
New Zealand newsletter

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WESTPAC v CHAHIL: SOMETIMES WORDS JUST MEAN WHAT THEY SAY

INTRODUCTION – INTERPRETATION IN THE SHADOW OF VECTOR GAS

The law of contract interpretation in New Zealand has been unsettled following the Supreme Court decision of *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] NZLR 444. There, the court presented mixed views on questions such as when a court can depart from the plain meaning of a document and the admissibility of extrinsic evidence.¹ Practitioners have raised concerns that the case erodes certainty of contract² and even suggested that “parties can no longer have confidence that the plain meaning of their contracts will be applied by the Courts.”³

The Court of Appeal’s decision, *Westpac New Zealand Ltd v Chahil*, [2012] NZCA 123 suggests that these fears may be overstated, and that, even in the post-*Vector Gas* world of contextual interpretation, straight-forward contract interpretation cases do still exist and are suitable for summary judgment.

THE CASE

Mr Chahil signed a deed of guarantee and indemnity with Westpac, as an individual and separately as the trustee of three different family trusts. Clause 34 of the deed, which limited the liability of a party who signed the guarantee as an independent trustee, read:

This clause only applies if you are a trustee and sign this document as trustee of that trust.

This document will bind you as trustee of that trust. It will also bind you personally unless you are an independent trustee.

You confirm:

- the terms of the trust document give you the power to enter into this document;
- you have properly signed this document in accordance with the terms of the trust;
- you have and will retain a right of indemnity from the trust assets.

The above are warranties, which means that the Secured Parties can sue you if any are incorrect.

The Secured Parties may recover the Guaranteed Money and any other amounts owing under this document from the assets of the trust and for this purpose may exercise your rights to be reimbursed from those assets or from any other person (such as a beneficiary of the trust).

The Secured Parties rights against you will be limited only if you are an independent trustee. In that case, the Secured Parties will only be entitled to recover Guaranteed Money and any other amounts owing under this document from any of your personal assets if they are not able to recover the Guaranteed Money and any other amounts owing under this document from the trust assets because the warranties you gave above were incorrect. The Secured Parties will only be entitled to recover from your personal assets the amount they would have recovered from the trust assets had those warranties been correct. ...

You are an *independent trustee* for the purpose of this clause unless you have any right to or interest in any of the assets of the trust except in your capacity as a trustee of the Trust.

¹ See McLauchlan D, “Contract Interpretation in the Supreme Court – Easy Case, Hard Law?” (2010) 16 NZBLQ 229.

² Tat L, “A Timely Reminder of the Importance of Careful Drafting”, *Commercial Quarterly* (February 2010) p 3, http://www.bellgully.com/newsletters/18corporate/commercial_1.asp viewed 26 May 2012. Tat comments that “The Supreme Court’s decision may seem quite radical in what appears to be a disregard for the unambiguous written text of a contract.” but goes on to say that “the underlying principles applied in the case are not as drastic a departure from established principles as the case might initially appear to suggest. The case does still raise some questions about the extent to which such an approach to interpretation may erode certainty of contract.”

³ Hall C, “Vector Gas – An Unwelcome Decision” (2010) 138 NZ Lawyer 23. Hall was general counsel for the unsuccessful party in *Vector Gas*.

For example, if you are a beneficiary of the trust then you are not an independent trustee.

(original emphasis)

Chahil argued that cl 34 applied in his case and limited his liability to the assets of the trusts. Westpac argued that cl 34 only applied to a trustee who had executed the guarantee solely as a trustee, and did not apply to Chahil since he had also executed the guarantee in his personal capacity. Peters J in the High Court thought Chahil's case was arguable and dismissed an application for summary judgment on that basis.⁴ The Court of Appeal disagreed, and made an order for summary judgment in favour of the bank.⁵

The Court of Appeal stated:⁶

The meaning of clause 34 is clear and unambiguous. Its purpose is to limit to the value of assets of a trust the personal liability of a party who borrows and covenants to repay in his capacity as an independent trustee. As [counsel for Westpac] points out, cl 34 reverses the common law rule that a trustee signing a contract is personally liable without limit for the contractual obligation thereby assumed. ...

However, Mr Chahil ... executed the guarantee in his separate capacity as a personal guarantor. Clause 34 does not apply to limit Mr Chahil's liability in that capacity; its opening words expressly provide that it only "applies if you are a trustee and sign this document as a trustee of that trust".

THE COURT OF APPEAL PUTS ITS FOOT DOWN

The Court of Appeal considered that there was no real question⁷ about the interpretation of the guarantee; the deed was "unambiguous on its face."⁸ This case is significant as it provides an example of when an appellate court is prepared to say that there is no ambiguity, even when the High Court had thought there was room for argument.

With respect, the High Court did not clearly give its reasons for why there was room for argument. Peters J stated that:⁹

Counsel for Westpac submits that clause 34 applies, or is intended to apply, only if the trustee concerned has executed the guarantee solely in that capacity [as a trustee]. Counsel submits that clause 34 does not concern itself with the position which arises if a guarantor is a party in two or more different capacities. I see the force in Westpac's submission but I am not satisfied that [Chahil] has no defence to the claim. In my view, it is arguable that the wording of clause 34 has the effect in this case of limiting the [Chahil's] liability to the assets of the trust.

That opposing counsel can present rival arguments about the interpretation of a deed is of course not a sufficient justification for a finding that there is actually room for argument. What is missing from the High Court judgment is a more detailed explanation of why both sides' meanings are linguistically plausible readings of the words of cl 34. Inventive counsel can always come up with some argument for why words mean something other than their plain meaning. Not all such arguments should be accepted, and at times – as the Court of Appeal did in this case – the court must put its foot down.

⁴ *Westpac New Zealand Ltd v Chahil* HC Auckland CIV-2011-404-1612 [2011] NZHC 996 (22 August 2011).

⁵ *Westpac New Zealand Ltd v Chahil* [2012] NZCA 123 at [19].

⁶ *Westpac New Zealand Ltd v Chahil* [2012] NZCA 123 at [14]-[15].

⁷ Since the Court of Appeal decided that the case was suitable for summary judgment and "[t]he 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* [1987] 1 NZLR at 3 (emphasis added), affirmed in *Krukiener v Hanover Finance Ltd* [2008] NZCA 187; (2008) 19 PRNZ 162 at [26].

⁸ *Westpac New Zealand Ltd v Chahil* [2012] NZCA 123 at [18].

⁹ *Westpac New Zealand Ltd v Chahil* HC Auckland CIV-2011-404-1612 [2011] NZHC 996 (22 August 2011) at [36].

Chahil's perhaps realised that the interpretation argument would not meet with much success at the Court of Appeal, and pointed to his "strained financial circumstances".¹⁰ The Court of Appeal thought that this was an attempt to uphold the High Court judgment on other grounds,¹¹ none of which the Court of Appeal had any sympathy for.

The Court of Appeal reached its conclusion based on an "interpretation of the ordinary meaning of cl 34 within the context of the deed of guarantee", a task that did not necessitate a detailed discussion of the principles of interpretation.¹² Another court taking a more traditional approach to contract interpretation might have invoked the "plain meaning rule" and the "four corners rule" in deciding *Chahil*. It might have found that it was bound to apply the plain meaning of cl 34¹³ and could not hear any extrinsic evidence which contradicted that plain meaning.¹⁴

The Court of Appeal referred to interpretation "within the context of the deed" but it does not appear that this was because the court considered itself bound to look no further than the four corners of the written document. Rather, none of the arguments raised by Chahil persuaded the court that there was anything outside of the four corners of the document that would aid in the understanding of the deed.

THE SOLICITOR'S CERTIFICATE

Chahil argued that he did not believe that he was signing the guarantee in his personal capacity. The Court of Appeal thought that his subjective intent was irrelevant as the deed must be construed objectively, and stated that:¹⁵

Critically, Mr Chahil's signature was witnessed by a solicitor who certified his explanation and Mr Chahil's understanding of the general nature and effect of the guarantee in both capacities in which he signed. Thus it would have been necessary for Mr Chahil to adduce evidence from the solicitor if he wished to challenge the efficacy of the solicitor's certificates. He did not take that step.

This passage is noteworthy for two reasons. First, the court's mention of the possibility of Chahil adducing evidence from the solicitor makes it clear that the court did not consider itself bound by a strict rule of exclusion of parole evidence. Secondly, the comment that the solicitor's certificate was "critical" raises the question: was it critical to interpretation? If the ordinary meaning of cl 34 was clear, it might, at first, seem odd that the presence of a solicitor's signature would be a decisive factor in the clause's interpretation. The solicitor's signature does make it objectively implausible for Chahil to maintain that he did not understand he was becoming a personal guarantor. The signature also strengthens the court taking the deed as the context for the interpretation of cl 34: if a solicitor could give Chahil an explanation of its nature and effect based only on the text, there is no reason that the court should look any further afield to come to a conclusion on the nature and effect of the text.

CONCLUSION

Chahil provides a helpful counter-example to the claim that interpretation is necessarily lengthy and messy if one departs from the traditional strict rules of plain meaning and exclusion of extrinsic evidence. Contextual interpretation does not mean that all cases descend into ambiguity and must be resolved by a long and expensive trial. In some cases, such as this one, relevant context will be limited

¹⁰ *Westpac New Zealand Ltd v Chahil* [2012] NZCA 123 at [17].

¹¹ *Westpac New Zealand Ltd v Chahil* [2012] NZCA 123 at [18].

¹² *Westpac New Zealand Ltd v Chahil* [2012] NZCA 123 at [16].

¹³ *Melanesian Mission Trust Bd v AMP Society* [1997] 1 NZLR 391 at 394-395 (PC) (Lord Hope), *Kookmin Bank v Rainy Sky SA* [2010] EWCA Civ 582 at 42 (Patten LJ); cf *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

¹⁴ *Edwards v O'Connor* [1991] 2 NZLR 542 (CA) at 548, *Shogun Finance Ltd v Hudson* [2003] UKHL 62 at [49], *Codelfa Construction Pty Ltd v State Railway Authority of New South Wales* (1982) 149 CLR 337 at 352.

¹⁵ *Westpac New Zealand Ltd v Chahil* [2012] NZCA 123 at [18].

and the meaning of words may be clear. The summary judgment jurisdiction is an important case management tool, and it is heartening to see that, even post-*Vector Gas*, interpretation issues can be resolved at summary judgment.

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