IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2009-470-000287

BETWEEN	OROPI PARK LIMITED Appellant
AND	A & R BETHLEHEM HEIGHTS LIMITED Respondent

Hearing: 18 September 2009

Appearances: G Brittain for the Appellant
J O'Brien for the Respondent

Judgment: 8 October 2009 at 4:00pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 8 October 2009 at 4:00pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:

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[1] This is an appeal against a reserved decision of Judge L H Moore given in the District Court at Tauranga on 24 March 2009.

Background

[2] The appellant, Oropi Park Limited ("Oropi"), and the respondent, A & R Bethlehem Heights Limited ("A & R"), were parties to a civil engineering contract. The contract required A & R to undertake earthworks on a site at Oropi Road in Tauranga on behalf of Oropi. The earthworks were required as part of a 13 lot subdivision being undertaken by Oropi. The site presented a number of difficulties and extensive pre-loading and filling were required.

[3] The contract was entered into following a tender process. A & R's tender was accepted by Oropi in September 2003 and the earthworks commenced at much the same time. The initial contract price was $813,300.

[4] The contract was largely based on a standard form contract prepared by the New Zealand Standards Council. The standard contract is known as NZS3910:1998.

[5] A & R was required to strip and stockpile existing topsoil and surface organic materials. It then had to supply and place a geo-textile mat over much of the site area and then import full material and fill the site within defined boundaries. It was required to pre-load the site to a depth of 0.2 metres above the proposed finished design contours with fully compacted engineering fill. Finally it had to finish the site by topsoiling and grassing the same.

[6] The contract called for the appointment of an engineer. A Mr Robinson was appointed. A & R was required to comply with his instructions and he was required to regularly inspect the contract works. A & R was paid on a "measure and volume" basis. It prepared progress claims at agreed intervals. Mr Robinson received the progress claims from A & R, assessed the claims, and then issued progress payment certificates for the value of any claims made, amended as necessary to comply with the contract. The contract allowed Oropi to retain a percentage of the amount claimed in each progress payment certificate but otherwise obliged it to pay the

amount certified by Mr Robinson, together with GST, to A & R within seven working days of the date of any certificate issued – clause 12.4.4. At the end of the contract, A & R was required to submit a final account detailing all its work and its claims in respect of the same to Mr Robinson. He was required to assess the final claim, and then to issue a final payments certificate. Oropi was then obliged to pay the amount detailed in that certificate within 10 working days by clause 12.5.5. Oropi agreed to pay interest on all monies certified as being payable but remaining unpaid after the expiry of the time fixed for payment. The interest rate was stated to be one and a quarter times the average monthly interest rate payable by A & R for its overdraft facilities. Interest was to be compounded on a monthly basis.

[7] The contract required A & R to remedy any defects following practical completion of the contract works. The defects liability period was 12 weeks.

[8] Monies retained by Oropi, less any deductions it was entitled to make, were to be paid to A & R after the issue of a certificate of practical completion and after a defects liability certificate was issued at the conclusion of the defects liability period.

[9] A number of progress claims were made. They were certified by the engineer and they were paid by Oropi to A & R.

[10] In December 2004 A & R made a further progress claim, claim number 6. Mr Robinson assessed and certified claim number 6 and issued a certificate for the sum of $98,354.59 (including GST and allowing for the deduction of retentions).

[11] Oropi was concerned at the possibility that old building materials had been bulldozed into the site by A & R. It was also concerned about the quantities of fill that had been measured. It refused to pay the amount certified. By letter dated 20 December 2004, it advised A & R that it had to pay the money to its solicitors as proof that funds were available. A & R stopped work.

[12] There were then a series of negotiations between the parties. In the event, matters were resolved and the parties entered into a deed of settlement recording the agreements they had reached. The deed provided as follows:

THIS AGREEMENT made the day of 2005

BETWEEN: **OROPI PARK LIMTIED** at Tauranga (hereinafter called "Oropi") of the first part

A N D: **A & R (B.H.) LIMITED** at Tauranga (hereinafter called "A & R") of the second part

BACKGROUND

A. Oropi is developing an industrial subdivision at Poike Road, Tauranga as shown on the attached plan and being more particularly described as Certificate of Title 61A/952 (South Auckland Registry) ("the development").

B. A & R are the earthmoving contractor for the development and currently have a claim outstanding of $98,354.59 ("Claim 6") including GST after deduction of retentions.

C. The parties are in a dispute over the possibility of building materials having been buried in the building sites of the development.

D. In order to settle the dispute the parties have agreed as follows:

NOW THIS DEED WITNESSES:

1. Oropi will pay to A & R the sum of $88,354.59 including GST being part of Claim 6 immediately.

2. The balance of Claim 6 amounting to $10,000 including GST shall be retained in an interest bearing trust account on the terms set out in clause 4.

3. In addition to the funds referred to in Clause 2, on release of the funds held as maintenance retentions of Claim 6 being available for release in terms of the contract between the parties, amounting to $23,305.56 including GST, the sum of $20,000.00 including GST shall also be retained in the interest bearing trust account on the terms set out in clause 4.

4.

4.1 The funds referred to in clauses 2 and 3 shall be retained in an interest bearing trust account, through the trust account of Cooney Lees Morgan, Solicitors, in the name of Oropi Park Limited.

4.2 All interest earned will accrue to the benefit of A & R and shall be retained in the account. All tax due on such interest will be payable by A & R.

4.3 Subject to clause 4.4, the funds will be held in the account for three years from the date of this Deed or until all lots within the development have been built on whichever is the earlier.

> 4.4 If any defect in the earthworks appears within the three (3) year period or on construction of any building or other structure on a Lot in the development and such defect is shown to be caused by A & R then A & R shall remedy such defect forthwith at its cost in all things in a manner satisfactory to Oropi and its engineers. If the defect is not remedied, or not remedied within a reasonable time, then Oropi shall use the funds in the account to meet the cost of remedying such defect. If the cost of remedying the defect exceeds the amount retained then Oropi shall be entitled to claim against A & R for any excess. Oropi shall not be liable for any loss incurred as a result of early termination of any term deposit. A & R shall continue to be liable for defects to which this clause applies notwithstanding that all funds in the account may have been exhausted.
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> 5. Oropi shall pay A & R for the completion of the works set out in the letter from A & R dated 3 December 2004 and attached to this Deed in full with no retentions in accordance with the contract between the parties.
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> 6. Oropi hereby irrevocably authorises Cooney Lees Morgan, Solicitors, to hold the monies referred to in this Deed and to invest them on interest bearing deposit and to pay such funds to the person entitled in terms of this Deed. Oropi shall not be entitled to call for repayment of such monies except in accordance with the terms of this Deed.

[13] The deed was drafted by Oropi's solicitors. It was executed by both parties on 6 May 2005.

[14] It is common ground that the steps required by clauses 1, 2, 3 and 4.1 of the settlement deed were taken. As a result, Oropi's solicitors were holding $30,000 in their trust account in Oropi's name and otherwise on the terms detailed in the settlement deed.

[15] A & R recommenced work and completed the various tasks which were detailed in the letter dated 3 December 2004, a copy of which was annexed to the settlement deed.

[16] In September 2005 the engineer certified A & R's final progress claim in the sum of $53,406 (including GST). The sum claimed related to the works required to be done by the settlement deed.

[17] Oropi refused to pay on this certificate as well.

[18] Thereafter, Oropi began selling various lots in the development. The lots were sold to commercial developers, who commenced erecting buildings on the site for commercial tenants. Problems were experienced with fill on some of the lots.

[19] In January 2008 the solicitors holding the fund pursuant to the settlement deed took out of the fund the sum of $13,010.84. They did so on instructions from Oropi. The monies were paid to a third party purchaser who had made a claim against Oropi.

[20] There was significant correspondence between the parties. Matters could not be resolved. In the event, in March 2008, A & R filed an application seeking summary judgment against Oropi. It sought the amount certified in the final payment certificate – $53,406 – together with interest at the rate set out in the contract or at the rate of 7.5% pursuant to s 62B of the District Courts Act 1947. It also sought the $30,000 referred to in clause 3 of the settlement deed, together with interest on that sum.

District Court decision

[21] Judge Moore recited the relevant factual background. He noted that Oropi had sold various lots in the subdivision to purchasers and that problems had arisen in some cases because purchasers had asserted that there was inappropriate material contained in the fill on some of the sites. He also noted that Oropi had negotiated with some of the purchasers, but that it had taken no steps to establish whether or not A & R was responsible for all or any of the problems encountered. He noted that Oropi had threatened litigation, but had not commenced any proceedings against A & R. He observed that there was a variety of issues, including:

a) How and when the objectionable material had been incorporated on the site?

b) Was it put there by A & R?

c) If not, should A & R have removed it?

d) Was some other contractor to blame?

e) Had the material been buried on the site before A & R started work, and was it at a depth to which A & R was not obliged to go in terms of the contract?

[22] Judge Moore considered that such defects as existed in the site earthworks had not been "shown" to have been caused by A & R in terms of clause 4.4 of the settlement deed. He held that the word "shown" in that clause denotes proof and not just assertion. He noted that in context, proof could be achieved in a number of ways, the most obvious of which were:

a) by A & R accepting liability;

b) by an arbitral award;

c) by the judgment of a competent Court.

[23] Judge Moore found that, on the facts, there was only an assertion by Oropi and that this was insufficient to establish an obligation on A & R to remedy any claimed defect in terms of clause 4.4 of the settlement deed. He held that only a claim for damages or loss properly shown to have been caused by A & R, and which A & R had failed to remedy, could be deducted from the retained sum.

[24] In relation to the final progress payment, he considered that the settlement deed was patently intended to reassure A & R, and to give it confidence to complete the contract works knowing that the final certified progress claim would be paid on time.

[25] The Judge noted that Oropi was asserting that it had paid out or accepted responsibility for remedial costs of some $67,118.89, and that further claims were pending. It was asserting that it was entitled to set off its liability by way of cross-claim against A & R, and that it would be unjust to allow A & R to have summary judgment without bringing the cross-claim into account. Judge Moore had no difficulty in dealing with this aspect of Oropi's arguments. He stated as follows:

> [25] In this case the Court is faced with a situation in which the liability of the defendant for the amounts claimed is not, and could not be, disputed. What is at issue is whether there is 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 into account. On that topic the Court is in no doubt. The parties entered into a deed which assured the plaintiff of timely payment for the work necessary to complete the contract. The deed set aside a fund, to be held in trust, which could be resorted to for the costs of remedial work only after and by procedures which the defendant chose not to follow. In all the circumstances here it would be grossly inequitable to allow the defendant successfully to persist with its tactics of refusing to pay whilst not taking any proper steps to establish its alleged cross-claims. The defendant's liabilities to purchasers are far from determinative of the plaintiff's liability (if any) to the defendant. In that regard the three-year period provided in the deed gave ample opportunity to resolve (in ways satisfying the deed) at least some of those purchaser claims said to give rise to a right of setoff. …
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> [26] The more one works back and forth through these voluminous files the more apparent it becomes that at its core this case raises relatively simple issues which must be determined against the defendant. There is no reasonable possibility that further evidence could require reconsideration of the Court's conclusions in this judgment. Both counsel, in thorough submissions, rightly recognised the likely centrality of the deed. Despite the skill of Mr Brittain's broader excursions this case hinges on that document in ways which mean that the plaintiff must succeed. The equities of the situation are, because of the deed, the circumstances which gave rise to it, and the events (and non events) which followed it, all one way. Time, in the context of cashflow, is vitally important in this type of business transaction (among many others) – as Parliament has recognised in the 2002 Act. The defendant, probably in seeking to use time against the plaintiff, has wasted or abused time in ways and to an extent from the consequences of which there can, in the context of this claim for summary judgment, be no escape. Justice requires that the plaintiff has judgment. There are now no competing equities which could possibly require that to be withheld.

[26] Judge Moore gave judgment in favour of A & R. He awarded $53,406, together with interest at the rate detailed in the contract. Further, he awarded A & R judgment in the sum of $30,000, together with the interest which would have been earned on the total sum had Oropi not caused its solicitors to pay part of the monies out of the fund to a third party purchaser.

The notice of appeal

[27] Oropi appealed Judge Moore's decision. The notice of appeal is dated 9 April 2009. It asserts as follows:

a. The learned Judge was in error in fact and in law, and incorrectly interpreted the agreement between the parties dated 6 May 2005. In particular, the learned Judge interpreted the word *"shown"* to require proof by admission of liability, or award of an arbitrator or judgment of a Court. Such an interpretation is inconsistent with the objective intention of the parties manifest from the background to the document;

b. The learned Judge was in error in fact and in law in finding that the appellant's solicitors should not have paid the sum of $13,010.84 to Waimapu Place Limited;

c. The learned Judge was in error in fact in drawing an inference that the parties would have been well aware of the purpose of the Construction Contracts Act 2002. In particular, there were no facts before the Court from which the inference could be drawn;

d. The learned Judge was in error in fact in finding that more than one party claiming against the appellant (the quantum of those claims forming the basis of a set-off against the respondent) were *"closely associated"* with the appellant;

e. The learned Judge was in error in law in applying the principle in *Grant v NZMC Limited* [1989] 1 NZLR 8;

f. The learned Judge's reasoning placed emphasis on the purpose of the Construction Contracts Act 2002, which was irrelevant;

g. The learned Judge was in error in fact and in law in failing to give sufficient weight to the appellant's arguable case to an equitable set-off which exceeded the amount for which the respondent sought judgment against the appellant.

Subsequent events

[28] As a result of Judge Moore's decision, the net amount held in the solicitor's trust account, together with accrued interest, has been paid out to A & R. The $13,010.84 paid out to the third party and interest on that sum has not been paid. Nor has the $53,406 or interest at the contract rate been paid.

Submissions

[29] Mr Brittain, appearing for Oropi, submitted that the essential issue was whether Oropi has a set-off, such that summary judgment ought not to have been entered on A & R's claim. He specifically challenged Judge Moore's findings on the

interpretation of clause 4.4, his findings in respect of the effect of clause 5, and his conclusions in relation to Oropi's ability to claim a set-off.

[30] He submitted that clause 4.4 must be interpreted in light of its factual background and in the context of the parties' rights and obligations as they existed prior to the settlement agreement. He further asserted that this must include the rights of third party purchasers of lots in the development. His starting point was that any purchaser of any of the subdivided lots had rights if the earthworks on those lots were defective. He argued that third party purchasers had a right to sue in contract and/or tort to remedy the problem, and to recover their losses, and that there was no obligation on third party purchasers to allow A & R or Oropi the opportunity to first remedy the defective work. He submitted that nothing in the settlement agreement could abrogate the rights of third party purchasers, and that the factual background as between Oropi and A & R had to include the scenario where a third party purchaser elected to carry out the remedial works itself and then recover its damages. He submitted that the parties must have contemplated that possibility.

[31] He submitted that the word "shown" in clause 4.4 does not require proof, and that rather it means disclosed or made manifest – for example by demonstrating that the fill did not meet the required standards by way of a report from an appropriate expert. He submitted that the parties cannot have intended that a third party purchaser's building project would be halted while A & R and Oropi completed an arbitration or a court action. He submitted that the words "shall remedy" contained in the clause must be interpreted broadly to include either physical remedial work or payment of compensatory damages. On that basis, he submitted that Oropi's solicitors were entitled to pay out the sum of $13,010.84 on Oropi's instructions.

[32] In relation to clause 5, Mr Brittain submitted that the Judge erred in his reasoning. He submitted that the Construction Contracts Act 2002 had no application, because Oropi had not made any claim under that Act. He submitted that the Construction Contracts Act ought not to have dictated the interpretation of the settlement agreement. Further, he submitted that Oropi had not "abused time". He submitted that it had actively engaged in correspondence and discussions with A & R.

[33] Mr Brittain then dealt with set off. He accepted that an engineer's payment certificate can properly seen as being of a "special and formal kind". However, he submitted that an employer obliged to pay on such a certificate can still raise a set-off against the amount certified. He submitted that the contract here in issue does not preclude a set-off, because the defective work was discovered after the settlement agreement was entered into, and because there are no further payment certificates to issue where matters could be addressed.

[34] Ms O'Brien, acting for A & R, accepted that it was appropriate to consider the background relationship between the parties when construing the settlement deed. She referred to the contract, and noted that at the time the settlement deed was entered into, Oropi was in breach of its contractual obligations. She submitted that the effect of the settlement agreement was to set aside an agreed sum, to be held for a maximum of three years on specific conditions. The agreement created what she called a "ring fenced payment" requiring payment of the final certified amount, and it put in place a procedure whereby any defects shown to have been caused by A & R would first be remedied by it, before the cost of repairing the same could be claimed out of the retention fund. She observed that the final contract works were completed by A & R and that Oropi had obtained a significant extension to the defects liability period.

[35] She submitted that the settlement agreement contained pre-conditions before there could be an obligation on A & R to carry out remedial works, namely:

a) the defect must have appeared within the three year period from the signing of the deed;

b) the defect must be "shown" to have been caused by A & R; and

c) the defect must have been made known to A & R, and A & R had to be given the opportunity to remedy the defect within a reasonable time.

[36] In relation to Oropi's claimed set-off, she noted that it can continue to rely on contract law to claim and prove any defects and that there is nothing precluding it from issuing separate proceedings after the deed expires. She submitted that Oropi had not complied with the pre-conditions in clause 4.4, and that it had not proven quantum, and that what was being raised by Oropi is a separate counterclaim.

Analysis

[37] I start by referring to the modern approach to the construction of contracts. There is now a much greater readiness to admit evidence of the matrix of facts in which the agreement was entered into: see *The Law of Contract in New Zealand* (3rd ed.) para 6.2.2 at 159 *et seq*.

[38] The modern approach to interpretation was set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913. His Lordship noted as follows:

> The principles may be summarised as follows.
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> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The

> background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
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> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] AC 191 at 201:
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>> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business commonsense.'

[39] This approach has been adopted in New Zealand – see for example, *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 at 81-82.

[40] Here the background to the settlement agreement was the construction contract which Oropi and A & R had entered into. I have set out above the terms of that construction contract.

[41] At the time of the settlement agreement Oropi was in breach of the construction contract. It had refused to pay progress claim number six, notwithstanding that the engineer had certified the same. Interest was running. A & R had stopped work under the contract. Oropi was unable to persuade A & R to complete work on its subdivision unless payment was made. Any delay in completing the works precluded Oropi from selling lots in its subdivision, from recouping its investment, and from realising a profit.

[42] I cannot accept Mr Brittain's submission that the starting point in considering the factual background must be the interests of the third party purchasers. A & R had no interest in the third party purchasers. Its interest was to get paid for the work it had done, and to secure a guarantee of payment for any future work it might complete. Nor can Oropi have had the interests of third party purchasers at the forefront of its thinking. It wanted to get the earthworks completed so that it could

market the sections. From its perspective, purchasers were the desired outcome, rather than a foregone conclusion.

[43] Interpreted against this background, in my view the meaning and effect of the settlement agreement is patently clear. Oropi paid the amount certified in progress certificate six in large part. A & R agreed to allow Oropi to retain $30,000 for three years. Thereafter the retention monies were to be paid out to A & R. If any defect in the earthworks became apparent within that three years, or on construction of any building or other structure and the defect was shown to be caused by A & R, then A & R was to remedy such defect forthwith at its own cost. If it did not do so, or did not do so within a reasonable time, then Oropi could use the retained funds to meet the costs of remedying the defect. If the cost of remedying the defect exceeded the amount retained, then Oropi was entitled to claim for any excess, and A & R continued to be liable for defects to which the clause applied, notwithstanding that all funds in the account may have been exhausted. A & R agreed to otherwise complete the contract work and Oropi agreed to pay the final amount certified by the engineer without deduction.

[44] There were four pre-conditions that had to be met before Oropi could access the retentions fund which were to be held on trust.

a) The defect must have appeared within the three year period from the signing of the deed, or on construction of any building or other structure. (The wording of this part of the clause is not particularly clear but it does not affect the determination of this appeal);

b) The defect must have been "shown" to have been caused by A & R;

c) A & R must have been given the opportunity to remedy the defect within a reasonable time; and

d) A & R must have failed to remedy the defect, or failed to do so within a reasonable time.

Unless these pre-conditions were met so that Oropi could properly access the retentions fund, then A & R was entitled to be paid out in full three years after the settlement agreement was signed.

[45] I agree with Judge Moore that the use of the word "shown" in clause 4.4 denotes proof and not just assertion. I also agree with the Judge that in context, proof could be achieved in any one of a number of ways, including A & R accepting liability, an arbitral award, or by a judgment of a court.

[46] There is nothing in the papers "showing" that any of the alleged defects were caused by A & R. The most Mr Brittain could point to was an engineer's report prepared at the request of the third party purchaser of two of the lots – lots 6 and 7. That report simply recorded that the engineers had visited lots 6 and 7 to inspect organic fill which had been uncovered. The engineers expressed the opinion that the material should have been removed, and replaced with compacted structural fill. That report does not go anywhere near "showing" that such defect as existed was caused by A & R. Still less does it establish that A & R had breached the construction contract. Further, it is clear that once the defect was discovered, it was not referred to A & R. Nor were defects discovered on other lots.

[47] In my view, Oropi has not adduced any evidence to "show" that any defects in the earthworks were caused by A & R, as required in terms of clause 4.4 of the settlement agreement.

[48] I refer by way of analogy to *Yoshimoto v Canterbury Golf International Ltd* [2004] 1 NZLR 1. In that case the contract between the parties provided that the price payable for real estate was to increase by $1M if all consents necessary for developing the property as a golf course had been obtained by a certain date. All consents except one had been obtained. The Privy Council held that the wording of the condition contained in the contract was clear, and that it could only mean that all necessary consents had actually been obtained by the date in question. It noted that it was not enough that the outcome of an outstanding application for consent was considered to be a foregone conclusion. As the Privy Council put it, the word "obtained" cannot mean "highly likely to be obtained".

[49] In my view, the same reasoning applies in the present case. Any defects in the earthworks that existed have not been "shown" to have been caused by A & R. At best, from Oropi's perspective, it can assert that the defects are likely to have been caused by A & R. That is not sufficient to trigger the operation of clause 4.4, and it is insufficient to allow Oropi to access the trust fund.

[50] It follows that Oropi should not have directed its solicitors to pay out part of the retention fund to a third party purchaser. Oropi had irrevocably authorised the solicitors to hold the fund referred to in the deed, to invest it on interest bearing deposit, and to pay out the fund only to the person or the persons entitled to it in terms of the deed. Oropi had acknowledged that it was not entitled to call for repayment of the monies, except in accordance with the terms of the deed. In my judgment Oropi had no entitlement to require the solicitors to pay out the monies to the third party purchaser.

[51] I am mindful that the solicitors are not a party to these proceedings so I will make no comment on their obligations in respect of the fund.

[52] The deed was executed on 6 May 2005. The period provided for in clause 4.3 has expired. A & R is entitled, in terms of clause 4.3 of the settlement deed, to repayment of the retained fund in full, together with the interest earned on that fund, or the interest that would have been earned on the fund but for the payment out by Oropi's solicitors. Subject to the issue of set-off which I deal with below, A & R is entitled to summary judgment for these moneys.

[53] I now turn to clause 5 in the deed. The background to that clause is much the same as is discussed above. Oropi was seeking to get further works done to complete the contract. The works were set out by it in a letter dated 3 December 2004. The works required the removal of pre-load materials on lot 1, the filling of a pond on lot 9, and the undercutting and removal of waste and backfill on lot 3. The letter detailing the required works was attached to the settlement deed. In terms of clause 5, Oropi covenanted to pay for those works in full, with no retentions and in accordance with the contract between the parties. As Judge Moore found at [20], the deed was patently intended to reassure A & R and to give it the confidence to

complete the contract works knowing that a final duly certified progress payment would be paid on time.

[54] A & R fulfilled its part of the bargain. It completed the works as required. It made a final progress claim. The claim was certified. Mr Robinson has deposed that the final progress certificate fairly represents the value of the work carried out in accordance with the contract and the agreed rates.

[55] There is no basis on which Oropi can properly dispute payment.

[56] Mr Brittain suggested that clause 5 needs to be read together with clause 4.4. I cannot follow that argument. In my judgment, clause 5 constitutes a clear and unequivocal undertaking by Oropi to pay for the completion of the works detailed in the letter of 3 December 2004 with no retentions. Oropi has failed to do so and, subject to the issue of set-off, it has no defence to A & R's claim. It follows that A & R is entitled to require payment of the certified sum, together with interest in accordance with the relevant provisions contained in the contract document.

[57] Finally, I turn to the claimed set-off.

[58] In the context of a summary judgment application, a set-off can be regarded as a defence: see *M L Paynter Ltd v Ben Candy Investments Ltd* [1987] 1 NZLR 257.

[59] The principles governing set-off and counterclaim were discussed by McGechan J in *Roberts Family Investments Ltd v Total Fitness Centre (Wellington) Ltd* [1989] 1 NZLR 15 at 21-22, and they were comprehensively reviewed by the Court of Appeal in *Grant v NZMC Ltd* [1989] 1 NZLR 8. Somers J noted as follows at 12-13:

> The principle is, we think, clear. 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.

[60] The Court also noted that set-off may be contractually excluded, either expressly, or by clear implication.

[61] Here Oropi is asserting that it is entitled to set off its cross-claim against any claim that A & R may have under the contract and the settlement agreement. A & R for its part is asserting that the status and effect of the certificates certified by the engineer is crucial, and that Oropi should be left bring any claims it wishes to bring separately, and pursuant to normal legal processes.

[62] The effect of certificates issued under building contracts has been examined in two cases: *Savoury Holdings Ltd v Royal Oak Mall Ltd* [1992] 1 NZLR 12 and *Hempseed v Durham Development Ltd* [1998] 3 NZLR 265.

[63] In *Savoury Holdings*, the plaintiffs were seeking payment on the basis of certificates issued in respect of those payments. Smellie J reviewed the contract between the parties. He referred to English authorities and to various relevant texts. His Honour found that the progress payment certificates were of a "special and formal kind". He noted that they emanated from quantity surveyors and architects appointed by the defendant, whose judgment the parties had expressly agreed to accept. Judgment was entered in favour of the plaintiffs.

[64] In *Hempseed*, the respondent had carried out building works for Hempseed. The contract used the general conditions of contract agreed by the New Zealand Institute of Architects. Disputes had arisen between the parties on various matters. They were referred to arbitration and an award was made. The architect issued a final certificate in terms of the award. Hempseed declined to pay. He claimed there were a number of unresolved matters still in dispute. The respondent issued proceedings for summary judgment. The Court of Appeal considered the contract between the parties. It referred to *Savoury Holdings*, and held that the certificate had to been seen as being of a "special and formal kind". It also considered that it was at least arguable that the contract prevented any claims made by the employer from being categorised as set-offs.

[65] If, as a matter of law, the claims which Oropi is making amount to claims of set-off, and, if those claims are not excluded by the contract, then summary judgment would generally be an inappropriate procedure to resolve the matters in dispute between the parties. On the other hand, if the claims Oropi is making amount to a counterclaim, or if they are a set-off but set-off has been excluded by the contract, then A & R is entitled to summary judgment and Oropi must be left to pursue its cross-claims in subsequent proceedings.

[66] The distinction between set-off and counterclaim is explored by the Court of Appeal in *Grant* at 11. Here the claims being made by Oropi are connected to the claims being made by A & R. Both arise in the same contractual context. Further the claims being made by Oropi are monetary claims, albeit that their quantum has not as yet been established. The various English statutes noted in *Grant* (which still apply in New Zealand) permit the set-off of mutual debts. They are however confined to liquidated claims. However equity would restrain an action to allow a set-off. This equitable right was not limited to liquidated cross-claims, but extended to unliquidated claims for damages. In the circumstances of this case, I accept that Oropi's cross-claims constitute an equitable set-off, which if established would *pro tanto* extinguish A & R's claim. However, the difficulty from Oropi's perspective is that its claims to set-off are precluded by clear implication from the construction contract and the settlement agreement.

[67] I have set out above the provisions relating to progress payment certificates, retention monies, and the final payment certificate. I have noted clause 12.2.4 in the contract, which required the principal to pay every amount certified in a progress payment certificate to the contractor within seven working days of the date of its certificate. Clause 12.4.2 dealt with final claims. Submission of a final claim by the contractor was conclusive evidence that the contractor had no outstanding claims against the principal and that the principal was not liable to the contractor for any matter in connection with the contractor unless contained within the final claim. The amount certified by the engineer in the final payment certificate was required to be paid by the principal to the contractor within 10 working days of the date of the engineer's final payment certificate by clause 12.5.5. On issue of the final payment certificate, under clause 12.6.1, the principal ceased to be liable to the contractor in

respect of any of the principal's obligations under the contract documents, except to pay the money certified in the final payment certificate, to pay any retention monies which were or which became payable, to pay any monies which became payable following resolution of any dispute under Section 13 in the contract, to pay interest which became payable, and to pay any monies certified prior to the issue of the final payment certificate but unpaid at the time. Section 13 dealt with disputes. Clause 13.1.1 provided that no decision, valuation or certificate of the engineer was to be questioned or challenged more than three months after it had been given. The clause went on to provide that nearly every dispute or difference concerning the contract was to be dealt with under the provisions of Section 13. An engineer's review was to be undertaken. There was provision for mediation, and/or for arbitration. Clause 13.5.2 provided as follows:

> No progress payment certificate nor payment due or payable shall be withheld on account of dispute proceedings. Where any items is in dispute, the Engineer shall issue a certificate for such amount as is properly payable according to his or her view as to the terms of the contract and his or her valuation in accordance with 12.1.3. No payment due under s 12 shall be withheld by reason of the existence of any dispute.

[68] These various provisions are in my judgment echoed in the settlement agreement. Clause 5 in the agreement expressly required Oropi to pay A & R for the completion of the works in full in accordance with the contract between the parties. Clause 4.3 provided its own mechanism, without express reference to the contract, but for the reasons I have already set out, it seems to me clear that that clause as well did not permit Oropi to assert set-off, and thus avoid its responsibilities.

[69] In case I am wrong in this regard I record that it is my clear view it would be unjust to deny A & R judgment and to permit Oropi to bring its alleged cross-claim to account. I cannot improve on the wording or the reasoning expressed by Judge Moore in [25] and [26] of his decision – noted above at [25] – and I adopt the same. Oropi has done nothing to advance its claims. It did not activate the dispute provisions contained in the contract. It has not commenced legal proceedings against A & R.

Conclusion

[70] The appeal is dismissed. A & R is entitled to summary judgment in the sum of $53,406, together with interest as provided in clauses 12.7.1 and 12.7.3 of NZS3910:1998 until the date of payment. A & R is also entitled to judgment for the amount paid out by the solicitors to the third party purchaser – $13,010.84 – together with the interest which would have been earned on those monies had Oropi not caused the same to be dispersed.

Costs

[71] A & R is entitled to its costs and reasonable disbursements in relation to this appeal. My preliminary view is that costs should be calculated on a 2B basis perhaps with some allowance for increased costs. In the event that the parties are unable to reach agreement, I direct as follows:

a) A & R is to file and serve a memorandum in support of its claim for costs within 15 working days of the date of this judgment;

b) Oropi is to file and serve any response within a further period of 10 working days; and

c) A & R is to file and serve any reply within a further period of five working days.

[72] I will then deal with costs on the papers unless I require the assistance of counsel.

Wylie J