2008 could be made on an enclosed form. Regarding the period after 30 June, the administrators set out clause 3.2(b) of the DOCA, which provided that any claim by a lessor for rent and outgoings for the period after 30 June 2008 would be treated as a subordinated claim. The administrators went on to say:

> If you believe that you have a claim in respect of rent or outgoings after the 30th of June 2008, you should submit this claim also now. For your information we would advise that it is unlikely that there will be any distribution under the deed to subordinated creditors.

[45] Mr Foley replied on 23 June 2008. He said:

> Thank you for your letter of 19 June 2008, concerning the P & L Trust. Contents are noted.
>
> Please find enclosed herewith an amended Creditors Claim Form for unpaid rental and outgoings to 3 April 2008.
>
> There is not much point making a claim for rental and outgoings after 30 June 2008 – our client will look to the guarantor.
>
> We look forward to receiving the proportionate payment now due.

[46] On 22 July 2008, Richard Hieber rang Mrs Reddington and advised that he was sending money and that an automatic payment was being set up. On 12 August 2008,

Mrs Reddington emailed Richard Hieber, seeking payment of $26,444.74, being rent and outgoings for August 2008. Richard Hieber replied by email on 2 September, advising that he had "wired $16,400" and had asked his brother to help with the August rent.

[47] On 10 September 2008, Mr and Mrs Reddington emailed Richard Hieber saying that they had received part of the rent payment from him, but not, as yet, the balance. They went on to note that the account for the September rent was still to come. They emailed Mr Hieber again on 26 September 2008, repeating that they had received a payment from him (albeit $16,275 rather than the promised $16,400) but had not received the balance. They attached the invoice for the September rent.

[48] On 7 October 2008, Richard Hieber emailed Mr and Mrs Reddington, saying that he had received legal advice that the guarantee had been invalidated by the sale of RMS. Richard Hieber made no further payments.

[49] At the same time as they were emailing Richard Hieber in relation to unpaid rent, Mr and Mrs Reddington were assisting with attempts to find a replacement tenant. Mr Reddington, in particular, cleared and cleaned the building, and took prospective tenants through the property. He was also seeking a purchaser for the building. The Reddingtons reported to Richard Hieber as to progress, in the emails referred to above.

[50] Mr Cooke submitted that Mr and Mrs Reddington's conduct showed that they had treated the lease as being no longer on foot. He submitted that they had, thereby, agreed to the termination of the lease, as requested by the administrators, as from 30 June 2008.

[51] Mr Templeton submitted that the Court could not conclude that Mr and Mrs Reddington agreed to the termination of the lease, and that such a conclusion was inconsistent with their repeated requests to Richard Hieber for payment of rent, and submitting invoices. He further submitted that Mr Hieber's responses showed that up until October 2008 he too acted as if the lease were still on foot.

[52] This is a difficult case. Mr Foley's letter of 23 June 2008 made it clear that the P & L Trust intended to "look to the guarantor" for rent after 30 June 2008 and is consistent with the P & L Trust regarding Rudolf Hieber's guarantee as continuing after that date. Mr and

Mrs Reddington's emails to Richard Hieber and Mr Hieber's responses up to October 2008 are consistent with the lease, and liability under the guarantee, continuing after 30 June 2008. On the other hand, we acknowledge the force of Mr Cooke's submission that the Reddingtons' actions of cleaning and clearing the building and taking prospective tenants through the property may indicate that they had elected to accept RMS's repudiation of the lease. Such acceptance of the tenant's repudiation would not affect, of course, a guarantor's continuing liability. But what acceptance of the repudiation would do is change the nature of the remedy to which the landlord is entitled.

[53] The difficulty in this case is that it is not clear on the evidence so far exactly when, after 30 June 2008, the P & L Trust did accept RMS's repudiation. That is a matter for trial. This will also affect the cross-appeal.

Does acquiescence preclude the claim by the P & L Trust?

[54] Mr Cooke submitted that because of what the trustees said and did at the relevant times, the P & L Trust cannot now insist on Rudolf Hieber's liability continuing after his death, and cannot now contend that it is not bound by the DOCA.

[55] Mr Cooke submitted that Mr and Mrs Reddington dealt with Richard Hieber after his father's death, including by inquiring whether probate had been granted. He submitted that it was never suggested that the P & L Trust was required to give formal consent to the change of beneficial ownership of RMS that occurred as a result of Rudolf Hieber's death. He submitted that because of the Reddingtons' words and conduct, the P & L Trust communicated that it was not relying on its strict legal rights, creating an expectation, relied on by Richard Hieber, that the guarantee no longer applied.

[56] This submission can be dealt with quite shortly. There is nothing in the evidence that supports a submission that Mr and Mrs Reddington at any time gave any indication that they were no longer seeking rent from either Rudolf Hieber, or Richard Hieber as his personal representative. There are no grounds on which we could find that the Reddingtons communicated to Richard Hieber that the guarantee was discharged, or that Richard Hieber understood that to have been the case. To the contrary, the P & L Trust sought rent payments, and Richard Hieber made them.

[57] Mr Cooke's second submission was that the trustees of the P & L Trust co-operated in the implementation of the DOCA, and took the benefits of it, and are not therefore entitled to say they did not agree to it, or say that it is not binding on the trust. He relied on the fact that a Creditors Claim form was submitted to the administrators on 23 June 2008, claiming rent and outgoings to 3 April 2008, and that the P & L Trust received payments of rent from the administrators.

[58] This submission may also be dealt with quite shortly. Even if it could be said that the P & L Trust went along with the DOCA, and received payments of rent from the administrators, that does not affect liability under the guarantee. The DOCA related only to the liability of RMS. As we have noted earlier, pursuant to s 239ACW(2) of the Act, any release of a company from its debts pursuant to a deed of company arrangement does not discharge or otherwise affect the liability of a guarantor of the debt.

In all the circumstances, was the Associate Judge correct to enter summary judgment on liability?

[59] Mr Cooke submitted that the evidence that will be required for the trial of the P & L Trust's quantum claims will include all the evidence as to when the lease is treated as terminated, the attempts at re-letting the property, the sale of the property, and the value of the property at different times. He submitted it will also include rental claims made by the P & L Trust, payments made by the administrators, and communications between Richard Hieber and the P & L Trust. He further submitted that such evidence will traverse essentially the same material as is involved in the issue of liability, and there is a danger in determining liability before these factual matters are traversed. In essence, his argument was that there is a risk that evidence may emerge at trial which would indicate that Mr Hieber should not be liable at all.

[60] Again, this submission may be dealt with quite shortly. Rule 12.3 allows the court to give judgment on the issue of liability, and to direct a trial as to quantum, if the party applying for summary judgment satisfies the court that the only issue to be tried is one about the amount claimed. In this case, the Associate Judge was satisfied that quantum was the only issue to be tried. Mr Cooke has not pointed to any evidence that the risk he refers to might eventuate.

Conclusion as to appeal

[61] We have concluded that the appeal must be dismissed. The Associate Judge was right to find that the appellant did not have an arguable defence to the claim by the P & L Trust on the guarantee given by Rudolf Hieber.

Cross-appeal: Did the Associate Judge err in declining to enter judgment on the claim for unpaid rent?

[62] Mr Templeton submitted that the Associate Judge was wrong to refuse to enter summary judgment for liability and quantum on the unpaid rent claim.

[63] We start our discussion on this point by noting that the application for summary judgment was for a specific sum for unpaid rent plus outgoings, removal costs, and legal and accounting fees up to the date the property was sold on 15 May 2009. The opposition filed on behalf of Richard Hieber was on the grounds that the lease had not been agreed, the guarantee was not given in the terms claimed or was given by mistake, and that the guarantee had been extinguished. There was no opposition (either in the notice of opposition or the affidavit of Richard Hieber) to the quantum of the claim.

[64] That said, we have considered whether the Associate Judge was wrong to refuse summary judgment, notwithstanding the lack of any opposition to the quantum of the unpaid rent claim. Our conclusion that there is uncertainty as to when the P & L Trust accepted RMS's repudiation of the lease leads to the conclusion that the Associate Judge was right to refuse to enter summary judgment as to quantum and really disposes of the cross-appeal. We simply do not know the date to which rent should run.

[65] That is not the only basis on which we have concluded that the Associate Judge was right to refuse to enter summary judgment as to quantum. In the course of the appeal hearing, we raised with counsel our concern as to the P & L Trust's calculation of the unpaid rent claim, which did not appear to be consistent in the statement of claim and application for summary judgment. We requested that counsel file supplementary submissions as to the calculation of the unpaid rent claim.

[66] Paragraph 21 of the statement of claim sets out the P & L Trust's claim for unpaid rent and outgoings to 15 May 2009, together with interest to 12 June 2009 (the date on which the P & L Trust's accountant prepared the calculation), as $331,855. It is then alleged that interest continued to accrue at $109.10 per day. At paragraphs 44 and 45 it is alleged that as at 12 June 2009 the sum of $314,848 was owed for outstanding rent, outgoings and interest, and that interest continued to accrue at $103.50 per day. There is no explanation of the difference between the allegations as to what is owed to the P & L Trust.

[67] In paragraph 1(a) and (b) of their application for summary judgment the P & L Trust sought judgment for $371,796.93, comprising outstanding rent and outgoings to 12 June 2009 ($331,855), together with removal costs and legal and accounting expenses (totalling $39,941.93). Interest was sought on $371,796.93 up to the date of judgment. However, in setting out the grounds for summary judgment at paragraph 2 (f) and (g), the P & L Trust said it was owed $379,383.93 "as listed above". Again, there is no explanation for the difference.

[68] In response to our request for supplementary submissions, Mr Templeton set out calculations of the P & L Trust's claim up until the hearing in this Court on 13 October 2011. He arrived at a claim of $428,594.04. In his calculations Mr Templeton appears to have adopted the figures set out in paragraph 21 of the statement of claim, but he gave no explanation for the discrepancies we have referred to. Further there are, we believe, arithmetical errors in his calculations, and the calculation appears to include interest upon interest.

[69] In the circumstances, we accept Mr Cooke's submission that the P & L Trust's claim is not clearly or properly calculated, or supported by references to the statement of claim and evidence.

[70] We have concluded that the cross-appeal must also be dismissed. The Associate Judge was right to find that there should be a trial as to quantum.

Section 274 of the Property Law Act 2007

[71] During the hearing, we raised with counsel an issue as to whether s 274 of the Property Law Act 2007 (as to liability of the administrator of an estate) might affect this case. In their supplementary submissions Mr Cooke and Mr Templeton agreed that s 274 has no relevance to the finding of liability under the guarantee in the present case. It bites only at the time of enforcement and does not prevent judgment being entered.

Costs

[72] Both sides have failed in their respective appeals. In the circumstances, costs should lie where they fall.

Solicitors:
Short & Partners, Auckland for Appellant
Foley & Hughes, Auckland for Respondents