#69

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-001013

UNDER	s 90 of the Companies Act 1993
BETWEEN	NASH PROPERTIES LIMITED Applicant
AND	HARRIS HOLDINGS CONSTRUCTION LIMITED Respondent

Hearing: 5 June 2009

Counsel: D E Smyth for applicant
C C H Fox for respondent

Judgment: 11 June 2009 at 4:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 11 June 2009 at 4:30pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Michael Hong & Co, PO Box 27231, Auckland 1440 for applicant
Simpson Grierson, Private Bag 92518, Auckland 1141 for respondent

[1] This proceeding concerns a dispute over payments due under a construction contract between Nash Properties Limited (Nash) as developer and Harris Holdings Construction Limited (Harris) as contractor.

[2] Harris has served a statutory demand on Nash for $76,323.69, as money due and owing to it pursuant to the contract. That sum comprises $56,614.20 as the balance of a progress payment certified on 20 May 2008 and $19,709.49 claimed as interest payable under the contract on that unpaid amount and on another late payment.

[3] Nash has applied to set aside the statutory demand. It says that there are disputes as to whether any sum is now due under the contract and as to whether the claim for interest has been calculated in accordance with the terms of the contract. More significantly it says that it is entitled to set-off two sums that extinguish the demand. The first is a credit for $27,498.73 due to it on a later certified payment claim. The second is a sum of $203,904.25 to which it is entitled on settlement of a contract with Harris for purchase of one of the properties in the development.

[4] Harris says that there is no substance to the disputes. It says that the outstanding balance of the payment claim is an undisputable debt (having regard to the provisions of s 24 of the Construction Act 2002) and the interest has been claimed in accordance with the contract. It says that it entered into the contract to purchase the unit as a means of obtaining payment of money due to it at that time, but that it was never intended that later contract entitlements would not be paid as they became due.

[5] For the reasons that I shall now give, I consider that Nash has failed to establish proper grounds for setting aside. The application will be dismissed and an order made extending time for compliance with the statutory demand.

Late filing of affidavit and synopsis

[6] This application was first called before Associate Judge Doogue on 18 March 2009. He made timetabling orders that day for Nash to file and serve any further affidavits in support of its application by 27 March 2009 and any affidavits in reply by 10 April 2009. Nash was also ordered to file and serve its synopsis of argument ten working days before the hearing.

[7] Nash filed a further affidavit on 4 June 2009 (a copy of it was served on Harris late the previous day). Its synopsis was also filed and served on 4 June 2009. The further affidavit was said to be by way of update but included some documents that ought to have been produced in an affidavit in support. Either way it was substantially out of time. The synopsis of argument was also extremely late. It was due on 21 May 2009.

[8] Counsel for Harris filed and served a memorandum of 26 May 2009 recording Nash's default and inviting the Court to treat the application as having been abandoned. Nash did not respond to that directly, but merely filed the further affidavit and synopsis as I have already mentioned.

[9] At the commencement of the hearing counsel for Harris objected to the late affidavit and synopsis, and again invited the Court to treat the application as having been abandoned or alternatively to decline to receive the affidavit and synopsis. In case the Court declined to take either of those courses, Harris had filed and served a further affidavit (in reply to Nash's late affidavit) late the previous day and its synopsis of argument shortly before the start of the hearing.

[10] Counsel for Nash could not offer any explanation for its default. He informed the Court that Nash had failed to provide him with instructions.

[11] Counsel for Harris said that it had been prejudiced by having to respond with such urgency but acknowledged that the only additional work involved was the filing of the initial synopsis or memorandum on 26 May 2009. Counsel did not seek an adjournment.

[12] As Harris had been able to respond, albeit under an unnecessary time pressure, I took the view that it was better to deal with the application substantively, with any residual prejudice to be taken into account in the weight to be placed on any evidence or submissions to which Harris had been unable to reply fully. I allowed the late filing of the affidavit of SJE Pack sworn on 3 June 2009, and the synopsis of argument filed on 4 June 2009, but reserving issues as to costs. As a consequence, I also allowed filing of the second affidavit of K S Harris sworn on 4 June 2009 and the synopsis of submissions for Harris filed shortly before the hearing.

Background

[13] Nash and Harris entered into a contract on 8 August 2007 for construction of 16 units at 35 Greenmount Drive, Auckland. The contract incorporated the Conditions of Contract for Building and Civil Engineering Construction NZS 3910:1998 as its general conditions. In terms of those conditions, Nash was principal, Harris was the contractor and a Mr Stephen Pack or his company Ultra Projects Limited (it is not clear which) was appointed engineer to the contract. It was Mr Pack's role to assess and certify Harris' claims for payment. Mr Pack (or Ultra) engaged quantity surveyors (Maltbys Limited) to quantify and value the claims.

[14] Nash and Harris were involved in several projects. It is common ground that by April 2008 Nash was overdue with payments to Harris totalling $190,970.75. To settle that debt, on 1 May 2008 Nash and Harris entered into an agreement for sale and purchase of Unit C5 in the Greenmount Drive development for a purchase price of $351,000 plus GST (if any). The agreement provided that the sum of $190,970.75 was to be credited to Harris as deposit for that agreement, and for payment of the balance of purchase price ($203,904.25) as follows: "To be paid from Final Account on the Project at this site". The agreement, also provided that settlement was to be the fifth working day after either of two dates, with the relevant one being the date that Nash advised Harris that a search copy of the title for the unit was available.

[15] This arrangement to credit outstanding contract payments towards purchase of Unit C5 was also recorded in a separate document entitled "Heads of Agreement

30 April 2008 Payment of outstanding monies by Nash Properties Limited to Harris Holdings Construction Limited", which the parties also signed on 1 May 2008. In this document the parties also recorded recent payment claims excluded from the sum of $190,970.75, and that these were to be paid on current account. They included payment claims 13 and 14 on the Greenmount Project.

[16] Payment claim 13 was certified by Maltbys in a payment schedule dated 22 April 2008 in the sum of $120,341.31 (including GST). That claim was paid in two instalments. The first one of $96,000 was paid on 15 May 2008. The second one of $24,341.31 was paid on 26 May 2008. Payment claim 14 was certified by Maltbys in a payment schedule dated on 20 May 2008 in the sum of $249,352.80 (including GST). Nash paid $190,300 on 29 May 2008 in respect of that claim. It is common ground that the statutory demand is in respect of the balance of $59,052.80 less sundry credits totalling $2,438,60.

[17] In December 2008 Harris submitted progress claim 23. On 16 December 2008 Maltbys issued a payment schedule certifying an overpayment in respect of work to that stage of $27,498.73 (inclusive of GST). The breakdown of the payment schedule shows that this sum was reached by an assessment of work completed of $1,689,520.75 as against claims certified of $1,717,019.48 (GST inclusive). The certified claims included claim 14 at its certified value ($249,352.80), rather than the amount actually paid ($190,300).

[18] By this time relationships between Nash and Harris had broken down. Harris issued its statutory demand on 13 February 2009 claiming $76,323.69 comprising:

a) The unpaid balance of progress claim 14, namely $56,614.20; and

b) Interest of $19,709.49, for delay in payment of progress claim 13 (from 22 April 2008 until paid in full on 26 May 2008), and of progress claim 14 (from 20 May 2008 until 20 February 2009) at a rate of 2.2% per month compounding on the balance outstanding from time to time.

Applicable principles

[19] The application is brought under s 290 of the Companies Act 1993. The relevant parts read:

> **290 Court may set aside statutory demand**
>
> (1) The Court may, on the application of the company, set aside a statutory demand.
>
> ....
>
> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—
>
> (a) There is a substantial dispute whether or not the debt is owing or is due; or
>
> (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
>
> (c) The demand ought to be set aside on other grounds.

[20] The general principles that the Court applies in determining an application to set aside a statutory demand are those summarised in *Brookers Company and Securities Law* CA 290.02(1). Essentially, it is for the applicant to show a fairly arguable basis for saying that it is not liable for the amount claimed, or for saying that it has a counterclaim, set-off or cross-demand, which extinguishes the debt.

The competing contentions

[21] Although Nash raised several grounds for setting aside in its application, at the hearing its counsel reduced them to three. The first was that there was a genuine dispute as to whether or not any amount was due, based on the engineer's certificate in December 2008 that Nash was entitled to credit due to overpayment, and a payment schedule issued by the engineer on 27 May 2009 in respect of Harris' final account, stating that no amount was due for payment. Secondly, Nash says that the sum claimed for interest has to be adjusted to take into account various credits due to Nash and the correct date for commencement of interest. Nash also disputes Harris'

evidence on the appropriate rate to apply. Thirdly, Nash contends that it has an available set-off in excess of $200,000 in respect of the balance of purchase price due by Harris on settlement of the purchase of Unit C5 which easily exceeds the amount of the demand.

[22] Harris says that there cannot be a dispute in relation to the unpaid balance of payment claim 14 as it has been certified for payment nor as to the interest, which is clearly recoverable under the terms of the contract. As to the claim to set-off, Harris says that the balance of the purchase price is not due, nor is there any evidence from which it can be determined when it might be due, but in any event it is not a matter of set-off as the parties have agreed that it is to be paid out of money due to Harris under the final account (or be the subject of a separate payment at that time if insufficient money is available). Further, Harris says that Nash also owes it $153,357.60 on another contract (the sum having been determined following an adjudication) and the total of that sum and the sum sought under the present demand will exceed the balance of purchase price even if no further sum is due to it under the final account.

[23] The issues that the Court has to decide on this application are first whether Nash has shown that there is a genuine dispute over its liability to pay the balance of payment claim 14 and the interest for late payment, and secondly whether Nash has a valid set-off in respect of the credit certified in December 2008 or the balance of purchase price for Unit C5.

Is there a genuine dispute

[24] The essential point of difference between the parties in respect of Nash's liability for the unpaid balance of payment claim 14 is whether the debt has been overtaken by later payment schedules. Harris contends that the balance remains a debt due whereas Nash contends that it has been overtaken by the December 2008 credit.

[25] I consider that the balance remains a debt due. Nash's argument is, in effect, that there is a running account between the parties so that the later credit is

automatically applied against and cancels the earlier unpaid debt. This contention has to be considered in relation to relevant terms of the Construction Contracts Act 2002 and of the contract, in relation to progress claims.

[26] The relevant parts of the Construction Contracts Act 2002 read:

> **22 Liability for paying claimed amount**
>
> A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if—
>
> (a) a payee serves a payment claim on a payer; and
>
> (b) the payer does not provide a payment schedule to the payee within—
>
> (i) the time required by the relevant construction contract …
>
> ….
>
> **24 Consequences of not paying scheduled amount in manner indicated by payment schedule**
>
> (1) The consequences specified in subsection (2) apply if—
>
> (a) a payee serves a payment claim on a payer; and
>
> (b) the payer provides a payment schedule to the payee within the time allowed by section 22(b); and
>
> (c) the payment schedule indicates a scheduled amount that the payer proposes to pay to the payee; and
>
> (d) the payer fails to pay the whole, or any part, of the scheduled amount on or before the due date for the progress payment to which the payment claim relates.
>
> (2) The consequences are that the payee—
>
> (a) may recover from the payer, as a debt due to the payee, in any court,—
>
> (i) the unpaid portion of the scheduled amount; and
>
> (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
>
> (b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract. …

[27] The general conditions of contract (NZS 3910:1998) provide (in relevant part):

> **12.2 Progress payment certificates**
>
> **12.2.1** Within 10 Working Days after the receipt of the Contractor's claim the Engineer shall issue a progress payment certificate for a sum comprising the value of the Contractor's claim amended as necessary under 12.3, less previous payment certified, and less any other deductions which are required by the terms of the contract or by law. The certificate shall show details of any amendments and deductions.
>
> **12.2.2** If any item of the Contractor's claim cannot be verified within the prescribed time, the Engineer shall within that time certify a reasonable estimate of the amount due.
>
> ...
>
> **12.3.4** Every amount certified by the Engineer in a progress payment certificate together with the amount of goods and services tax payable shall be paid by the Principal to the Contractor within seven Working Days of the date of the certification.

[28] The purpose of the progress payment regime is to ensure that a contractor is paid promptly for work properly undertaken. The trigger point in the present claim is the payment schedule prepared by Maltbys on behalf of the engineer on 20 May 2008. Clause 12.2.4 is expressed in mandatory terms. Nash is required to pay Harris the amount certified by the engineer for that progress payment. Counsel for Nash accepted that Maltbys' progress schedule and a covering fax advice constituted a progress payment certificate for the purpose of clause 12.2 of the general conditions. Maltbys' schedule is clearly a payment schedule in terms of ss 21 and 24(1) of the Construction Contracts Act 2002.

[29] It may well be the case that later payment schedule 23 similarly creates a debt due from Harris to Nash that would be capable of immediate recovery or set-off (a matter I will come back to) but it does not automatically expunge the earlier debt. In my view the intention of the Act and of the contract is that debts created by the payment schedules/progress payment certificates will stand and be recoverable independently (subject to any permitted right of set-off). There can be no dispute that Nash remains liable for the unpaid balance of progress payment 14. If further support is needed for this view, it can be found in the fact that progress schedule 23

records progress payment 14 at its full certified value ($249,352.80) at the same time as showing the credit of $27,498.73.

[30] I turn now to consider the claim for interest. Harris makes this claim under clause 12.7 of the general conditions which reads:

> **12.7 Interest**
>
> **12.7.1** The principal shall pay the Contractor interest compounding Monthly on all monies certified as payable and remaining unpaid after the expiry of the time provided for payment.
>
> **12.7.2** In the event of unreasonable delay in the issue of a certificate for any claim or part of a claim which is later certified, the Contractor shall be entitled to interest compounding Monthly on the amount certified from the date on which it would have been payable if the delay had not occurred down to the date of payment.
>
> **12.7.3** The rate of interest shall be equal to one and a quarter times the average Monthly interest rate as certified by a chartered accountant or trading bank manager, which is currently payable or which would be payable by the Contract for overdraft facilities.
>
> **12.7.4** The right to interest shall be additional to any other remedy to which the Contractor may be entitled at law.

[31] In his affidavit in reply Mr Harris produced a letter from Harris' bank dated 4 June 2009 annexing an overdraft facility letter setting out overdraft rates applicable between 20 November 2008 and 31 March 2009. There are two rates, depending on whether the overdraft exceeded $50,000. Harris calculated its interest claim by applying the average of the two rates to the amount outstanding under claims 13 and 14 from the date of the engineer's certificate. That seems a more than reasonable approach given that the amounts outstanding always exceeded $50,000 (at least up until the credit certified in December 2008).

[32] Nash challenged the interest calculation on several grounds. First, interest was taken from date of the payment schedule or certificate rather than 7 working days later (the due date for payment). Secondly, there was no or insufficient credit for payments made on claim 13, or for the credits subsequently allowed against the balance of claim 14 (both by Harris itself and subsequently by the engineer). Thirdly, there was inadequate evidence of the overdraft rate for the whole of the

period of the claim. Having said that, counsel for Nash acknowledged that an amount of interest would undisputedly be due to Harris.

[33] I accept that there are issues over the calculation of interest. However, I consider that there can be no dispute that interest would be payable on the unpaid amount of claim 13 from 2 May 2008 until 26 May 2008. Similarly, interest would be payable on the unpaid amount of claim 14 from 29 May 2008, even if the sum was reduced by the credit certified in December 2008. Counsel were unable to calculate what that might be in the hearing. Having done a calculation since, but based only on simple interest (rather than compounding as the contract terms provide), it seems that there will be at least $12,000 due to Harris (and this may well be on the conservative side). Counsel offered to undertake a calculation, but I consider that this conservative estimate is sufficient for present purposes.

[34] Taking both aspects into account, I find that although there is some dispute as to the interest claim, there can be no dispute that Nash owes Harris at least $68,600 in respect of the unpaid balance of claim 14 and interest in respect of claims 13 and 14. I turn now to consider whether Nash has an arguable case for set-off in excess of that amount.

Is there a valid set-off for a sum exceeding the demand?

[35] It is for Nash to show that it has "clear and persuasive grounds" for a set-off against Harris. If it can, that set-off will cast genuine doubt on Harris' claim to be a creditor: *Covington Railways Limited v Uni-Accommodation Limited* [2001] 1 NZLR 272.

[36] As well as showing a factual basis for set-off, Nash must also show that it is available in law. In that respect, s 79 of the Construction Contracts Act 2002 is relevant:

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
>
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or

cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—

(a) judgment has been entered for that amount; or

(b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[37] Nash contends that it has valid set-offs in respect of the sum of $27,498.73 certified as a credit in payment claim 23, and in respect of the balance of purchase price for Unit C5 amounting to $203,904.25. It contends that there cannot, in fact, be any dispute in relation to either of these sums. It says that they are either legal set-offs (arising out of the same transaction) or alternatively (in the case of the balance of purchase price) an equitable set-off which impugns the statutory demand: *NZ Factors Limited v Farmers Trading Co Limited* [1992] 3 NZLR 703.

[38] Harris contests the set-off of the credit certified by Maltbys in respect of claim 23, and says further that it is insufficient in any event to defeat the statutory demand.

[39] Mr Harris has given evidence that the credit is disputed. Although it is relatively brief, and there is no evidence as to any steps taken to address that dispute, the evidence is not challenged. I accept that there is a dispute over that credit. Accordingly, the claim to set-off is barred by s 79(b). I note in passing that there is no such allegation (of dispute) in relation to the amount certified for claim 14.

[40] This brings me to the question of whether Nash has a valid set-off in respect of the balance of the purchase price for Unit C5.

[41] Counsel for Nash argued that there could be no dispute, in fact, in relation to its claim for the balance of the purchase price as the contract was unconditional. He referred to the provision for payment to be made out of the final account for the construction contract, and submitted that that was sufficient to found an equitable set-off. He relied on evidence that titles were shortly to become available on another stage of the Greenmount Project as an indication that settlement of this contract was likely in the near future. He submitted that the set-off was not barred by s 79 of the

Construction Contracts Act in light of the fact that there could be no dispute that the amount was due to Nash on settlement.

[42] Counsel for Harris submitted that the set-off was not available for two reasons. First, she said that the balance of purchase price was not due. The evidence relied on by Nash as to issue of title was inconclusive. The contract originally contemplated issue of title by no later than 1 September 2008, and Nash's initial evidence on this application was that it would be available by the end of March 2009. The evidence was an email message from Manukau City Council that took the matter no further (there were steps still to be taken before title issued and therefore before the settlement date could be established). Moreover, the email referred only to issue of title for stage 3 of the project whereas Unit C5 was in stage 2. The second ground for rejecting any set-off was that the parties had agreed that it was to be paid out of the final account.

[43] I do not accept that Nash has established a "clear and persuasive case" for set-off in relation to the balance of the purchase price. The contract expressly provides that the money is not due until five working days after title is available. The evidence is that title is not yet available. Nash's claim that it is imminent is not supported by the evidence before the Court. Nash initially said that it would be available by the end of March. That did not eventuate. The email from the Council refers to another stage.

[44] Equally significantly, Counsel for Nash properly acknowledged that Nash could not call for payment until the final account was settled (at which point it would be known what amount if any was still due to Harris and able to be applied towards the settlement). Given the difference between the parties on the final account (Harris claims $420,892.68, Maltbys determined that $73,579.30 was payable, and the engineer issued a payment schedule stating that nothing is payable), it seems likely that the value of the final account will not be settled for some time.

[45] The evidence needs to be far more cogent than this to justify a set-off against a sum now overdue for more than a year.

[46] Furthermore, there is also a dispute as to what the parties intended by providing for payment of the balance of the purchase price out of the final account for the contract. Counsel for Harris submitted that this precluded any set-off against sums already due. Counsel for Nash submitted that the parties intended that there would be "a wash-up" of all claims between the parties, including the sum unpaid on claim 14, with the agreement on Unit C5 acting as security for all outstanding sums pending settlement. He argued that this view of the agreements was consistent with references to "all outstanding claims" in clause 12.4 of the general conditions (providing for submission of final claims).

[47] I find the argument of counsel for Nash unconvincing. If followed to its logical conclusion it would allow Nash to defer all payments from that point on until the final account. That cannot be so (I note that claims in excess of $600,000 were certified after that point). The argument is not supported by clause 12.4 of the general conditions. In my view the references in that clause to "outstanding claims" mean claims that have not been presented up to that time, rather than those that have been presented and certified for payment.

[48] There is one last point to take into account on the issue of a set-off. I have found that there is no arguable dispute over the balance of claim 14 and for at least $12,000 of the interest. In addition Harris has produced evidence of judgment debt of $153,357.60 due to it by Nash following an adjudication on another contract. Even if there is no amount due to Harris on the final account, these indisputable debts exceed the balance of purchase price.

Decision

[49] I am not persuaded that there are proper grounds to set the statutory demand aside. Most of the money being claimed has been overdue for a year. Nash gave no explanation for non-payment at the time that it became due. There was no challenge to the engineer's certificate in respect of it. I consider that it would defeat the purpose of the progress payment regime to defer payment for the final account as suggested by Nash. The history of debt, the failure to pay this claim, the delays in finalising the development, and the fact that there is a significant judgment debt in