

**IN THE DISTRICT COURT  
AT HUTT VALLEY**

**CIV-2018-096-000036  
[2018] NZDC 5935**

BETWEEN

HYDRADIESEL ENGINEERING  
LIMITED  
Plaintiff

AND

DEBORAH ANN O'BRIEN  
Defendant

Hearing: 26 March 2018

Appearances: GWD Manktelow for Plaintiff  
J F Meates for Defendant

Judgment: 29 March 2018

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**RESERVED JUDGMENT OF JUDGE C N TUOHY**

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**Introduction**

[1] This is an application for summary judgment for the sum of \$27,013.13 owed to Hydradiesel for services and parts supplied by it to a freight haulage company, Phillips and O'Brien Limited, now in liquidation. Hydradiesel claims that Ms O'Brien is personally liable for that debt.

**Factual Background**

[2] The claim is based upon a credit agreement dated 7 November 2017. At the time, Ms O'Brien was employed by Phillips and O'Brien Limited as office manager. At that time, the directors of the company were Ms O'Brien's parents, Warren and Beverley O'Brien, who were also the sole shareholders of the company.

[3] The credit agreement consists of a four page document, obviously a standard printed form used by Hydradiesel. The front page is headed "*APPLICATION FOR*

*CREDIT – GOODS AND SERVICES*”. It provides for a number of fields to be filled in which have been completed in handwriting. The material entries are reproduced below:

Trade Name:  
Phillips & O’Brien Ltd trading as a company

Legal Name:  
Phillips & O’Brien Ltd

Principal Shareholders or Proprietors:  
W & B H O’Brien Family Trust

Name and address of all Directors, or Partners if a Partnership:  
Warren O’Brien, [address deleted]  
Beverley Hazel O’Brien, [address deleted].

Persons with authority to order are:  
Deborah O’Brien, Warren O’Brien

Name of Accounts Payable contact:  
Deborah O’Brien

This form completed by:  
Deborah O’Brien  
Title: Office Manager

[4] The following three pages consist of “*Terms and Conditions of Trade*” followed at the end by a Declaration. The Terms and Conditions of Trade are, as is very often the case, detailed and in fine print, primarily designed to ensure that the supplier’s position is protected as well as it can be.

[5] The only terms material to this dispute are:

**2. Definitions**

“Customer” means the person or entity making the application or any person acting with ostensible authority on behalf of the Customer.

...

“Guarantor” means any party executing a Guarantee of the Customer’s Account with the Vendor.

**35. Personal Guarantees of Company Directors or Trustees**

If the Customer is a Company or Trust, the Director(s) or Trustees signing this contract, in consideration for the Vendor agreeing to supply Goods and Services and grant credit to the Customer at their request, also sign this contract in their personal capacity and jointly

and severally personally guarantee as principal debtors to the Vendor the payment of any and all moneys now or hereafter owed by the Customer to the Vendor and indemnify the Vendor against any non-payment by the Customer. Any personal liability of a signatory hereto shall not exclude the Customer in any way whatsoever from the liabilities and obligations contained in these Terms and Conditions of Trade. The signatories and the Customer shall be jointly and severally liable under these Terms and Conditions of Trade and for payment of all sums due hereunder.

[6] The admitted signature of Ms O'Brien at the end of the Declaration is the foundation of Hydradiesel's case against her. It is set out in full below:

#### **DECLARATION**

I, "Deborah O'Brien" (name):

- have read the Terms and Conditions of Trade;
- understand the Terms and Conditions of Trade;
- agree to the Terms and Conditions of Trade;
- confirm that I am authorised to accept these Terms and Conditions of Trade on behalf of the Customer;
- agree the Vendor shall retain full ownership of all Goods and Services supplied;
- authorise any person or company, under the Privacy Act 1993, to provide the Vendor with any information the Vendor may require in response to its credit enquiries;
- authorise you to furnish to any third party details of this application for credit and any subsequent dealings the Customer may have with you;
- undertake to pay the Account as it falls due;
- acknowledge that in default of prompt payment, interest will accrue at the rate of 2.5% per month;
- agree all unpaid accounts will occur collection/legal fees (as between solicitor and client).

Signed: "*D O'Brien*" ~~Company Director/Partner/Proprietor/Manager~~

Title: "*Office Manager*" Date: 7/11/13

## The Parties' Submissions

[7] Hydradiesel's case is that Ms O'Brien agreed to become personally liable to pay the company's account because she signed the declaration which included the words:

I, Deborah O'Brien ...

- Undertake to pay the Account as it falls due ...

[8] Mr Manktelow submitted that those words are clear and unambiguous on their face. The fact that Ms O'Brien was not a director of the company at the relevant time in terms of cl 35, does not nullify the liability created by the wording of the declaration. He submitted in any event that the word "*director(s)*" in cl 39 should be construed as bearing the extended meaning given to that word by s 126(1) of the Companies Act 1993 and that extended meaning would, in the circumstances, cover Ms O'Brien.

[9] He also submitted that the fact that she was authorised to sign the credit application, and named in it as having authority to order on behalf of the company and as the Accounts Payable contact, pointed to her having accepted personal liability to pay the company's account.

[10] Mr Meates submitted that the issue is whether Ms O'Brien signed the credit agreement in her personal capacity, or merely as office manager for and on behalf of the customer, ie. the company. He submitted that for personal liability to attach the wording must be clear and unequivocal. He submitted it was not, pointing to:

- The fact that the word "*personally*" is not used in the Declaration section.
- The use of the words "*on behalf of the Customer*" in that part of the Declaration relating to acceptance of the Terms and Conditions of Trade.
- That the acceptance of personal liability in cl 35 is specifically limited to directors and Ms O'Brien was not then a director.

- That if it was intended that personal liability either as guarantor, or as a principal debtor was to extend to non-directors, then cl 35 would have been drafted accordingly.

[11] In any event, no consideration was given to Ms O'Brien for giving a guarantee of the company's debt and the credit agreement is not in the form of a deed.

## **The Law**

[12] The principles to be applied in an application for summary judgment are well established. They were set out by the Court of Appeal in *Krukziener v Hanover Finance Ltd*<sup>1</sup> and usefully summarised by Osborne AJ in *Bell v Bell*<sup>2</sup>. It is unnecessary to restate them in this judgment. In essence, the plaintiff must show that the defendant has no arguable defence, that is, there is no real question to be tried.

[13] The substantive law applicable to this dispute is the law relating to the interpretation of written contracts. In New Zealand, the Courts have adopted the principles of interpretation expounded by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*<sup>3</sup>. These were summarised by Tipping J in the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*<sup>4</sup>:

Interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The nature and ordinary meaning should not lead to a conclusion that flouts business common sense.

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<sup>1</sup> [2008] NZCA 187 at [26]

<sup>2</sup> [2015] NZHC 3059 at [27]

<sup>3</sup> [1998] PWLR 896 at 912 - 913

<sup>4</sup> [2010] 2 NZLR 444 at [61]

## **Discussion**

[14] The issue is whether Ms O'Brien's signature to the Declaration would convey to a reasonable person with the background knowledge available to the parties that she was thereby accepting personal liability for the company's account. Hydradiesel must satisfy the Court that there is no reasonable argument about that.

[15] Plainly that is an objective test. What the parties subjectively believed or intended is neither relevant nor admissible in evidence.

[16] The words in the Declaration which Hydradiesel relies upon as a clear and unambiguous imposition of personal liability must be interpreted in the context of the agreement as a whole within its commercial context as known to the parties.

[17] Approaching the issue on that basis, I am not persuaded that Ms O'Brien's denial of personal liability is not reasonably arguable. There are a number of reasons for that conclusion.

[18] First, the front page of the credit agreement specifically recorded the directors and principal shareholders of the company to which credit was to be extended on the terms and conditions therein. They were recorded, correctly, as Ms O'Brien's parents, Warren and Beverley, and their family trust. There was no point in recording who the directors and principal shareholders were unless there was some purpose in doing so.

[19] That purpose was obviously to identify the persons who would be bound by the guarantee in cl 35 provided, of course, that they signed the agreement, as required by its terms.

[20] Ms O'Brien's name was also inserted in various places on the front page, but only for three specific practical purposes, all of which relate to the day-to-day operation of the company's business relationship with Hydradiesel. All the functions referred to are consistent with those of an office manager.

[21] Clause 35 is by its terms applies only to the directors of the company which is entering into the credit agreement. Self-evidently Ms O'Brien was not a director of

the company at the time, but merely its office manager. The front page made that very clear. There is no basis for giving the word “*director*” the extended meaning given to the term in the Companies Act. The word “*director*” has an ordinary meaning which every person in business would understand, viz. a person appointed as director in accordance with the company’s constitution. If the parties intended the word “*director*” to carry the extended meaning in the Companies Act, a reasonable business person would have expected them to provide for that in the definitions clause, cl 2.

[22] Given the very clear and unequivocal imposition of personal liability on directors signing the agreement by virtue of cl 35, it is by no means obvious that the parties intended to impose personal liability on any person who signs the declaration, even persons who are not within the ambit of cl 35. That is in effect what Hydradiesel is asserting.

[23] Nor does such an interpretation accord with business common sense. It would be obvious to anyone familiar with business practice that the credit agreement is in a standard form likely to be presented for signature to all Hydradiesel’s customers, regardless of the size of the enterprise. It is likely that the form is sometimes signed by a mere employee of the customer rather than by a director. Some customers may be so large that no one would expect a director to sign it or even know about it. Nevertheless, as it contains the whole of Hydradiesel’s terms of trade with its customers, Hydradiesel is likely to require it to be signed in every case by some employee with authority to bind the customer.

[24] No reasonable business person would expect the employee to be personally liable for the customer’s account in such circumstances. Yet if Ms O’Brien is to be held personally liable by virtue only of the wording of the Declaration, so must any employee who signs such a Declaration on behalf of the company which employs them, regardless of the size of the company or the degree of connection between the employee and the directors or proprietors of the company.

[25] In any event, read in context, there is a sensible alternative interpretation of the words in the Declaration relied upon by Hydradiesel. That interpretation is that by signing the Declaration, Ms O’Brien was providing an undertaking on behalf of the

company that it would pay the account when it fell due. It is plain that the declaration has to be signed by someone with authority in the company concerned, including a manager, which is the capacity in which Ms O'Brien signed it. So the intent of the Declaration was to obtain an undertaking from a person with authority in the company that would ensure that the company would carry out its obligations. That is consistent with other aspects of the Declaration, e.g. the signatory "*agree(s) the Vendor shall retain full ownership of the Goods and Services supplied*" which is obviously an undertaking given on behalf of the customer. Other examples are the acknowledgements that default interest and collection costs will be incurred if payments are not made on the due date. Those acknowledgements merely repeat terms binding the customer contained within the Terms and Conditions as does the undertaking to pay the account as it falls due.

## **Result**

[26] The application for summary judgment is dismissed. Costs are reserved. A first case management conference is to be scheduled in accordance with the District Court Rules.

C N Tuohy  
**District Court Judge**