IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009-409-2041

BETWEEN	CANTERBURY LEGAL SERVICES LTD Applicant
AND	TUAM VENTURES LTD (IN RECEIVERSHIP) Respondent

CIV 2009-409-2129

AND BETWEEN	PROPERTY VENTURES LTD Applicant
AND	TUAM VENTURES LTD (IN RECEIVERSHIP) Respondent

CIV 2009-409-2130

AND BETWEEN	PV NO 4 LTD Applicant
AND	TUAM VENTURES LTD (IN RECEIVERSHIP) Respondent

CIV 2009-409-2131

AND BETWEEN	ATLAS FOOD AND BEVERAGE LTD Applicant
AND	TUAM VENTURES LTD (IN RECEIVERSHIP) Respondent

Hearing: 14 October 2009

Appearances: Austin Forbes QC for Applicants
Geoff Carter for Respondent

Judgment: 29 October 2009

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 10:30 am on 29 October 2009

Solicitors:
Cousins & Associates (Christchurch) for Applicants
Chapman Tripp (Christchurch) for Respondent

Counsel:
AJ Forbes QC

Introduction

[1] Four lessees of a commercial property owned by a company now in receivership apply for relief against cancellation of their leases, and the receivers counterclaim for orders for possession, in unusual circumstances.

[2] Three of the lessees are part of the same group of companies as the lessor. The fourth lessee is an independent legal services company. Its owners are solicitors who have carried out unpaid legal work for the other three lessees for which the lessor has recently guaranteed payment. All four lessees are in arrears of their rental obligations to the lessor but claim rights of set-off against that liability.

[3] The primary issue is whether any or all of the lessees are able to establish those rights. A contingent issue is whether unsecured creditors should to the extent of the claimed set-offs obtain a preference over a secured creditor in the receivership.

Background

[4] Tuam Ventures Ltd (in receivership) owns a commercial property at 179 Tuam Street (known as the SOL Square precinct, a popular hospitality area containing a number of bars, restaurants and shops), Christchurch. Its sole director and owner is Mr David Henderson. Tuam is a subsidiary in the Property Ventures Ltd (PVL) group. Other members of the group are PV No 4 Ltd (PV4) and Atlas Food and Beverage Ltd (Atlas). PVL and Atlas lease upper floors in the building. PV4 leases a large court-like area which services a number of the entertainment venues.

[5] Canterbury Legal Services Ltd (CLS) leases premises on the first floor. It is described as a legal services company. Its directors and shareholders are Messrs Clive Cousins and Grant Smith. They are the principals of Cousins & Associates, a firm of solicitors practising in Christchurch.

[6] The building is valuable. Current estimates place its worth at between $13m and $15m. It is apparently Tuam's principal if not sole asset.

[7] The Bank of New Zealand and Tuam are parties to a general security agreement executed pursuant to the Personal Property Securities Act 1999 on 27 May 2007. The BNZ is the first charge-holder over Tuam's assets. Tuam owed the bank about $7m when it appointed Messrs Stephen Tubbs and Colin Gower of BDO Spicers (Christchurch) Ltd as receivers on 27 July 2009. The property is subject to a second charge in favour of South Canterbury Finance Ltd (SCF). There was a suggestion from counsel that SCF may be interested in purchasing the BNZ's mortgage.

[8] As pointed out by Mr Austin Forbes QC, counsel for all applicants, the BNZ placed Tuam in receivership for its failure to repay principal on due date, and not for any breaches of interest obligations. Tuam was unable to refinance in a difficult economic climate. The company's interest liability under the BNZ charge is about $50,000 monthly. The rent currently paid by tenants other than the applicants is about $40,000 monthly. The bank's net rental return is heavily eroded by receivers and legal costs.

[9] I will now consider each lessee's application separately.

(1) CLS

(a) Contracts

[10] Tuam entered into an agreement to lease with CLS on 8 March 2007. The subject area is 500 square metres on the first floor. The term is for three years with three rights of renewal of the same duration. The annual rental payable is $77,500 plus GST and outgoings.

[11] The Second Schedule provides for the parties to enter into a formal deed of lease on terms no more onerous than those contained in the Auckland District Law Society lease form. It is common ground that no deed was ever entered into. It is apparent from the agreement to lease that the premises were especially fitted out for CLS's use at a cost shared between the parties.

[12] Tuam entered into a deed of guarantee with Messrs Cousins and Smith, defined as 'the Creditor', on 9 March 2009. The deed recited that:

> … in consideration of the creditor [Messrs Cousins and Smith] undertaking not to sue or take any legal proceedings against [Tuam] or debtor companies for the period of three months from the date of the deed, [Tuam] has agreed to guarantee payment of, and indemnify [Messrs Cousins and Smith] in respect of all the [debtor companies] (existing and future) indebtedness to [Messrs Cousins and Smith] …

[13] The deed defined the debtor to include a number of companies within the PVL group including PVL itself. Tuam's liability was described as that of principal debtor and was not dependent or conditional upon any default by PVL or affected or discharged by a range of specified events. It appears that the document was prepared by Messrs Cousins and Smith and that Tuam was not independently advised.

[14] The deed materially provided:

> **13.0 Liquidation and Receivership**
>
> 13.1 Notwithstanding any other provision of this agreement, [Messrs Cousins and Smith] undertaking [set out above] shall be of no effect with respect of any guarantor or debtor that goes into liquidation or has any of its assets place under the control of a receiver.
>
> 13.2 Notwithstanding any provision in the agreement to lease dated 8 March 2007 between [Messrs Cousins and Smith and Tuam], [Tuam] agrees that in the event of [Tuam] being placed in liquidation or having a receiver appointed with respect to any of its assets, **[Messrs Cousins and Smith] shall be entitled to set off and/or deduct any amounts payable under this guarantee against any rent, operating expenses or other amounts payable under the agreement to lease.**
>
> [Emphasis added]

[15] Mr Forbes says that the reference to Messrs Cousins and Smith in clause 13.2, described as the creditor, is a manifest error. Tuam and CLS were the parties to the lease. Thus the reference in clause 13.2 should have been to CLS. Mr Forbes submits that rectification of the deed would undoubtedly be available; alternatively, CLS could avail itself of its rights under s 4 Contracts (Privity) Act 1982. The more appropriate way to correct the error, Mr Forbes says, would be to invoke the Court's power to correct a simple clerical slip as part of the process of interpreting the

document: *Haira v Burbery Finance & Savings Ltd (In Receivership)* [1995] 3 NZLR 396 (CA) at 401-402.

[16] Cousins & Associates advised the receivers of the existence of the guarantee on 28 August 2009. The firm quantified the sum owing under that instrument on 18 August 2009 at $379,959. Its advice was given in response to a notice of intention to cancel the lease issued by Tuam's receivers on the same day: s 245 Property Law Act 2007 (the PLA). The receivers fixed arrears of rental as at 31 March 2009 at $25,595. They required payment of $34,361 by 14 September.

[17] The indebtedness secured by the guarantee represented unpaid legal fees for services rendered by Cousins & Associates to a range of companies within the PVL group. The largest individual debtors were PVL, PVI and Five Mile Holdings Ltd for $84,594, $108,743 and $108,548 respectively. Tuam's own indebtedness was $7,830.

(b) Competing Positions

[18] CLS says that since Tuam was placed in receivership it has validly exercised its express right of set-off under clause 13.2 of the guarantee by withholding monthly rental payments. Mr Forbes submits that the right is exercisable because Tuam owes an amount under the guarantee in favour of Messrs Cousins and Smith well in excess of the rent payable by CLS to Tuam under the lease. He submits that the right of set-off was acquired prior to and is unaffected by the receivership. Accordingly, CLS denies any breach of the lease and Tuam's entitlement to cancel.

[19] Mr Geoff Carter for Tuam raises these grounds in opposition:

(1) CLS is not a party to the guarantee and does not have a right of set-off;

(2) There is no mutuality between the claims by CLS or Cousins & Associates against Tuam under the guarantee and CLS's failure to pay rent under the lease;

(3) Any claim by CLS against Tuam under the guarantee does not impeach Tuam's claim to rent under the lease and the claims are not interdependent;

(4) CLS's exercise of a right to set-off amounts payable by Tuam under the guarantee to Messrs Cousins and Smith against rent payable to Tuam is inequitable, unconscionable and an attempt by CLS to obtain a preference in the receivership to the detriment of Tuam's secured creditors;

(5) Tuam's entry into the guarantee in favour of Messrs Cousins and Smith constituted a breach of Tuam's general security agreement with the BNZ of which Messrs Cousins and Smith ought to have known;

(6) In the circumstances it would be inequitable for the Court to grant relief against forfeiture.

(c) Legal Principles

[20] Counsel agree on the legal principles relating to relief against cancellation. A lessor's right to cancel for breach of a covenant to pay rent can only be exercised upon proof of arrears and provision of notice: s 245 PLA. A Court has concurrent power to make an order for possession and cancel the lease but subject to conditions: s 251. A lessee is entitled to apply for relief against cancellation: s 253. The Court's powers on an application are wide and include the power to grant relief on conditions: s 256.

[21] CLS will be entitled to relief against cancellation if it can establish its right of set-off. The question is whether the company is able to discharge that burden here.

[22] Rights of set-off may be of either a legal or equitable nature. The former right is derived from the statutes of set-off 1728 and 1734 (preserved by the Imperial Law Application Act 1988). Its essential requirements are the mutuality of debts – between the same parties and in the same capacity – and that they are liquidated,

even if unrelated. The latter right allows for equity's intervention if the competing claims are so closely interrelated that it would be unconscionable not to bring the defendant's cross-claim into account.

[23] The principles relating to each right were authoritatively summarised by Tipping J in *Hamilton Ice Arena Ltd v Perry Developments Ltd* [2002] 1 NZLR 309 (CA) as follows:

> [3] Before examining the facts of the present case, we will identify the general principles which apply to equitable set-off. A set-off is a right vested in a defendant facing a money claim by a plaintiff to use its own money claim against the plaintiff to absolve itself wholly or partially from its obligation to the plaintiff. A set-off is different from a counterclaim which, if established, gives the defendant a right to an independent judgment against the plaintiff, but no ability to reduce or extinguish the plaintiff's claim against the defendant. Common law set-off originated in statutes passed early in the eighteenth century. Essentially the common law right was to set off mutual liquidated debts. Equity intervened to allow set-off on a wider basis than that available at law. Cross-claims were allowed by way of defence, and the Courts of equity would also restrain a plaintiff from proceeding at law if the defendant could show a cross-claim which had the effect of impeaching the plaintiff's title to make the claim at law. It is helpful to remember this historical origin when examining claims of equitable set-off today.
>
> [4] Equity would intervene only if the defendant in the suit at law could show some cross-claim for a sum of money which, in the eyes of equity, undermined the right of the plaintiff in the suit at law to enforce his legal claim either at all, or to the extent of the cross-claim. Equity always acknowledged the defendant's right to counterclaim but took the view that in some circumstances such right was not sufficient to do justice. The Courts of equity would not readily interfere with the proceedings at law and confined themselves to cases where the claim at law and the defendant's cross-claim were so closely interrelated that it would be unconscionable for the plaintiff to seek judgment at law without bringing the defendant's cross-claim to account.
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> [5] The need for such close interrelationship was and still is underscored by the fact that an equitable set-off extinguishes the plaintiff's right to judgment, either entirely or pro tanto, according to the amount which the defendant is entitled to set off. There is a detailed discussion of the principles pertaining to equitable set-off in the judgment of this Court delivered by Somers J in *Grant v NZMC Ltd* [1989] 1 NZLR 8. His Honour discussed the historical background and referred to a number of cases which have marked the development of this area of the law. It is unnecessary in the present case to say any more about equitable set-off generally, save to note this Court's statement of principle in Grant's case at pp 12 – 13:
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> > "The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must

> be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract."

[6] Penlington J reviewed the authorities and consistently with them said that 'the equity claimed must go to the very root of the plaintiff's claim'. He thereby adopted the way Forbes J put the matter in *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 at p 145.

…

[8] Neither party referred to the title Set-off and Counterclaim in 42 *Halsbury's Laws of England* 4th ed, 1983. There at para 435 the authors say that, subject to stated exceptions, none of which apply in the present case:

> "a set-off may only be maintained where the claims to be set off against each other exist between the same parties and in the same right."

What *Halsbury* says was certainly the position at common law under the statutes of set-off as noted in footnote 2 to para 435. The cases there cited also support the view that the position is the same with equitable set-off. The need for identity of parties is also consistent with the proposition that the cross-claim is regarded in equity has fully or pro tanto extinguishing the plaintiff's right to judgment on the claim. The concept of extinguishment is difficult if the cross-claim is made by a different party.

[24] In *Hamilton Ice Arena* the Court affirmed at [35] that rental obligations do not fall into a special category of set-off and observed further that:

> [36] *Woodfall on Landlord and Tenant* (2000 edition) states at para 7.114:
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> > "A cross-claim may be set-off against a claim for rent, even if it is unliquidated, provided that it arises under the lease itself, or directly from the relation of landlord and tenant, or out of an agreement for lease."
>
> The authorities cited in support of that proposition are the *British Anzani* case noted above, *Melville v Grapelodge Developments Ltd* (1978) 39 P & CR 179 and *Asco Developments Ltd v Gordan* (1978) 248 EG 683.
>
> [37] *Hill and Redman's Law of Landlord and Tenant*, Issue 35, states at para [3384]:
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> > "However, it is now clear that a tenant has a right to set-off against rent cross-claims which arise not only out of the same contract as the claim (ie the lease), but also where the cross-claim arises directly out of the relationship of landlord and tenant or out of an agreement for lease, or otherwise where there is a sufficiently close connection between the transaction giving rise to the cross-claim for the equitable doctrine of set-off to apply."

> [38] It can be seen that Hill and Redman's formulation is somewhat wider than that of Woodfall in that it includes the passage starting 'or otherwise'. The authority given for that addition is the *Melville* case cited by Woodfall. Additional authorities are *Cleghorn v Durrant* (1858) 22 JP 419 and *Star Rider Ltd v Inntrepreneur Pub Co* [1998] 1 EGLR 53. There is also a general reference to *The Teno* [1977] 2 Lloyd's Rep 289.
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> [39] Hill and Redman's somewhat wider formulation is of course consistent with what was said by this Court in *Grant*. It is therefore appropriate to adopt that approach which allows a set-off even if the cross-claim does not arise out of the relationship of landlord and tenant, provided there is a 'sufficiently close connection' between the two claims – essentially the classic requirement for equitable set-off.

(d) Decision

[25] On its face, CLS's application does not fall within either category of set-off. While the two debts are liquidated, there is no mutuality. They are between different parties and in different capacities.

[26] Mr Forbes is apparently alive to this difficulty. He suggested in reply that CLS's claim fell within the 'unusual circumstance' postulated by Tipping J in *Hamilton Ice Arena* where it might be appropriate to allow equitable set-off even without identity of parties: at [9]. Mr Forbes relies on the factors that Tuam was a party to both the agreement to lease and the guarantee; that Tuam in its capacity as part of the PVL group continued to obtain the legal services provided by Cousins & Associates; and that CLS was clearly a beneficiary of the Tuam receivership.

[27] In summary, Mr Forbes submits, the connection between the parties could hardly have been closer. He says that the guarantee and the agreement to lease have a 'practical conceptual linkage'.

[28] I disagree with Mr Forbes. In *Hamilton Ice Arena* Tipping J accepted that the right of set-off does not have to arise out of the relationship of lessor and lessee. But it is important not to lose sight of the fact that the passage upon which the Judge relied from *Hill and Redman* referred to that relationship or 'otherwise'. The requirement for a 'sufficiently close connection' must refer to a related or analogous relationship.

[29] In allowing for the possibility of an equitable right of set-off arising from a relationship other than that of lessor and lessee in *Hamilton Ice Arena*, Tipping J was not suggesting that it might extend to all contractual relationships between the parties. He was expressly limiting the right to one which gives rise to a cross-claim that is so integral or connected that it operates to extinguish the plaintiff's originating right to judgment on its claim. The closeness or proximity of the relationship to that of lessor and lessee is illustrated by the decision in *Grant v NZMC* [1989] 1 NZLR 8 (CA) (which I shall discuss in more detail later) where the necessary degree of interdependence arose from a contract collateral to the agreement to lease.

[30] In *Hamilton Ice Arena* the Court did not recognise a right of set-off where the lessee owed rental to the lessor which itself owed money to the lessee's owners in their personal capacity under an independent contractual relationship and for different services. Tipping J noted that 'the authorities seem to proceed on the basis that the need for identity of parties is axiomatic': at [7]. The Court's rationale for rejecting any exception to that axiom was as follows:

> [10] In coming to that view we have borne in mind that the Speirs brothers personally guaranteed Hamilton Ice's rental obligations. Indeed the guarantee made them principal debtors and treated them as tenants themselves. Counsel suggested that this circumstance should be seen as overcoming any difficulty that might otherwise exist because the parties to the claimed set-off were not the same. The difficulty with this argument is that Perry never sought to claim arrears of rental from the Speirs brothers. If such a claim had been made, their cross-claim for wages would have qualified for equitable set-off, subject to the need to show sufficient interdependence.

[31] In this case the relationship of lessor and lessee was between Tuam and CLS. The deed of guarantee, executed some time later, was between Tuam and Messrs Cousins and Smith, practising as Cousins & Associates. In turn they own CLS but the owners and company are separate legal entities even though closely related. Tuam's right to judgment on its claim for rent against CLS would never be extinguishable by a judgment in favour of Messrs Cousins and Smith, a different legal entity, against Tuam under the guarantee.

[32] Mr Forbes' rectification argument does not assist CLS. He does not and could not suggest that the deed of guarantee itself should be rectified; Messrs

Cousins and Smith as principals of Cousins & Associates were properly nominated as creditor, not CLS. Rectification would only possibly be available to the extent of substituting CLS for Messrs Cousins and Smith in clause 13.2 as the party entitled to exercise a right of set-off. But that would be a nonsense because, given that Messrs Cousins and Smith were Tuam's creditor for performance of professional services, CLS which was not a party to the guarantee could not acquire a right of set-off under that instrument for Tuam's separate indebtedness to a third party.

[33] This lack of mutuality or of identity of parties acting in the same or a similar capacity is sufficient to answer CLS's claim. But the point just made – that Tuam's indebtedness under the guarantee was unconnected to CLS's liability for rent under the agreement to lease – answers any possible alternative argument if my primary conclusion is wrong. The necessary degree of interdependence is absent. CLS owes rent for its right to occupy Tuam's premises; Tuam is a guarantor of debts owed to a separate legal entity from CLS. Contrary to Mr Forbes' submission, there is no connection between the respective liabilities, let alone a sufficiently close one to warrant equity's intervention to allow CLS to set-off its obligation to pay rental to Tuam. The facts of CLS's application are materially indistinguishable from *Hamilton Ice Arena*.

[34] This conclusion is a composite acceptance of four of the six grounds raised by Tuam in opposition to CLS's claim. It is unnecessary for me to determine the other grounds relating to the existence of a preference in the receivership and a breach of the general security agreement.

(2) PVL

(a) Contracts

[35] Tuam entered into an agreement to lease with PVL on 13 June 2006. The subject area is 1100 square metres on levels three and four and the associated mezzanine level. The term is for six years with two rights of renewal of the same

duration. The annual rental payable is $269,500 plus GST. Again the agreement provided for the parties to enter into a formal deed which was never executed.

[36] The receivers also gave PVL notice of intention to cancel on 28 August 2009. They quantified the arrears of rental owing as at 31 March 2009 at $252,849. They required payment of $379,176 by 14 September.

(b) Set-Off

[37] The nature of PVL's claimed right of set-off is different from that advanced by CLS. The circumstances are set out in an affidavit sworn by Mr Henderson. He says that the rent payable by PVL under the lease was intended to be satisfied from the outset by way of set-off against Tuam's inter-company current account indebtedness to PVL. At all material times this debt has been well in excess of the amount of rental payable by PVL.

[38] Mr Henderson rationalises the arrangement on this basis:

> 11. The decision in this regard have been made by myself, as a director and the chief executive of all of the companies involved. The SOL Square precinct is an integrated hospitality and entertainment area situated between Lichfield and Tuam Streets, Christchurch. The companies involved in owning and leasing the various premises and operating the businesses from them operate on a group basis. Agreements to lease are in place essentially for valuation purposes and in the event that any property or business is sold. However, it is the overall net group situation which, at all times, is important. The restaurant, bar and entertainment businesses which are operated by the companies in the PVL Group and the Atlas Group were all effectively created by PVL. AFB was established for the purpose of managing the companies which operate the various businesses. Each company in each group is substantially dependent on the other.
>
> 12. The only occasions when any lessee company in either group has actually paid rent is when PVL has required this for cashflow purposes. This has only occurred on a few occasions. Most of the companies in the PVL Group have a debit current balance owing by each of them to PVL. Subject to cashflow requirements on particular occasions, it has never been intended that rent would be paid by lessee companies and this has not occurred. It has always been intended that the rent would be set-off against the current account owed by the lessor company or accumulated by the lessee company as a current account debt owed to the lessor company.

> Appropriate adjustments to the general ledgers of each company are made periodically, or would be intended to be made.
>
> …
>
> 14. Up until 30 July 2009 Tuam had current account debts owed to it by six lessee companies in both groups. On the other hand, Tuam has a substantial current account debt owed to PVL. As at the date of the appointment of the receivers of Tuam on 27 July 2009 this debt was $2,117,054.49. In addition to having the benefit of this advance from PVL, Tuam also benefits from having the lessees of the premises owned by it operating businesses which contribute to both groups as a whole. It is PVL which has been responsible for arranging these leases for Tuam. It was always intended that at some stage the current account owed by Tuam to PVL would be reduced by the amount of the current accounts owed by these lessee companies for rent payable to Tuam. As I have said, it is only when the cashflow requirements of PVL have necessitated it that rent has actually been paid by any lessee company, which has only been on a few occasions.

[39] Tuam's grounds of opposition to PVL's application are similar to those raised in answer to CLS's application.

(c) Decision

[40] In this case, contrary to CLS's application, there is mutuality. The parties are identical. Thus the focus must be on any possible interdependence of liability.

[41] The question is essentially factual. Mr Henderson described PVL as providing 'head office, administrative and accountancy services for the companies in the PVL group' including Tuam. I can only assume that PVL's claim to a right of set-off relates to its purported performance of these services for Tuam.

[42] However, Mr Henderson gave no details. All he provided was a copy of extracts from a general ledger for the period between April and August 2009. It is singularly uninformative. It commences with a reference to a cumulative balance payable by Tuam to PVL of $2.283m as at 4 March 2009. It follows with a series of random and unrelated entries for various amounts. Over the period in question the balance slightly but progressively reduced to $2.1m on 14 August 2009. Two other debit entries follow on the same day for $1.091m and $580,820, reducing the balance

to $580,820. These entries followed the appointment of Tuam's receivers on 27 July.

[43] In my judgment PVL has fallen well short of providing a satisfactory or sufficient evidential basis for asserting a right of set-off against its contractual obligation to pay rent. It is not enough for Mr Henderson to assert that, in view of these arrangements, he did not consider that one company in the group could ever have demanded payment from another of a current account balance or of outstanding rental. Apart from being in the nature of a legal submission, his assertion does not advance PVL's position.

[44] PVL has failed to establish the nature and extent of Tuam's liability to it for any alleged indebtedness or, more importantly, how that indebtedness, if it exists, is sufficiently interdependent with or upon Tuam's separate contractual obligation to pay rental. An example of what is required to satisfy the interdependence requirement is found in *Grant*. The Grants leased premises from NZMC for a fixed term of seven years pursuant to an agreement to lease but failed to pay rent due continuously from the sixth month of the term. The Grants carried on a panelbeating business from the premises through their wholly owned company. They alleged that they entered into the lease in consequence of NZMC's agreement to provide them or their company with all of its panelbeating and paint-work emanating from one of its branches if the Grants agreed to lease premises at that location; and that in accordance with this collateral agreement NZMC referred its panelbeating and paint-work to the Grants for the first five or six months of the lease but then ceased the referrals because it had decided to transfer its business to another location. As a result, the Grants claimed that their company suffered a substantial reduction in trade with a loss of profits.

[45] In *Grant* the Court of Appeal quashed the summary judgment entered in the High Court for NZMC's claim for unpaid rental. The Court held that the Grants had an arguable right of set-off against the arrears. Somers J noted at 13:

> If the collateral contract and its breach are established the case is one in which NZMC is endeavouring to enforce a promise by the Grants to pay rent while itself in breach of its own undertaking which gave rise to the lease on which it relies.

[46] In this case there is no connection whatsoever between PVL's liability to pay rent to Tuam and its alleged but unspecified liability to PVL on current account. By contrast in *Grant* the relationship giving rise to the claimed right of set-off was integrally linked with the agreement to lease even though not emanating directly from it. Putting the case at its very best for PVL, there is simply a possibility on the evidence of independent, not interdependent, liabilities. An assumption that that factor alone will justify a right to set-off an unequivocal obligation to pay rental cannot carry the day.

(3) PV4

[47] Tuam entered into an agreement to lease with PV4 on 14 November 2008. The subject area is described as the 'SOL precinct' meaning part of the shopping precinct located on the ground floor. The term is for two years commencing on 1 November 2008 with four rights of renewal of the same duration. The annual gross rental payable is $27,000.

[48] I do not need to dwell unnecessarily on PV4's application. Mr Forbes acknowledges that the rent payable under its lease has not actually been debited to any inter-company current account between PV4 and Tuam. However, he submits that the parties could never have intended that PV4 would pay rent because it leases an open area of the SOL Square precinct. The company presently has no rental or other income derived from any source and thus was never going to be in a position to meet its obligations.

[49] Mr Forbes relies on a statement by Mr Henderson that it was intended that leases to companies operating restaurant and bar businesses in the precinct would generally satisfy their rental obligations either by way of a debit to any advance account owed by Tuam or by debiting the current account between the lessee company and Tuam. That proposition must fail for the reasons already given in rejecting PVL's application.

[50] PV4 has not paid any rent since the commencement of its lease. The sum of $30,374 is now owing. I cannot identify any basis whatsoever for a right of set-off in favour of PV4.

(4) Atlas

[51] Tuam entered into an agreement to lease with Atlas on 25 January 2008. The subject premises were an area of about 117 square metres on level one. The lease was for a term of six years from 1 February 2008 with two rights of renewal of three years. The annual rent payable was $26,500 plus GST.

[52] It is common ground that the company has vacated its premises. I do not need to consider Atlas' position further.

Result

[53] All four applicants have failed to establish rights of set-off against their contractual liabilities to pay rent to Tuam. However, they should be given an opportunity to rectify their contractual breaches. Accordingly I grant each application for relief on condition that the applicant party pays to the receivers by 4 pm on 20 November 2009 all arrears of rental owing as at that date under its lease. In the event that a party fails to satisfy this condition, time being strictly of the essence, Tuam will be entitled to enter judgment against that party for: (1) possession of the subject premises and (2) the amount of arrears then owing.

[54] Costs must follow the event. Tuam has effectively succeeded. CLS, PVL, PV4 and Atlas are ordered jointly to pay one set of costs to Tuam according to category 2B on or before 4 pm on 20 November 2009.

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Rhys Harrison J