IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2004-404-003957

BETWEEN	D E CUTTING AND J F ALEXANDER AS EXECUTORS OF THE ESTATE OF M D ALEXANDER First Plaintiffs
AND	PARKBROOK HOLDINGS LTD (IN RECEIVERSHIP) AND (IN LIQUIDATION) Second Plaintiff
AND	LESNAM HOLDINGS LTD Third Plaintiff
AND	FIFER RESIDENTIAL LTD Fourth Plaintiff
AND	K F GOULD First Defendant
AND	D M GRAHAM Second Defendant

Hearing: 12 and 24 August 2009

Counsel: RB Stewart QC for Judgment Debtor
JM Holland for Judgment Creditor

Judgment: 31 August 2009 at 11:00am

RESERVED JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for stay of execution of judgment]

Solicitors: Blackwells, PO Box 9325, Auckland for judgment creditor
Bruce C McNiece, PO Box 99, Auckland for judgment debtor

Introduction

[1] The judgement debtor, Mr K F Gould, applies for orders:

a) Staying enforcement of a judgment dated 18 May 2007 and sealed on 2 July 2007 (see *Parkbrook Holdings Ltd (In rec & liq) & Ors v Gould* HC AK CIV-2004-404-3957, CIV-2003-404-442, CP 118-IM03 18 May 2007);

b) Cancelling the registration of a charging order against certain land that he owns.

[2] The application is made in reliance on rr 17.29 and 17.44 of the High Court Rules and s 310 of the Companies Act 1993.

[3] Rule 17.29 provides:

> **17.29 Stay of enforcement**
>
> A liable party may apply to the court for a stay of enforcement or other relief against the judgment upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were enforced, and the court may give relief on just terms.

[4] Rule 17.44 provides:

> **17.44 Application for relief by persons prejudicially affected**
>
> (1) At any time, a person alleging that he or she is prejudicially affected by a charging order may apply to the court for relief.
>
> (2) The court may—
>
> (a) vary or rescind the order; or
>
> (b) cancel the registration or modify the effect of registration of any order affecting land.
>
> (3) The powers of the court under this rule are in addition to its powers under rule 7.49.

[5] I will refer to s 310 of the Companies Act 1993 when I discuss the specific grounds advanced in support of the application dealing with a mutual credit and set-off.

[6] The major focus in this application is whether or not a stay in respect of the judgment should be ordered. That predetermines what should be done in relation to the charging order.

[7] The application is opposed. In summary, the grounds advanced in opposition are:

a) The matters relied upon by Mr Gould in seeking a stay could, with reasonable diligence, have been raised in the trial that led to the costs judgment, which is the subject of this application, and is accordingly barred by the rule in *Henderson v Henderson* (1843) 3 Hare 100;

b) The judgment debtor is purporting to set-off debts incurred prior to the judgment creditor company, Parkbrook Holdings Limited going into receivership against a liability which Mr Gould incurred arising from the judgment which was entered after the plaintiff company went into receivership with the result that there is no mutuality and therefore no justification for the set-off which is claimed; and

c) The fees which are the subject of the set-off claimed by Mr Gould arose from negligent work he carried out for the judgment creditor company and in respect of which negligence a judgment was entered against Mr Gould.

[8] In the course of submissions, counsel confirmed to me that I should treat the contest in this case, being a contest between Parkbrook Holdings Limited (In Receivership) and (In Liquidation) as the judgment creditor, and Mr Gould as the judgment debtor. I proceed on that basis.

Factual background

[9] In 2004, the judgment creditor, along with others, brought proceedings against Mr Gould and his instructing solicitor for losses arising from a residential development which ran into difficulty. The plaintiffs alleged that Mr Gould and Mr Graham, as professional legal advisers, had acted negligently. The trial of that proceeding commenced on 2 May 2006 before Rodney Hansen J. Judgment for quantum against Mr Gould was delivered on 1 November 2006: see *Parkbrook Holdings Ltd (In rec & liq) & Ors v Gould & Anor* HC AK CIV-2004-404-3957 1 November 2006. The subject matter of this proceeding is a costs judgment issued by Rodney Hansen J following the quantum determination. That judgment was delivered on 18 May 2007.

[10] Mr Gould had issued proceedings for certain outstanding bills of costs for work which he says was undertaken on behalf of Mr Paul Alexander, representing the M B Alexander Family Trust, together with Parkbrook Holdings Limited (the judgment creditor), Parkstone Holdings Limited, Proprius Holdings Limited, Muzbank Corporation Limited, and Fifer Group of Companies.

[11] The judgment creditor was placed into receivership on 11 June 2002.

[12] Mr Gould rendered nine bills of costs, together with a global statement of account totalling $197,969.57, to Paul Alexander, the trustees of the Alexander Family Trust, the trustees of the M B Alexander Family Trust, Proprius Holdings Limited and Muzbank Corporation Limited on 17 June 2002.

[13] On 6 March 2003, Parkbrook Holdings Limited was placed into liquidation.

[14] On 17 April 2003, Mr Gould issued summary judgment proceedings for his unpaid costs against Paul Alexander and trustees of the the Alexander Family Trust.

[15] Mr Gould's proceedings for summary judgment were eventually given a date of hearing at the same time as the negligence proceedings that had been brought against Mr Gould. That was for 2 May 2006. Mr Gould discontinued his claim for

summary judgment before the trial. In the course of the trial, he admitted liability to the plaintiff and judgment for quantum was given on 1 November 2006.

[16] Mr Gould has paid the quantum judgment and also the costs judgment arising out of his discontinued proceedings.

Matters in dispute

[17] Mr Gould declined to pay the costs of $93,528.88 pursuant to the judgment of Rodney Hansen J on 18 May 2007. He seeks to set-off his unpaid bills of costs because he says they are in fact owed by Parkbrook Holdings Limited and that fact was acknowledged on that company's behalf by Mr J F Alexander in evidence which was read at the negligence trial which commenced on 2 May 2006.

[18] The affidavits before me do raise an issue as to what precise evidence was given at the negligence trial. Mr Gould and his counsel at the trial, Mr A Lusk QC, have sworn affidavits confirming that Mr Alexander gave evidence at the trial acknowledging Parkbrook Holdings Limited's liability to Mr Gould for unpaid costs. Mr Gould's evidence is to the effect that the quantum of the unpaid costs accepted by Mr Alexander on behalf of Parkbrook Holdings Limited was in the sum of $103,616.53. Mr Alexander swore an affidavit in which he said that part of his brief of evidence was deleted and was not adduced at trial.

[19] I gave Mr Holland the opportunity, during a short adjournment, to take instructions to see if this question could be resolved. Following that adjournment, he confirmed to me that Parkbrook Holdings Limited acknowledged its liability to Mr Gould for unpaid costs for a slightly higher figure, $108,587.66. The fact that the two figures are mentioned is not of particular significance so far as the submissions advanced before me in this case are concerned. That is because both figures, whether it be the lower figure mentioned by Mr Gould or that contained in the acknowledgement given to me by Mr Holland exceed the judgment for costs of $93,529.88.

[20] What then is required is an analysis of the specific grounds advanced in opposition to the stay to see whether, as a matter of principle, the set-off claimed by Mr Gould in fact is not available.

Discussion

Oppression and abuse of process

[21] I deal with each of the three grounds advanced in opposition to the stay.

[22] The first matter of principle that requires analysis is whether Mr Gould's action in raising the set-off in respect of his liability under the cost judgment, is oppressive and an abuse of process.

[23] Mr Holland submitted that the facts justified the application of the rule in *Henderson v Henderson*. At 115, Sir James Wigram VC said:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject and contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[24] The rule or principle has been considered in a number of cases, in particular *Johnson v Gore Wood & Co.* [2002] 2 AC 1 and by the Supreme Court in *Lai v Chamberlain* [2007] 2 NZLR 7.

[25] Mr Holland submitted that it is manifestly unfair for the plaintiffs in the negligence trial to be vexed with any set-off that has been raised in relation to the costs judgment. He submitted it clearly should have been raised during the negligence trial.

[26] Mr Stewart QC referred me to Derham *The Law of Set-off* (3ed 2003) at 5.131 and following, where the authors say:

> When it is sought to litigate in a later action a cross-claim that would have given rise to a defence of equitable set-off if pleaded in an earlier action to enforce a debt, a judgment on the cost claim in the latter action would not contradict the earlier judgment for payment of the debt … Rather the substantive nature of the defence means that, prior to judgment for a set-off, the unpaid creditor's conscience is affected in equity such that he is not entitled to treat the debtor as being in default to the extent of the cross-demand, notwithstanding that the cross-demands still exists at common law.

[27] The authors at 5.132 discuss the *Henderson v Henderson* principle, as follows:

> The question remains whether it would be an abuse of process for the purpose of the *Henderson v Henderson* principle to bring a separate action on the cross-claim, rather than raising it as a defence in earlier proceedings. In *Escudier v Lloyds Bank plc* [[1996] EWCA Civ 1131] Hobhouse LJ, with whom Peter Gibson LJ agreed, accepted that a defendant who is sued in debt is not under any obligation to raise an equitable set-off, and Simon Brown LJ expressed a similar opinion in relation to the circumstances in issue in that case. Views to a similar effect have been expressed on other occasions. Indeed, the contrary view would sit uncomfortably with the position that Courts to date have accepted in relation to the common law defence of abatement, and it would be difficult to offer a rational explanation for treating the common law and the equitable defences differently.

[28] The author refers to the position in Australia which I need not further explore in this case because, having regard to the concession made by Mr Holland that Mr Alexander gave the evidence that he did, there is no need to test in this application the accuracy of the evidence given by Mr Alexander again.

[29] There is here an acknowledgement of liability for the fees. There can in these circumstances be no oppression or abuse of process in bringing the admitted liability in respect of those fees into account in relation to the judgment for costs. There is no need for a hearing to establish entitlement to the set-off. Therefore it cannot be said that raising this set-off is oppressive or an abuse of process. I reject the first ground advanced in opposition to the application for stay.

Is set-off available?

[30] The second matter of principle is whether on the facts of this case a set-off is available.

[31] Mr Holland submitted that the requirement of mutuality was lacking.

[32] There are, of course, three possibilities:

a) The claim for costs and the cost judgment are both post-receivership since the invoices that were issued by Mr Gould were issued post the appointment of a receiver;

b) The two claims, that is the claims for Mr Gould's fees and the cost judgment, are both in respect of facts that occurred pre-receivership; and

c) The legal fees claimed by Mr Gould are in essence a pre-receivership claim because they relate to work carried out and therefore a liability to pay being incurred before the receiver was appointed. On the other hand, the cost judgment relates to matters which occurred at the trial and are therefore properly classified as a post-receivership claim.

[33] In Blanchard and Gedye, *The Law of Private Receivers of Companies in New Zealand* (2008) at p 216, the authors state the general rule, as follows:

> The most difficult application of set-off in receiverships occurs where it is sought to set-off pre-receivership and post-receivership debts. Ordinarily the Courts have not allowed a set-off between debts arising before the receivership and debts arising afterwards. In one direction this does not materially affect the matter. If a receiver incurs a debt to a pre-receivership debtor of the company, both must pay, and the receiver's debt, being a personal liability, is paid ahead of the secured creditor's indebtedness. But if a pre-receivership creditor enters into a contract with the receiver under which the creditor becomes indebted to the company in receivership, generally the debt must be paid to the receiver without set-off.

[34] It is therefore necessary to determine whether the general rule applies to the facts of this case. Mr Stewart referred me to a number of the leading authorities, which I now examine.

[35] In *Felt and Textiles of New Zealand Ltd v R Hubrick Ltd (In Receivership)* [1968] NZLR 716, a receiver sold an asset of the debtor company to a creditor. The creditor sought to set-off against the purchase price a pre-receivership debt owing by the company. The creditor knew of the receivership when acquiring the asset.

[36] Richmond J held that there was no beneficial mutuality. At p 718, he said:

> [The creditor] when it agreed to purchase the calculating machine, had notice of the debenture and of the appointment of a receiver … The indebtedness of the respondent (the company) to the appellant (the creditor) was incurred at a time when the respondent was truly its own master. The indebtedness of the appellant to the respondent was incurred at a time when the respondent was acting not as a free agent but for the benefit of the bank which then had a fixed charge on the calculating machine … The position of the respondent was thus analogous to that of a trustee. In substance, the appellant was not dealing simply with the company but with the company and the debenture holder.

[37] In *Rendell v Doors and Doors Ltd (In Liquidation)* [1975] 2 NZLR 191, a receiver sold assets of the company to a creditor. The creditor sought to set-off a pre-receivership debt owing by the company. The creditor knew of the receivership when acquiring the assets. Chilwell J followed *Felt and Textiles of NZ Ltd v R Hubrick Ltd (In Receivership).* He held that the set-off was not available because of the lack of beneficial mutuality.

[38] In *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613 (CA) the defendant had purchased goods from a company knowing that it was in receivership. The defendant then took an assignment of a previous receivership debt owing by the company to a third party. The English Court of Appeal rejected the defendant's claim to set-off of this assigned debt against the price of the goods. The Court of Appeal reached that conclusion because there was no mutuality in the beneficial interest in the two cross-claims.

[39] *Blanchard & Gedye* at 212-213 observe that in respect of equitable set-off, that the absence of beneficial mutuality is not necessarily fatal, although it can furnish grounds for refusing to allow a set-off.

[40] Mr Stewart drew attention to the fact that lack of beneficial mutuality being not necessarily fatal to the set-off was recognised in both *Felt and Textiles* by Richmond J and by Chilwell J in *Rendell v Doors & Doors Ltd*. Richmond J at 718 said that the result may have been different had the receiver been carrying on the business of the company rather than realising the company's assets. Chilwell J at 202 observed that:

> It is conceivable that in the process of carrying on of a business competing equities could arise between the person claiming a set-off and the debenture holder.

[41] Mr Stewart submitted that a key feature in the three cases just referred to is that the unsuccessful claimant was attempting to set-off a pre-receivership credit against a debt that had been incurred under a post-receivership voluntary dealing and in circumstances where the claimant had obtained something of value from the company. In short, the claimant would have obtained value from the receiver without having to pay anything to the receiver in exchange.

[42] Mr Stewart further submitted that an important element of the general rule is that the debt against which the claimant asserts a right of set-off arose from a voluntary dealing with the company post-receivership. He submitted that in the instant case that does not apply. A cost judgment did not arise from Mr Gould dealing voluntarily with the receivers of Parkbrook Holdings Limited. Nor did Mr Gold obtain anything of value from the receivers.

[43] Mr Stewart next referred to *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1973] 1 All ER 394. In that case, the company owed the defendants £124. The company then agreed to sell goods to the defendants for £159. Before the goods were delivered and the price became payable, a receiver was appointed. The company then delivered the goods and claimed the price of £159. The defendants were allowed to set-off £124 that was owing to them in respect of the price claimed. Russell LJ said at 396:

> … the debenture holder could not be in a better position to assert those rights [that is rights under the contract of sale] than had been the assignor plaintiff company.

[44] Mr Stewart next referred to *Meagher Heydon and Leeming's Equity: Doctrines and Remedies* (4ed 2002) at 28-340. The authors summarise their analysis of the law on set-off and receivership as follows:

> The result, it is submitted, is this: a pre-receivership creditor of a company will not ordinarily be allowed to set-off the debt due to him by the company against a claim of the company against him which arose after the receiver was appointed. If there is a good legal set-off in those circumstances, it may not be pleaded, as unconscionable. A fortiori, what would otherwise be a good equitable set-off will not be allowed. In some (comparatively rare) circumstances, however, the set-off may be allowed: if the two transactions are so intertwined that it may be said that the claim of the defendant against a company impeaches the company's claim against the defendant (as in *Parsons v Sovereign Bank of Canada* [1913] AC 160), or if, for some other reason, it may be said that the secured creditor, as against the company's debtors, in equity occupy no better position than the company itself (as in *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd*[1974] QB 1; 1973 1 All ER 394) there is nothing unconscionable in pleading the set-off.

[45] Mr Stewart submitted that the receivers of Parkbrook Holdings Limited should not be in a better position to assert the claim against Mr Gould than Parkbrook Holdings Limited would have been had it not been in receivership. He submitted that had Parkbrook sued in its own right, Mr Gould would have been able to set-off his claim to legal fees against any judgment obtained by Parkbrook Holdings Limited.

[46] I accept Mr Stewart's submission. This case can be either looked at as one which falls within the second of the three possibilities I have earlier mentioned, namely two cross-claims that in essence arose pre-receivership; or it is a case which falls within what has been described as those comparatively rare circumstances where there is nothing unconscionable in pleading the set-off. Indeed, to fail to allow the set-off would give the receivers a benefit that the company itself would never have been able to enjoy.

[47] For these reasons, I reject the second ground pleaded in opposition.

Other grounds

[48] Although the application referred to s 310 of the Companies Act 1993, counsel's submissions did not concentrate on that section. That is understandable because the contest here is between the receivers of Parkbrook Holdings Limited and Mr Gould, and not the liquidator. Indeed, it was confirmed to me that the cost judgment, if paid in full, would produce no benefit to the general creditors of Parkbrook Holdings Limited. Accordingly, there is no need for me to analyse the application of s 310 of the Companies Act 1993 to the facts of this case.

[49] The third ground was not canvassed in any detail by counsel. That is understandable having regard to the acknowledgement quite properly made by Mr Holland and as confirmed by Mr Alexander's evidence that Parkbrook Holdings was responsible for payment of Mr Gould's fees. Accordingly, the third ground provides no basis for opposing the stay which is sought.

Conclusion

[50] I conclude that the judgment debtor is entitled to an order staying enforcement of the judgment dated 18 May 2007 and sealed on 2 July 2007. It follows from that conclusion that the charging order 8092873.1 registered on 5 March 2009 against identify NA 116D/920 must be cancelled and be removed from the title. I order accordingly.

Costs

[51] The judgment debtor is entitled to costs. If counsel cannot agree, memoranda are to be filed in support, opposition and reply at seven-day intervals.

JA Faire
Associate Judge