IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-002305

BETWEEN	GULL NEW ZEALAND LIMITED Plaintiff
AND	GULLROS LIMITED First Defendant
AND	GULLREV LIMITED Second Defendant
AND	GULLBOT LIMITED Third Defendant

Hearing: 4 December 2008

Counsel: D E Smyth for plaintiff
D M Carden for defendant

Judgment: 31 July 2009 at 5:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me 31 July 2009 at 5:30pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Jones Young, PO Box 1584, Shortland Street, Auckland 1140
Young & Caulfield, PO Box 35 069, North Shore City 0753

[1] This is a dispute over obligations arising under agreements for the operation of three petrol stations in the Auckland region.

[2] Gull is a supplier of petroleum products (gasoline and diesel). It establishes service station sites through which it sells its products but engages other parties to operate the sites under licence from it. The licence agreements tend to be in a standard form under which the licensee sells petrol on Gull's behalf but has the right to retail other products through a convenience store on the site. Gull pays the licencees a management fee, which reflects the cost of operating the site after allowing for profit generated by the licensee from the convenience store business.

[3] The defendants are related companies, each of which was a licensee of one of Gull's sites over a three year period from February 2005 to February 2008. When their operating agreements came to an end they retained $184,554.44 from proceeds of sale of Gull's products for the last few days of the agreement on the ground that they were due in excess of that amount for unpaid management fees.

[4] Gull seeks summary judgment against all three defendants (together referred to as "the licencees") for the retained proceeds of sale plus interest at a rate set out in the agreements. It says that it has paid the licencees all management fees payable in accordance with the operating agreements, save for fees for February 2008 ($27,743.49). It claims the right to setoff this sum against the unpaid proceeds of petrol sales. More significantly for the purposes of the present application, Gull says the licencees are not entitled to any setoff against the proceeds of the petrol sales.

[5] The licencees oppose summary judgment on the grounds that they have arguable claims for unpaid management fees which exceed the sums that they have retained, and that it would be unjust not to allow a setoff between the two. In the alternative they seek a stay until their counterclaim can be determined.

Background to the dispute

[6] Gull has service stations at Roscommon Road, in Wiri; Reeves Road, in Pakuranga and Ti Rakau Drive, in Botany. In 2004 it approached the director of the licencees, Nicholas Paterson, and asked him to consider taking over the operation of those sites (the existing operator did not wish to continue). Mr Paterson had previously operated another site for Gull and at the time of Gull's approach, he was managing sites for another petrol supplier.

[7] Following negotiations between Gull's executives and Mr Paterson, Gull and each of the licencees entered into operating agreements for the separate sites. Under those agreements the licencees started operating the sites on 27 February 2005.

[8] The operating agreements were for a period of 3 years. They required the licencees to operate the respective service stations in accordance with standard operating procedures. The agreements were in identical form for each site save for the management fee and the schedules of service station and convenience store equipment, which were specific to each site. The terms included the following provisions of specific relevance to the present application:

> **3. LICENCE REMUNERATION**
>
> 3.1 Gull shall pay the Operator the Management Fee specified in the Reference Schedule in advance on the first day of each month for that month. If the Term shall commence on a day other than the first day of a month then Gull shall pay on the Commencement Date the Management Fee calculated on a daily basis from the Commencement Date through to the end of that month.
>
> 3.2 The Management Fee shall be reviewed and amended if considered appropriate by agreement between Gull and the operator on any Review Date, which Review Date shall be:
>
> 3.2.1 every six months after the Commencement Date; and
>
> 3.2.2 within any six month period if either party wishes to alter the terms of this agreement.
>
> 3.3 On every Review Date the Operator shall provide Gull with certified copies of income and expenditure relating to its

operation of the Service Station for the preceding six month period.

5. SUPPLY OF PRODUCT

5.1 Gull shall supply the Operator with Gull Petroleum Products for sale from the Service Station in accordance with the obligations specified in the First Schedule on the terms and conditions contained in this agreement.

5.2 Gull shall retain full interest and ownership in the Gull Petroleum Products supplied to the Operator up until completion of the sale to a customer.

5.3 The Operator acknowledges that it is selling all Gull Petroleum Products on behalf of Gull and agrees to comply with Gull's instructions concerning the holding of and transfer to Gull of the sale proceeds.

…

6. CREDIT TERMS

6.1 The Operator shall pay by direct credit to Gull's nominated bank account the full sum equating to the previous days fuel sales from the Service Station by 3.00pm each business day. Notwithstanding the foregoing where any day is not a business day then the Operator shall direct credit Gull's bank account by 3.00pm on the first business day following.

18. WHOLE AGREEMENT

18.1 This agreement together with the Reference Schedule and Schedules to this agreement and any other written agreements entered into between Gull and the Operator shall constitute the entire agreement between the parties and shall supercede all prior agreement or understandings between the parties whether written or oral.

[9] The management fees stipulated in the reference schedules to the respective operating agreements were:

a)	Roscommon Road	-	$9,805 per month
b)	Reeves Road	-	$11,156 per month
c)	Ti Rakau Drive	-	$18,517 per month.

[10] Mr Paterson met with representatives of Gull in September 2005 to review the performance of the outlets as contemplated by clause 3.2 of the operating

agreements. It appears that the parties accepted that there was no need to change the management fee at that time. Mr Paterson says that at that point the profit from the convenience stores was close to the amounts that had been estimated when the figure for the management fee was negotiated.

[11] The parties met again to review the trading results at the end of a year's trade. This occurred in May 2006. The parties took different views of the results at that point. The licencees contended that the management fees should increase and Gull contended that they should decrease. Mr Paterson invited Gull to review the licencees' books. Gull did not take up that offer.

[12] The licencees pursued the matter by way of correspondence until November 2006 when they forwarded invoices to Gull representing their view of the unpaid management fees at that point. Gull did not respond. The licencees took no further steps until the operating agreements came to an end in February 2008, at which point they withheld sums received from the sale of Gull products over the last few days of operation as follows:

a)	Roscommon Road	:	$65,870.20
b)	Reeves Road	:	$71,595.18
c)	Ti Rakau Drive	:	$47,089.06

[13] Gull accepts that when the operating agreements came to an end on 19 February 2008 it was liable to pay the licencees' management fees totalling $27,743.48 for the period from 1 February 2008 to 19 February 2008, made up as follows:

a)	Roscommon Road	$6,890.36
b)	Reeves Road	$7,840.49
c)	Ti Rakau Drive	$13,012.63

[14] Gull also accepts that the licencees were entitled as at 19 February 2008 to payment for various sundry items (supermarket discount vouchers, standard compensation of $200 per outlet for "drive offs" and a standard allowance of

$225.45 per outlet for "forecourt hours") totalling $11,336.08, made up as follows:

a)	Roscommon Road	-	$3,037.85
b)	Reeves Road	-	$3,938.28
c)	Ti Rakau Drive	-	$4,359.95

The application and opposition

[15] Gull issued this proceeding, including its application for summary judgment on 23 April 2008. It seeks summary judgment for the net amount due to it (leaving aside the disputed management fees), comprising:

a)	Gullross Limited (Roscommon Road)		
	Unpaid proceeds of sales		65,870.20
	Less	management fees payable	(6,890.36)
		sundry payments due	(3,037.85)
	Sum claimed		$55,941.99
b)	Gullrev Limited (Reeves Road)		
	Unpaid proceeds of sales		71,595.18
	Less	management fees payable	(7,840.49)
		sundry payments due	(3,938.28)
	Sum claimed		$59,816.41
c)	Gullbot Limited (Ti Rakau Drive)		
	Unpaid proceeds of sales		47,089.06
	Less	management fees payable	(13,012.63)
		sundry payments due	(4,359.95)
	Sum claimed		$29,716.48

[16] In addition, Gull claims it is entitled to interest on the overdue proceeds of sale, at a default interest rate, being the base commercial rate charged by Gull's bank, plus 5%. It says this base rate was 18.45% as at date of default, and claims interest accordingly at the rate of 23.45%, as follows:

a) Roscommon Road - $1,032.30 up to 22 April 2008 and thereafter at a daily rate of $33.30

b) Reeves Road - $1,121.89 up to 22 April 2008 and thereafter at a daily rate of $36.19

c) Ti Rakau Drive - $737.80 up to 22 April 2008 and thereafter at a daily rate of $23.80

[17] The licencees filed notice of opposition on 4 June 2008. In an affidavit in support of that opposition Mr Paterson has set out his calculation of the licencees' claims for unpaid management fees, by reference to actual turnover and expenses for the three outlets. On 12 November 2008, the licencees filed a statement of defence and counterclaim and a further affidavit in which Mr Paterson updated the claims made in his earlier affidavit, as a consequence of having had final figures prepared for the licencees to 31 March 2008. A counterclaim is now pursued by the second and third defendants only. The first defendant acknowledges that under Mr Paterson's calculations it is not owed anything further (and may in fact be obliged to pay money back to Gull). The counterclaims being advanced are:

a) Reeves Road $193,363.00

b) Ti Rakau Drive $101,216.00

The issues

[18] There is no dispute over Gull's claim except in respect of interest. The parties agree on the sums that each of the licencees has withheld. Similarly there is no dispute over the licencees' contractual obligation to pay these amounts by 3:00pm on the working day following the sales (clause 6 of the operating agreement). Furthermore, counsel for Gull acknowledged in the hearing that each of the licencees is entitled to setoff against sale proceeds the amounts which Gull accepts as due to the respective licencees.

[19] The essential issues in the case are whether the licencees have an arguable case for payment of further management fees and, if so, whether those claims can

be raised by way of setoff against the debts due to Gull. There is also a further issue as to whether Gull is entitled to the interest it is claiming.

Applicable principles for summary judgment

[20] The principles which the Court applies in determining an application for summary judgment are well understood and can be found in the leading cases *Pemberton v Chappell* [1987] 1 NZLR 1, *Bilbie Dymock Corp. v Patel* (1987) 1 PRNZ 84 (CA), and more recently *Jowada Holdings Limited v Cullen Investments Limited* CA 248/02 5 June 2003. The following are relevant to the present application:

(a) It is for the plaintiff to show that there is no real defence to the claim;

(b) The Court will not attempt to resolve genuine conflicts of evidence, or to assess the credibility of statements made in affidavits; but

(c) The Court must balance caution that there not be any prejudice to a defendant with a robust and realistic attitude when called for by the facts of the case.

Is there an arguable case for the counterclaims?

[21] The licensees contend that Gull is in breach of the operating agreements in two respects. First, it failed to implement a review of the management fee in accordance with clause 3.2 of the operating agreements. Secondly, it has failed to bring management fees up to a minimum of $80,000 per annum for each site (as required on a proper constructions of clauses 3.2 and 3.3 of the agreements), or alternatively in accordance with representations made that this was the intent of the management fee arrangements.

[22] Gull contends that there is no merit to either aspect of the alleged counterclaim:

a) It says that the review clause was inserted for the benefit of both parties, but it was up to the party seeking review (in this case the licensees) to instigate the procedure. It says that the licensees failed to follow the procedure (particularly by failing to provide financial information in a timely way).

b) As to the issue over a minimum management fee, Gull says that there is no reason to construe clauses 3.2 and 3.3 as the licensees suggest. There is nothing express in the clause. The licensees had the opportunity to negotiate an express provision to this effect but did not pursue it. Gull's manager at the time of the negotiations, Mr Gillott, says that the negotiations were for a fixed monthly fee, and the review clause was intended to operate both ways. Gull wanted the management fee to be reduced if the profits on the convenience store exceeded expectations. Gull also says that the licensees cannot succeed on the claim to a representation to this effect in light of clause 18 of the agreement (a "whole agreement"clause).

[23] I do not consider that it is possible to come to a firm view as to the interpretation of the remuneration clause in the agreements (clause 3) on this summary application. The clause needs to be construed in context. I regard that as a matter for trial. The same applies to the review procedure. I regard it as an open issue as to which party has the obligation of initiating the review and hence whether the licensees can still bring their claim. The position might have been different if the only claim was under the Fair Trading Act (and the claim to an expectation loss all create significant issues for the licensees). However, as I consider that the contractual claims are arguable, I do not need to determine that point. The more significant issue for the licensees is whether these claims are available as a setoff.

[24] Gull also argues that even if the clause provided for a minimum management fee as suggested, the licensees have been paid that fee. I cannot resolve the dispute over that on this application.

Can the licensees set-off their counterclaims?

[25] The licensees say that their counterclaims qualify as equitable setoffs against the debts, which they accept are owed to Gull. They say that as both claims arise out of the same contractual arrangement, their counterclaims impeach Gull's debts: *Grant v NZMC Limited* [1989] 1 NZLR 8.

[26] Gull says that the equitable set-offs cannot arise because there is no interdependency between Gull's claim and the licensees' counterclaim. Gull is simply asking to be paid money that the licensees are holding on its behalf, whereas the licensees are pursuing strongly contested claims under the operating agreements (which are quite different from the arrangements for supply and sale of Gull's petrol).

[27] Counsel referred me to the decision of the Court of Appeal in *Mason Engineers (NZ) Limited v Norcast Corporation Limited* CA 52/93, 16 December 1993. That case is sufficiently close to the present detailed consideration.

[28] Norcast (a Canadian manufacturer) sought summary judgment against Mason (a New Zealand importer and distributor) for the price of goods supplied to Mason for onsale to a third party. Mason accepted it was liable for the cost of the products, but claimed that it had an arguable case for a setoff for breach of an exclusive distribution agreement. It said that the supply of products in question was made pursuant to the distribution agreement. It claimed setoff of losses claimed to have been suffered as a consequence of breach of the distribution agreement. Norcast acknowledged that there had been negotiations about an exclusive distribution agreement, but denied that the parties had reached agreement.

[29] The High Court found that Mason did not have an arguable case for an exclusive distribution contract. It did not need to decide whether the defence of setoff was available, and did not do so.

[30] The Court of Appeal found that Mason had an arguable case that the parties had an exclusive distribution contract, but rejected the claim to setoff. It found that it would not be unjust to require Mason to pay its debt to Norcast immediately, and proceed separately with its cross claim. It found that the supply from Norcast to Mason was under a separate contract to Mason's supply to the third party (Mason was not selling on behalf of Norcast). The Court regarded it as particularly significant that Mason had been paid for the material supplied, and was in breach of its contract with Norcast, which required payment to be made to Norcast on Mason's receipt of payment from the third party.

[31] Of particular significance for the present case, the Court of Appeal found that Mason's obligation to pay was independent of the parties' rights and duties under the alleged distribution agreement. It held that judgment for that supply could "fairly be given without regard to the claim for breach of the alleged agency agreement" because the alleged breach did not impeach Norcast's claim for the goods actually supplied.

[32] Gulls case is even stronger than Norcast's case was because here the basis of supply, the licensees' obligation to account for sale proceeds, the remuneration to the licensee (the management fee), and the licensees' claim for an additional amount for that management fee all arise out of the one agreement.

[33] The issue is whether Gull's refusal to accept the claim for an enhanced management fee impeaches its right to receive proceeds for the sale of its petrol. I find that it does not. The contract expressly provides for the licensees to account for sales of petrol by 3:00pm on the day following sale to the licensees' customers (they are in a fiduciary position in respect of this money, which they hold on Gull's behalf). The management fee was payable monthly, and quite independently of the obligation to account for petrol sales.

[34] I accept for the purposes of this application that the licensees have an arguable case for an increase in the agreed management fee. However, it is significant that although they raised their claim in the first half of the contract period, they did nothing to advance it after sending tax invoices to Gull in

November 2006 for what they claimed was properly due to them for the management fee.

[35] Counsel for Gull argued that it had a number of defences to the licensees' counterclaim (primarily relating to inadequate management of the licensees and the effect that had on their financial performance) and submitted that that was a possible explanation for the licensees' failure to press their claim from November 2006 until the agreement came to an end in February 2008. Whether or not that is the case, the licensees treated the dispute over the management fee quite separately from their obligation to account throughout the course of the contract. They had ample opportunity to pursue the matter through the second half of the contract, including by issue of a proceeding themselves but did not do so. They are entitled to choose how and when they pursue their case. However, in light of that history, I do not regard it as unjust for them to have to pursue that claim independently of the explicit obligation to account for petrol sales under the agreement which they followed for the whole of the contract.

The claim for interest

[36] As stated earlier, in addition to its claim for the sale proceeds, Gull claims interest on the unpaid amounts at the rate of 18.45% per annum. It bases this claim on a provision in the agreements (on a page headed "reference schedule") for a default interest rate. That rate is stated as:

> The base rate for commercial lending from time to time at Gull's bank as at the date of the default plus 5%.

[37] The licensees challenge this claim on the basis that there is no reference to "default interest rate" in the operating agreements, and therefore no contractual obligation on the part of any of the defendants to pay interest on overdue money.

[38] Counsel for Gull accepted that the agreement did not contain an express covenant to pay interest on overdue amounts at the default penalty rate. He submitted, however, that it was clearly within the contemplation of the parties that interest at that rate would be payable on default, and said that it was open to award

the interest as damages given that it had been specifically pleaded in the statement of claim and proved in the affidavit of Gull's retail business manager, Mr G Stirk: *Clarkson v Whangamata Metal Supplies Limited* [2007] NZCA 590 at para 22, referring to *Hungerfords v Walker* (1989) 171 CLR 125 at 152.

[39] I accept that Gull can claim interest as damages as explained in *Hungerfords v Walker* (at 152):

> [A]n actual award of damages which represents compensation for a wrongfully created loss of the use of money and which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money or which was in fact paid upon borrowings which otherwise would have been unnecessary or retired.

[40] I also accept that the inclusion of the provision for a default interest rate in the reference schedule to the operating agreements is a clear indication that the parties contemplated that Gull would suffer loss if the licensees did not account to Gull for the proceeds of sale of its petrol by 3:00pm on the following working day. Furthermore, the default interest rate was clearly an assessment by the parties of the loss that Gull would suffer (in other words it was a genuine pre-estimate by the parties of that loss).

[41] Counsel for the licensees accepted the general proposition that interest could be claimed as damages but contended that Gull had failed to plead that in the statement of claim. I accept that it has not been expressly pleaded in those terms, but do not accept that it is necessary to describe the claim as one for damages. That is simply the effect of the pleading. There can be no doubt that the licensees were aware of the nature and composition of the claim.

Stay pending disposal of counterclaims

[42] Counsel for the licensees invited the Court to enter judgment but stay execution pending determination of the counterclaims in the event that their claim to setoff was rejected. I am not prepared to do so. As I have already indicated the nature of Gull's claim is quite different from that of the licensees' counterclaims. Moreover, only two of the licensees have counterclaims. I see no reason to deny

Gull its money. If the licensees are successful, they too can seek interest on their money as part of their counterclaim.

Decision

[43] I am satisfied that Gull has an undisputed claim against the licensees for the net sums identified in paragraph [15]. I am not persuaded that the counterclaims being advanced by Gullrev Limited and Gullbot sufficiently impeach Gull's claims against them to give rise an equitable setoff. The claims are distinct. I see no reason to stay execution of judgments against Gullrev Limited and Gullbot Limited until their counterclaims are determined.

[44] I enter summary judgment against the defendants for the net sums set out in paragraph [15] above, together with the sums claimed in paragraph 8 of the statement of claim and the prayers for relief, as damages for interest in the amounts identified in paragraph [16].

[45] As the successful party, Gull is entitled to costs of and incidental to this application on a 2B basis together with disbursements as fixed by the Registrar.

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Associate Judge Abbott