IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-000540

BETWEEN	NEW ZEALAND FOOD GROUP (1992) LIMITED Plaintiff
AND	KARSTEL MARKETING PTE LIMITED Defendant

Hearing: 2 November 2009

Appearances: O G Paulsen for Plaintiff
P McGrath for Defendant

Judgment: 2 November 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

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[1] This is a contested application under r 11.28 for an order entering satisfaction of a judgment.

[2] The judgment in question is a summary judgment obtained by New Zealand Food Group Limited against Karstel Marketing PTE Limited in the sum of SGD$115,726.56 together with interest of SGD$2583.11 and costs and disbursements on a 3B basis.

[3] The judgment was for unpaid goods New Zealand Food supplied to Karstel at the latter's request in December 2008. Karstel did not defend the application for summary judgment and judgment was entered on 18 May 2009.

[4] Karstel is a company incorporated in Singapore. New Zealand Food registered its judgment in Singapore and served a notice of registration on Karstel on 23 July 2009 with a view to enforcing the judgment.

[5] On 20 August 2009 Karstel's solicitors wrote to New Zealand Food enclosing two documents:

i) Notice of an assignment from Kartono Widjaja and Stella Kwok to Karstel of a debt owing by New Zealand Food to Mr Widjaja and Ms Kwok.

ii) Karstel's cheque for $49,236.46, being what the letter said was the balance due to New Zealand Food under its judgment after deduction of the assigned debt.

[6] Mr Widjaja and Stella Kwok are directors and the principal shareholders of Karstel. They also hold together a 43.57% shareholding in New Zealand Food.

[7] The debt which was assigned to Karstel on 20 August 2009 represents shareholder advances the couple made to New Zealand Food. The advances are recorded in New Zealand Food's accounts of June 2008.

[8] The solicitor's letter enclosing the cheque concluded by stating that the judgment sum was now wholly satisfied, and that accordingly New Zealand Food was not entitled to commence enforcement proceedings.

[9] New Zealand Food however refuses to accept that is the correct legal position. New Zealand Food wishes to proceed with their enforcement and that in turn has prompted Karstel's application to this Court under r 11.28(3).

[10] Rule 11.28 provides:

> **11.28 Satisfaction of judgment**
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> (1) As soon as a judgment is satisfied by payment, levy, or in another way, the party against whom the judgment was given is entitled to have satisfaction of that judgment formally entered.
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> (2) For the purposes of subclause (1), the party against whom the judgment was given must produce and file in the registry of the court an acknowledgment of satisfaction signed by or on behalf of the party obtaining judgment.

> (3) Despite subclause (2), the court may order satisfaction to be entered upon proof that the judgment has been satisfied.

[11] The key issue is whether the raising of a cross-claim after judgment is capable of constituting the satisfaction of a judgment "by payment, levy, or in another way" within the meaning of the rule.

[12] Unfortunately there does not appear to be any authority directly on point. As noted in the commentary to McGechan, the procedure is rarely used and, I would venture to suggest, the rule little known.

[13] It was common ground the word "levy" must refer to a legal enforcement process and was clearly not applicable. However, counsel for Karstel, Mr McGrath, submitted that on the facts there had been satisfaction by "payment", or if that was not correct there had been satisfaction "in another way", a phrase which could only mean "other than by payment and other than Court ordered seizure and sale of property."

[14] In support of his submission that the word "payment" was broad enough to cover what had happened, Mr McGrath referred me to a dictum of Lord Evershed in *White v Elmdene Estates* [1959] 3 WLR 185 at 192 where it was said "the word payment in itself is one which, in an appropriate context, may cover many ways of discharging obligations. It may even … include a discharge, not by money payment at all but by what is called payment in kind."

[15] In my view, that dictum cannot help Karstel. Lord Evershed was dealing with a very different situation, and in any event nothing he said bears on the major problem which Karstel faces in this case, namely that payment and cross-claims are fundamentally different concepts.

[16] As Mr Paulsen pointed out, payment is the performance of the obligation in respect of which the claim arises. Set-off on the other hand exempts a debtor from making any satisfaction of the obligation as the obligation is extinguished, while counterclaim is separate from the obligation altogether and is simply a procedural mechanism which allows for the hearing of cross-claims in one action.

[17] In this case, the only "payment" there has been has been the amount of the cheque. That is to say, there has only been part-payment of the judgment debt

[18] I turn then to consider the phrase "in another way".

[19] Here again Karstel faces a number of significant difficulties.

[20] First, it is well established that a plea of set-off must be raised in the action in which the plaintiff's claim is made. If not raised, the ability to raise it later is lost. That is because the plea can only be used in the way of a defence as a shield, not a sword: see *Stooke v Taylor* (1880) 5 QBD 569; and *TC Trustees Ltd v Darwen* [1969] 1 All ER 271 at 273, where the English Court of Appeal set aside a stay of judgment on the grounds that:

> It seems to me that, if the defendants are entitled to relief at all, it can only be by way of relief in equity… But nevertheless, even if there is room for relief in equity, I think relief must be sought in the action itself before judgment is given, and not afterwards.

[21] Karstel did not, of course, raise set-off in the proceeding in which Food Group obtained its judgment.

[22] Secondly, the High Court Rules contain specific rules dealing with judgment in proceedings where there is both claim and counterclaim. See rr 11.23 and 11.24. Rule 11.25 provides that cross-judgments may be set off against each other, but only with the leave of the Court. As Mr Paulsen submitted, it would be anomalous if it was the case that a party who has obtained a cross-judgment is required to obtain the leave of the Court, but a person in the position of Karstel with no judgment can do so without leave as of right.

[23] Mr McGrath acknowledged the difficulties, but submitted that the use of such a wide phrase as "in another way" indicated that the intention of the draftsperson was that the technical rules about set-off and counterclaim should not prevent the existence of a cross-claim being used in an appropriate case to constitute satisfaction.

[24] I disagree. The specific must prevail over the general. In my view, if the intention had been to include cross-claims then the draftsperson would have said so. Karstel's interpretation would have the effect of undermining the specific rules, which could never have been what was intended.

[25] I accept the existence of a counterclaim can be used to support an application for a stay of execution to prevent there being a miscarriage of justice, but it is another thing altogether for a party to attempt to elevate an untested cross claim to the status of a judgment under the guise of r 11.28.

[26] In my view a cross-claim raised post judgment is not capable of constituting the satisfaction of a judgment "in another way" for the purposes of r 11.28.

[27] This conclusion still gives meaning to the phrase "in another way". As Mr Paulsen submitted:

> There are many ways in which a judgment may be satisfied which do not include the raising of a set-off or counterclaim. The judgment creditor may choose to release the debtor by deed. The debtor may perform some obligation owed by the judgment creditor to a third party in satisfaction of the judgment. The creditor may agree that the debtor satisfy the judgment by the performance of some work of service.

[28] Even if I am wrong in my conclusion and a post judgment cross-claim is capable of constituting satisfaction, I would not in any event be willing to grant the order sought in the exercise of my residual discretion. I say that for two reasons:

i) On the facts, there is an issue as to whether or not the shareholder advances in question are currently owing by New Zealand Food. The affidavit sworn in support of the application contains conflicting information. On the one hand it exhibits correspondence that asserts the advances were repayable on demand, but on the other hand the financial accounts exhibited show the advances under the head "Term Portion". There is also a statement in the accounts that the company is reliant upon the continued support of its shareholders.

ii) The shareholder advances are in New Zealand dollars so that the effect of the claimed set-off is to require New Zealand Food to accept currency other than the currency in which the judgment was obtained.

[29] There is a further factor that in calculating the balance owing, Karstel has failed to pay interest on the judgment sum.

[30] I have come to a very clear view that the application should be dismissed.

[31] It is accordingly dismissed and Karstel ordered to pay costs on a 2B basis to New Zealand Food.

Solicitors:
Cavell Leitch Pringle & Boyle, Christchurch
Duthie Whyte, Auckland
(Counsel: P McGrath, Auckland)