IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2020-004-001067
[2021] NZDC 8520

BETWEEN	TICKETEK NZ LIMITED Plaintiff
AND	NOEL JOHN WIUM First Defendant
AND	SCOTT CHAO Second Defendant
AND	DTC SYTEMS (2003) LIMITED Third Defendant

Hearing: 6 May 2021

Appearances: C Lewis for Plaintiff
R Barnsdale for First Defendant
D Liu for Second and Third Defendants

Judgment: 7 May 2021

DECISION OF JUDGE G M HARRISON

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[1] The Plaintiff (Ticketek) applies for summary judgment against the defendants, the first and second defendants having been convicted in this Court in its criminal jurisdiction on 14 September 2018 of multiple charges of dishonestly using a document contrary to sections 228(b) and 66(1) Crimes Act 1961.

[2] Mr Wium pleaded guilty on a representative charge in respect of 121 invoices totalling $283,409.97.

[3] Mr Chao also pleaded guilty to one representative charge in respect of 104 invoices totalling $250,872.40.

[4] As part of their sentences Mr Wium was ordered to pay reparation of $45,800, and Mr Chao of $30,000. That totalled $75,800 which Ticketek has credited against the full amount of the claim against both resulting in a net claim of $207,610. Higher amounts could have been claimed against each of Mr Wium and Mr Chao if the reparation ordered against each had been deducted from the amounts to which they pleaded guilty but Ticketek has elected to limit its claim to the amount stated.

[5] At the commencement of the hearing Mr Barnsdale advised that Mr Wium had settled with Ticketek. At his invitation I entered judgment by consent against Mr Wium for the total sum of $100,000, and otherwise adjourned the summary judgment application to a case management conference on a date to be fixed on or about mid-June 2021.

[6] The hearing then proceeded against Mr Chao and the third defendant DTC Systems (2003) Limited (DTC).

[7] Mr Chao was the sole director and shareholder of DTC. The modus operandi of the defendants was for DTC to issue, in most cases, bogus invoices to Ticketek which Mr Wium, as an employee of Ticketek would certify for payment.

[8] It is unnecessary to go into any further details of the fraudulent behaviour of the defendants all of which is detailed in the sentencing notes of Judge Field.

Summary judgment

[9] Rule 12.2(1) of the District Court Rules 2014 provides—

> The Court may give judgment against the defendant if the plaintiff satisfies the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[10] The principles were summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd.*[1] The Court said—

[1] [2008] NZCA 187.

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried; *Pemberton v Chappell.* The Court must be left without real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart*. The Court will not normally resolve material conflicts of evidence or the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan.* In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel*.

The defences

[11] Mr Liu indicated that his instructions were to put Ticketek to strict proof of its allegations. As I have outlined Ticketek has the onus to satisfy the Court that there is no defence to the claim, that is no real question to be tried.

[12] The first defence is that Ticketek has not proved its claim because it has not obtained a certificate pursuant to section 139 Evidence Act 2006. Section 139, as relevant, provides—

> (1) Evidence of the following facts, if admissible, may be given by a certificate purporting to be signed by a Judge, a Registrar, or other officer having custody of the relevant Court records:
>
> (a) the conviction or acquittal of a person charged with an offence and the particulars of the offence charged and of the person (including the name and date of birth of the person if the person is an individual, and the name and date and place of incorporation of the person is the person is a body corporate).
>
> (b) the sentencing by a Court of a person to any penalty or other disposition of the case following a plea or finding of guilt, and the particulars of the offence for which that person was sentenced or otherwise dealt with and of the person (including the name and date of birth of the person if the person is an individual …).
>
> (c) an order or judgment of a Court and the nature, parties, and particulars of the proceeding to which the order or judgment relates.
>
> …

(2) a certificate under this section is sufficient evidence of the facts stated in it without proof of the signature or office of the person appearing to have signed the certificate.

(3) the manner of proving the facts referred to in subsection (1) authorised by this section is in addition to any other manner of proving any of those facts authorised by law.

…

(5) if this section applies, it is presumed, in the absence of evidence to the contrary, that the person whose name is stated in the certificate is the person concerning whom the evidence is offered.

(6) subpart 1 of Part 2 (which relates to hearsay evidence) does not apply to evidence offered under this section.

[13] No such certificates were submitted in evidence.

[14] Ms Lewis' submission was that that was irrelevant. She relied upon section 18 of the Evidence Act.

[15] Subsection (3) of section 139 admits of the possibility of proving the facts of the convictions in another manner. The documentation authorised by section 139 is essentially hearsay. Section 17 of the Evidence Act provides that hearsay statements are not admissible except in stated circumstances, to which I shall come. That restriction however does not apply to a certificate obtained pursuant to section 139.

[16] Section 18 approves the general admissibility of hearsay. It provides—

(1) A hearsay statement is admissible in any proceeding if—

(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable;

(b) either—

(i) the maker of the statement is unavailable as a witness; or

(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

(2) This section is subject to sections 20 and 22.

[17] Sections 20 and 22 have no relevance.

[18] The documents relied upon by Ticketek are the summary of facts presented to the Court in respect of each defendant in support of the charges laid against them, the Crown Charge Notice in respect of each defendant, and the sentencing notes of the Judge Field of 14 September 2018 signed by him.

[19] **Statement** is defined in section 4 of the Evidence Act as—

(a) a spoken or written assertion by a person of any matter; or

(b) non-verbal conduct of a person that is intended by that person as an assertion of any matter.

Hearsay statement is defined as—

A statement that—

(a) was made by a person other than a witness;

(b) is offered in evidence at the proceeding to prove the truth of its contents.

The documents I have described would therefore fall within the definition of **hearsay statement.**

[20] Turning then to section 18. A hearsay statement is admissible if there is reasonable assurance that the statement is reliable; and the maker of the statement is unavailable as a witness; or the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[21] I have no doubt whatsoever that the documents relied upon are reliable.

[22] Whether it is reasonably practicable for the witness to be called, must be judged in the light of the alternative ways available of giving evidence, as well as the expense, time, effort and inconvenience involved – *Clout v New Zealand Police.*[2]

[2] [2013] NZHC 1364 at [17].

[23] The time, effort and inconvenience involved in calling members of the police engaged in the prosecution of the defendants and Judge Field are simply not justified in this case. As I have said the documentation they have produced is completely reliable and it is admitted in evidence to establish the truth of their contents.

[24] The first ground of defence therefore fails.

Deceit

[25] The elements of the tort of deceit were specified by the Court of Appeal in *Amaltal Corp Limited v Maruha Corp*[3] as—

> (a) a false representation as to a past or existing fact made by a defendant who knew it to be untrue or who had no belief in its truth or who was reckless as to its truth;
>
> (b) intention that the claimant should have acted on the representation;
>
> (c) action by the claimant in reliance on the representation;
>
> (d) the plaintiff must suffer damage as a result of relying upon the representation.

[26] In Clerk & Lindsell on Torts 22nd Edition at 18-08 the authors state—

> Active non-verbal conduct can amount to misrepresentation, and hence deceit, just as much as words can. So, for instance, pledging goods knowing one has no title to them is deceit, as is ordering goods on credit for someone known to be insolvent or presenting company accounts to a buyer in the knowledge that they have been doctored.

[27] Here, the defendants issued bogus invoices through DTC to Ticketek, which amounted to representations. They intended that Ticketek should act on those representations which it did by paying the invoices and as a consequence suffered damage in the form of the loss now claimed. Mr Chau submits that the offence of dishonestly using a document under section 228(1)(b) of the Crimes Act 1961 involves elements of:

> (a) dishonesty;
>
> (b) without claim of right;

[3] [2007] 1 NZLR 608 (CA) at [46] and [55].

(c) uses any document;

(d) with intent to obtain pecuniary advantage.

[28] He argues that the elements of deceit differ from that of the crime. I do not agree.

[29] The element of dishonestly equates to the false representation by the defendants in the issuing of bogus invoices. There could be no claim of right by the defendants to do so, both of them knowing that the invoices were false. They used the invoices with the intent of obtaining pecuniary advantage which again equates to the intention that Ticketek should act on the representation and as a consequence suffered loss.

[30] That defence also fails.

The third defendant

[31] Ticketek's claim includes DTC as a joint tortfeasor. Plainly it was.

[32] At 4-04 of Clerk & Lindsell (op cit) the following is stated—

> Thus, the agent who commits a tort on behalf of his principal and the principal himself are joint tortfeasors.
>
> …
>
> Finally, a company director and the company itself may be regarded as joint tortfeasors where the director "is sufficiently bound up (in the company's) acts to make him personally liable". This will certainly occur where the wrongful acts complained of arise from a director's participation in a manner that goes beyond the mere exercise of his power of control through the constitutional organs of the company.

[33] Mr Chao is the sole director and shareholder of DTC. He was entirely responsible for the company issuing the bogus invoices and there can be no doubt that Mr Chao was sufficiently bound up in the company's acts, to make both him and the company joint tortfeasors.

[34] It is therefore unnecessary to consider the second cause of action pleaded against DTC of money had an received because as joint tortfeasors Mr Chao and DTC are jointly and severally liable for the loss suffered by Ticketek.

Conclusion

[35] Mr Liu also sought to challenge the quantum claimed by Ticketek. He referred to the amount of $248,094.43 to which Mr Chao pleaded guilty and in respect of which both he and DTC are liable. He then deducted from that figure the total amount of reparations of $75,800 leaving a shortfall of $172,294.43, but that cannot be correct because that takes advantage of the reparation of $45,800 ordered against Mr Wium in respect of the higher amount of $283,409.97 to which he pleaded guilty.

[36] I am therefore satisfied that Ticketek is entitled to judgment against Mr Chao and DTC jointly and severally for the sum of $207,610 and judgment is entered accordingly.

[37] It may be that if Mr Wium pays the agreed sum of $100,000 the amount payable by Mr Chao and DTC will reduce.

[38] Ticketek is also entitled to costs and interest. It is to file a memorandum in that regard within 10 days of the delivery of this decision. Any response is to be filed within a further 10 days.

G M Harrison
District Court Judge