

**BETWEEN**

**HJJ Ltd**  
APPLICANT

**AND**

**RQ**  
RESPONDENT

Date of Order:

26 November 2015

Referee:

Referee: E Paton-Simpson

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the claim is dismissed.**

## **Facts**

[1] HJJ Ltd (HJJ) is a debt collection company directed by Mr QJ and owned by his wife RH. Mr QJ was also a director and fifty percent shareholder in JQR Ltd (JQR), which has since been liquidated.

[2] HJJ claims that, as at 31 October 2008, a retail paint store trading as HQJ Y Suburb (HQJ) owed \$124,541.00 to JQR for the supply of paint. In March 2009, JQR went into liquidation, and HJJ claims that the debt was assigned to JRR Ltd (JRR), and then assigned by JRR to HJJ.

[3] HJJ claims that HQJ paid \$108,950.00 of the debt before going into liquidation in August 2010, leaving an outstanding balance of \$15,591.00, of which \$8,524.00 was for interest charged to 30 April 2009. HJJ claims that further interest (over \$37,000.00) has accrued since that date, but it has reduced its claim to \$15,000.00 to bring it within the Tribunal's jurisdiction.

[4] On 11 October 2014, HJJ filed this claim against Ms RQ, on the basis of a document she signed on 5 September 2000. HJJ claims that the document, headed "JQR Ltd Customer Update Form", was a personal guarantee of HQJ's debts to JQR by Ms RQ.

[5] Although Ms RQ had been represented at an earlier hearing before Referee Hayes, no-one attended the hearing before me on behalf of Ms RQ. The absence of a party does not prevent the hearing going ahead.

## **Issues**

[6] The issues to be determined are:

- a. Is there an enforceable guarantee of HQJ's debts by Ms RQ? Does the Tribunal have jurisdiction to rectify the guarantee, and if so, should it exercise that jurisdiction?
- b. Has HJJ proven the amount of HQJ's debt owing as at 31 October 2008?
- c. Is the claim or any part of the claim barred by the Limitation Act 1950?
- d. Is the agreement to pay interest enforceable or is it an unenforceable penalty?

e. Has the debt been validly assigned to HJJ?

*Is there an enforceable guarantee of HQJ's debts by Ms RQ? Does the Tribunal have jurisdiction to rectify the guarantee, and if so, should it exercise that jurisdiction?*

[7] The relevant law is the Contracts Enforcement Act 1956 (CEA), which still applies to contracts of guarantee that came into operation before 1 January 2008. Section 2 of the CEA provides that a contract of guarantee is unenforceable unless it is in writing and signed by the guarantor. The written instrument must contain all the material terms of the guarantee, including the identity of the principal debtor.

[8] The Customer Update Form starts with a list of customer details. The "legal business name" of the customer is stated to be HQJ Ltd, trading as HQJ. The problem is that there was no company in existence with the name HQJ Ltd at the time the document was signed in September 2000.

[9] Underneath the customer details, where the terms of the agreement are set out, a space for the principal debtor has been left blank. Since the document does not identify the principal debtor, or only identifies a principal debtor that does not exist, it does not comply with s 2(2) of the CEA, and the guarantee is unenforceable.

[10] On behalf of HJJ, Mr QJ argued that the parties clearly intended the principal debtor to be the company that owned the Y Suburb HQJ store. This company, of which Ms RQ was a director, was named HQJ Ltd in September 2000.

[11] Where a document does not accurately record the mutual intention of the parties, the courts have jurisdiction in equity to rectify the document. As held in *Whiting v Diver Plumbing & Heating Co Ltd* [1992] 1 NZLR 560, the courts can rectify a document of guarantee to identify the principal debtor in an appropriate case, and then enforce the guarantee. This entails two separate orders: one to rectify the document then a further order to enforce the guarantee.

[12] Section 19(1)(f) of the Disputes Tribunals Act 1988 allows the Tribunal, where any writing purporting to express the agreement between the parties does not accord with their true agreement, to make an order varying the writing. I therefore find that the Tribunal has the jurisdiction to rectify a defective guarantee.

[13] However, rectification is a discretionary remedy, and I have formed the view that the Tribunal's discretion to vary the writing should not be exercised in all the circumstances of this case. A significant factor is the long delay before HJJ filed its claim, after most of the debts

had expired and shortly before the limitation period would expire for the remaining debts. This delay was not adequately explained. In the intervening period, HJJ has mislaid approximately \$8,459 worth of invoices. HJJ has nevertheless included this sum in its calculation of the amount of its claim that is not statute-barred, based merely on an aged trial balance, and deducing dates by a dubious process of elimination.

[14] HJJ claimed that the total was undisputed, and placed great reliance on a sentence in an email from Ms RQ's daughter, who has a Power of Attorney over her mother's affairs, referring to "the 2008 debt of \$125,541". However the very next sentence of the email states "We are now reviewing the legitimacy of claims for payment from Mr QJ for the total debt – including the monies already paid."

[15] Amongst other factors, I have also taken into account:

- a. JQR's carelessness in failing to take the simple steps of checking the Companies Register and ensuring that the space for the principal debtor was filled in;
- b. HJJ's acceptance of the assignment despite the problems on the face of the guarantee; and
- c. HJJ's failure to bring evidence of the assignment of HQJ's debt from JQR to SHL, despite a request for such evidence from Ms RQ's representative in February 2015, and Referee Hayes's note in his Order dated 15 July 2015 that any further written information to be relied on should be filed in advance of the adjourned hearing.

[16] I therefore decline to order that the guarantee document be rectified. Since the guarantee is unenforceable under s 2(2) of the CEA, the claim must be dismissed.