IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-1330
[2024] NZHC 3433

IN THE MATTER	of the Companies Act 1993
BETWEEN	NBL (NEW ZEALAND) LIMITED Applicant
AND	NORTHLAND FOOD LIMITED Respondent

Hearing: 5 November 2024 (by AVL)

Appearances: A R B Barker KC and Z Chen for Applicant
J W A Johnson and A Ho for Respondent

Judgment: 18 November 2024

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 18 November 2024 at 2.30 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

…….

Introduction

[1] Northland Food Limited (**Northland**) issued a statutory demand relating to unpaid rental it says is owed by NBL (New Zealand) Limited (**NBL**).

[2] The demand was for $269,302.93. NBL does not dispute that it has not paid the rental in the demand, but nonetheless applied to set the demand aside, relying on what it says is unpaid rental it is owed by a company called Supermega Market Limited (**Supermega**) which, for all intents and purposes is in the position of sub-tenant to NBL. NBL says the unpaid sub-rental is the reason it was unable to pay the rent claimed in the demand to Northland. Northland and Supermega have the same director and shareholder, Mr Yi Wu.

[3] Northland opposes the application to set aside the demand relying on the 6th Edition Auckland District Law Society Deed of Lease which provides:

> All rent shall be paid without any deductions or set-off by direct payment to the Landlord or as the Landlord may direct.

[4] Northland in effect says the application to set aside the demand fails on this ground without the need to consider what it characterises as a strained argument that NBL can rely on the unpaid sub-rent.

[5] The principles applicable to this application are not in dispute. In short, NBL must show it has a reasonably arguable set-off in respect of the sum demanded.

The history of the Deed of Lease

[6] The industrial building occupied by NBL was built for it as a bare shell. NBL was responsible for fitting out the building and installing equipment for the processing and packaging of milk powder and nutraceutical products. There was an Agreement to Lease dated 4 November 2016. By the time the building was completed and the parties were ready to complete the Deed of Lease required by the Agreement to Lease, the land was owned by Oyster Industrial Properties Limited (**Oyster**), which acquired the property in August 2018.

[7] The Agreement to Lease required NBL to provide an irrevocable unconditional on demand bank guarantee in favour of the Landlord from a registered trading bank in New Zealand for NZ $735,000 — said to be the equivalent of 12 months' rent and outgoings under the Agreement to Lease. This obligation was carried over into the Deed of Lease. The bank guarantee was expressed to be, "in order to secure the obligations owing by the Tenant to the Landlord under the Lease".

Supermega — the Co-operation Agreement

[8] For reasons that are in dispute, on 15 March 2022 Supermega entered into what is called the "Co-operation Agreement" with NBL. It seems the Co-operation Agreement was drafted by Mr Li, the general manager of NBL.

[9] Supermega says the Co-operation Agreement amounts to a sub-lease of the premises. Under the Co-operation Agreement, Supermega was to pay:

(a) all rent, wages and outgoings for the premises with the rental recorded as being NZ $78,000 per month; and

(b) NZ $20,000 per month described as a "depreciation of equipment fee".

[10] In relation to advances made by Supermega to NBL, the Co-operation Agreement recorded that NBL would repay the advance within 12 months and provided that the machinery and equipment on site would be offered as security albeit it recorded that a separate mortgage contract would be signed.

[11] Supermega says it advanced almost $800,000 to NBL. It called up that advance on 27 February 2024. Supermega ceased paying rental to NBL in April 2023. The precise reason why rent was not paid is unclear. Mr Wu, the director of Supermega, says that it is because NBL refused to repay the loans but Supermega does not say the unpaid rent was set-off against the debt owed by NBL. The Co-operation Agreement does not contain a no set-off clause so Supermega could now raise a set-off if NBL pursued the unpaid rental. There are other disputes between Supermega and NBL relating to NBL not purchasing product from Supermega as contemplated by the Co-operation Agreement.

[12] NBL points out that even if what it owed Supermega was set-off against Supermega's obligation to pay, Supermega still owes $520,000 for unpaid depreciation fees.

[13] NBL says the fact that Supermega stopped paying "sub-tenant" rental meant NBL was not in a position to pay its rent under the head lease to Northland. NBL complains that because Mr Wu controls both Northland and Supermega, it is not open to Mr Wu to have Northland call up the unpaid rental when the reason NBL cannot pay the rent is because Supermega has not paid its rent under the "sub-lease".[1]

[14] With Supermega not paying "sub-tenancy" rent, matters came to a head on 25 March 2024 when NBL attempted to cancel the Co-operation Agreement and essentially locked Supermega out. Supermega sought and obtained an interim injunction, where the following orders were made:[2]

(a) NBL is prohibited from restricting Supermega's access to the premises at 12 Harbour Ridge Drive, Wiri and from dismantling or removing any of the industrial equipment at the premises whether that be equipment owned by Supermega or by NBL.

(b) That prohibition is conditional upon Supermega paying a monthly rental of $78,000 including GST on the first of each month commencing 1 April 2024.

[15] Supermega paid rental to NBL for April and May 2024 as required by the terms of the injunction but NBL did not on-pay that rental to Northland. That unpaid rental is included in the statutory demand. Supermega obtained a variation to the injunction permitting it to pay the rental directly to Northland from June 2024. However, on 27 May 2024, Northland cancelled the lease for NBL's failure to pay rental for April and May 2024. An application for relief against forfeiture by NBL was not pursued.

---

1 NBL does not accept that the Co-operation Agreement creates a sub-lease but I refer to sub-tenancy rent to describe Supermega's rent obligations to NBL.

2 *Supermega Market Ltd v NBL (New Zealand) Ltd* [2024] NZHC 712.

Northland acquires the leased property

[16] Northland purchased the property from Oyster in a sale that settled on 30 June 2023, that is, shortly after the date of the Co-operation Agreement.

How the rent demanded by Northland is made up

[17] The demand attached a schedule of the unpaid rental as follows:

Date	Description	Debit	Credit	Running Balance
01/07/2023	Rent	$66,955.61		$66,955.61
01/08/2023	Rent	$66,955.61		$133,911.22
11/08/2023	Demand on bank guarantee		$477,252.06	$-343,340.84
01/09/2023	Rent	$66,955.61		$-276,385.23
01/10/2023	Rent	$66,955.61		$-209,429.62
01/11/2023	Rent	$66,955.61		$-142,474.01
01/12/2023	Rent	$68,629.49		$-73,844.52
01/01/2024	Rent	$68,629.49		$-5,215.03
01/02/2024	Rent	$68,629.49		$63,414.46
01/03/2024	Rent	$68,629.49		$132,043.95
01/04/2024	Rent	$68,629.49		$200,673.44
01/05/2024	Rent	$68,629.49		$269,302.93
Total				**$269,302.93**

[18] It will be seen that in August 2023, Northland which had the benefit of the bank guarantee referred to at [7] above, called on the guarantee and received the balance of the amount available under the guarantee. It seems following previous calls on the guarantee by the prior owner, the full amount available of $477,252.06 was received by Northland even though at that stage the rent was only in arrears by $133,911.22.

[19] Nonetheless, NBL has received full credit for the amount of the bank guarantee leaving $269,302.93 of rent outstanding.

[20] Mr Zhang of NBL complains about Northland calling up the full guarantee. However, Mr Zhang who must have been aware the guarantee had been called upon, has taken no steps to obtain from his bank the information provided to the bank by Northland that caused it to pay the full amount. In fact, in July 2023, Mr Wu wrote to NBL demanding overdue rental. NBL replied, inviting Northland to "please deduct the rental amount from the term deposit."

[21] Even if it was a breach of the terms of the guarantee for Northland to call up the entire guarantee, it is not clear what, if any, loss NBL could complain about given the full amount of the guarantee sum received by Northland has been applied to NBL's rent.

The grounds of the application

[22] The application was brought on the basis there is arguably a dispute as to the existence or quantum of the debt, that the demand ought to be set aside as an abuse of process and it is said Northland is estopped from claiming rental arrears. I do not consider there can be any dispute as to the existence or quantum of the debt given there is no issue taken with the correctness of the schedule attached to the demand. The starting point is that NBL has an obligation to pay rent to Northland.

[23] Mr Barker KC, counsel appearing for NBL, was not involved in the preparation of the application. The grounds raised in his submissions have a different focus.

[24] The arguments raised in the submissions are that:

(i) following the cancellation of the agreement, Northland has failed to return NBL's plant and equipment giving NBL an arguable set-off for its value which exceeds the amount in the demand;

(ii) as Mr Wu controls both Supermega and Northland, the amount claimed by Northland from NBL and the amount owed to NBL by Supermega for "sub tenancy rent" are inter-dependent, meaning it is unconscionable for one claim to be assessed without regard to the other, therefore they can be set-off by NBL; and

(iii) there is an implied term in the lease between Northland and NBL that Northland had a duty to do all it reasonably could to empower NBL to perform the lease, that is, pay rent and that term was breached by Northland.

[25] Again, Northland says the above arguments fail because of the no set-off clause. Other litigation and/or mediation/arbitration is underway under the Lease in respect of other disputes between the parties, in particular, in relation to the equipment.

[26] In my view, all Mr Barker's arguments are aimed at establishing a breach of contract by Northland which would give rise to a set-off available to NBL.

[27] NBL has agreed to pay rent without set-off or deduction. It has been settled at least since *Browns Real Estate Ltd v Grand Lakes Properties Ltd*, that a no set-off clause precludes a debtor from raising a set-off in the context of an application to set aside a statutory demand.[3] In short, such clauses require "pay first and argue later".

[28] It has been recognised that the wording of the ADLS Deed of Lease set out at [3] above, was amended to bolster prior wording. *Grant v New Zealand Motor Corporation Ltd* held it was not wide enough to contractually exclude the right of set-off.[4] As Mr Johnson, counsel for NBL, notes, Associate Judge Osborne in *Browns Real Estate*, commented that the wording of the clause to expressly preclude the set-off:[5]

> … may objectively be taken to have been deliberately constructed to avoid the difficulties that the Court of Appeal recognised with construction of the brief words 'any deduction' in *Grant*.[6]

[29] Mr Barker's written submissions do not address the basis upon which NBL should not be held to its contractual obligation to not raise a set-off in respect of unpaid rental. At the hearing Mr Barker developed the submission that the no set-off rule from *Browns Real Estate* is not absolute with the Court retaining a discretion to set aside a demand albeit all things being equal, that discretion will not be exercised in an applicant's favour if the sole ground to set aside the demand is the existence of a set-off.

---

3 *Browns Real Estate Ltd v Grand Lakes Properties Ltd* [2010] NZCA 425.

4 *Grant v New Zealand Motor Corporation Ltd* [1989] 1 NZLR 8 (CA).

5 *Browns Real Estate Ltd v Grand Lakes Properties Ltd* HC Invercargill CIV-2009-425-670, 10 March 2010 at [13].

6 Mr Johnson also refers to Mr Beck's article "Demands and Set Off" [2011] NZLJ 46 at 47: "The more extensive wording [of the no set-off clause] in *Browns* was clearly designed to remedy the gap, and it is therefore not very surprising that the Court decided to uphold the contractual right."

No set-off clause: the authorities

[30] The Court of Appeal in *Browns Real Estate Ltd* considered whether a contractual no set-off provision precludes a successful application to set aside a statutory demand under s 290(4)(b) of the Companies Act 1993 (**the Act**) where the application relies on a set-off. The Court said that the efficacy of a no set-off contractual provision would be undermined if statutory demands could be set-off on the basis of a set-off, counterclaim or cross demand, a commercial party had by contract expressly agreed, could not be raised. The Court said:[7]

> In our view a contractual no set-off provision of the type at issue in this case would normally result in the court's discretion being exercised against an applicant if the sole grounds for an application to set aside a statutory demand was the existence of a set-off, counterclaim or cross-demand which a party had expressly agreed could not be raised. We consider that commercial parties should be required to honour the bargain they have made, absent other grounds that tell against the recognition of a statutory demand. Grand Lakes, rightly in our view, conceded that an application to set aside the demand can be made under s 290(4)(c). Such an application would, however, need to be on grounds other than the existence of a set-off or counterclaim.
>
> (footnotes omitted)

[31] Mr Barker relied on Associate Judge Bell's decision in *Simply Logistics Ltd v Real Foods*.[8] The Judge's discussion in that case started with the Court of Appeal's reference in *Browns Real Estate* to the exercise of its discretion where the sole basis for the application was a set-off.

[32] Associate Judge Bell in *Simply Logistics* was not prepared to give effect to a no set-off clause because the amount the applicant sought to set-off was accepted by the respondent as being due and owing. However, the respondent claimed to have already set-off that amount against other amounts disputed by the applicant. The Judge said:

> In my judgment, Real Foods Ltd's appropriation of the undisputed invoices to the disputable parts of its claims, while asserting its claim in full for rent, is unfair and oppressive and takes this case out of the run of the mill.

[33] Further, there was a claim that the creditor had unlawfully retained property belonging to the applicant without any colour of right, that is, it had converted the

---

7 *Browns Real Estate Ltd v Grand Lakes Properties Ltd*, above n 3, at [17].

8 *Simply Logistics Ltd v Real Food* HC Auckland CIV-2011-404-3497, 14 September 2011.

applicant's property. The Judge was not prepared to apply the no set-off clause to that claimed set-off.

[34] A further decision relied on by Mr Barker was *Bountiful Holdings Ltd v University of Auckland*, another decision of Associate Judge Bell. There the Judge said:[9]

> In a similar way, I regard the claims here as disputes that, typically, could arise between landlords and tenant. The *Browns Real Estate* approach applies. The landlord is entitled to require the rent to continue to be paid to it, notwithstanding arguments as to it allegedly diverting work away from its tenant in favour of other caterers. *That may be hard on a tenant who finds its cash-flow cut off as a result of the actions of its landlord* but, hard as it may be, that is the effect of the contractual arrangements that the tenant has entered into.
>
> (emphasis added)

[35] The Judge concluded:[10]

> I accept that in issuing the statutory demand the university was doing no more than asserting its rights under the lease to recover payment of rent. It was entitled to exercise the powers under the lease, even though it may cause hardship on Bountiful Holdings Ltd. It is not something that gives any cause for setting aside the statutory demand.

[36] I note here that NBL is essentially in the same position as the applicant in *Bountiful Holdings Ltd* as it is asserting its cashflow, that is, receipt of "sub-tenancy" rental was cut off as a result of Mr Wu's actions via Supermega.

[37] There is only so much that can be gained from looking at the circumstances of other cases. Two cases where a no set-off clause was not applied arguably involved deceit by the party seeking to rely on the clause leading to the contract being entered into in the first place.[11] Such a consideration is not in play here as the Deed of Lease assigned to Northland was originally entered into between Oyster and NBL.

---

9 *Bountiful Holdings Ltd v University of Auckland* [2012] NZHC 1076 at [23].
10 At [25].
11 *Industrial Group Ltd v Bakker* [2011] NZCA 142 and *Sunrise Management Ltd v Bunnings Ltd* [2022] NZHC 317 at [54].

Does the nature of the alleged set-offs warrant not applying the no set-off clause?

[38] I am satisfied the no set-off clause applies in this case to prevent the alleged claims relied on by NBL being grounds to set aside the demand or that the alleged set-off is not reasonably arguable. Firstly, this was a commercial lease with a substantial monthly rent. I appreciate such will be a factor common to many cases where a no set-off clause is challenged. As Mr Johnson submitted, it is not unusual for a business to incorporate a company to hold land and buildings and a different company to own the trading business that might operate from the land and buildings. While those two companies may have the same shareholders and directors, the starting point is that they are separate entities. NBL was fully aware of that reality.

[39] Secondly, the point of the no set-off clause is to preserve cashflow, as already noted. There does not seem to be any correspondence from NBL calling upon Supermega to pay outstanding rent, notwithstanding that it ceased paying rent in April 2023.[12] Whether that was because NBL thought Supermega was off-setting the rent against the amounts owed by NBL to Supermega or the converse, that is that NBL was content to off-set its indebtedness to Supermega against the unpaid rent is unstated, but NBL knew it was not receiving rent from Supermega and that it was not paying rent to Northland from when it became lessor, yet NBL remained silent in respect of its entitlement to recover rent from Supermega and the unpaid depreciation charge (totalling $520,000).

[40] I now discuss each claimed set-off in a little more detail.

The rental for April/May 2024

[41] Even when Supermega paid rent as a condition of the injunction in April/May 2024, NBL failed to on-pay that rent to Northland.

[42] There can be no possible defence to NBL not paying that rental. In respect of these months, the actual receipt of rental from Supermega addresses the arguments raised by Mr Barker in relation to Mr Wu's control of both companies and in respect

[12] See also the discussion at [70] below. NBL during the currency of the lease did not seek to justify its non-payment of rent by reference to Supermega's default.

of the implied term discussed below. Nor can the issue of NBL's processing equipment have been justification for it not paying rent because at the time the April/May 2024 rent was not paid by NBL, the lease between it and Northland and NBL had not been cancelled. The rent payable on 1 April and 1 May 2024 totals $137,258.98. The no set-off clause undoubtedly applies to this sum. NBL cannot rely on its other claims to not pay this rental as its basic submission is that it would have used the Supermega sub-rent to meet the head tenancy rental — when it received that rental it failed to pay it to Northland.

The claim in respect of the plant

[43] As to the dispute around the plant, NBL says cl 20.1 of the Deed of Lease means that because NBL did not remove its plant before the end or termination of the term of the lease, ownership of items not removed at the landlord's election pass to the landlord without compensation payable to the tenant.

[44] With Northland having issued the requisite notices under the Property Law Act 2007 that it would terminate the lease for non-payment of rent, NBL had notice that the lease was going to be terminated and so had an opportunity to take steps to at least commence removal of its plant and equipment including, applying to have the injunction prohibiting it from removing the equipment from the premises set aside. Accordingly, this is not a case of a lessor not having an arguable claim to the tenant's plant. It was the absence of any "colour of right" in *Simply Logistics* that led the Court to exercise its discretion to set aside the demand in that case.

[45] NBL's argument that the equipment became fixtures and therefore its property at the time it was installed in my view, has less merit given the lease confirms "tenant's works" remain owned by the tenant throughout the term of the lease subject to the provisions applying on termination. The lease contemplated NBL repairing concrete floors which could be damaged by the removal of equipment fixed to the floor pointing to a right to such equipment remaining the property of NBL.

[46] However, at the end of the day, whatever claim NBL considers it has against Northland in respect of the plant and equipment, it is one squarely caught by the no set-off clause being one of those disputes that "typically could arise between landlords

and tenant" (to adopt Associate Judge Bell's wording from *Bountiful Holdings Ltd*), meaning the *Browns Real Estate Ltd*'s approach to the no set-off clause applies. Disputes about tenant's chattels or fixtures are not uncommon at the end of a lease. Such disputes are the very type of claim NBL agreed not to raise as a reason for not paying rent. Such do not warrant not "applying the no set-off clause".

[47] I will address the no set-off clause in respect of the implied terms below.

Set-off — mutuality

[48] NBL says it is entitled to set-off its claims against Northland for the rent it is owed under the "sub-tenancy".

[49] Mr Barker confronted the absence of identity between Northland and Supermega, recognising the importance of mutuality in a claim of equitable set-off discussed in *Hamilton Ice Arena Ltd v Perry Developments Ltd*.[13]

[50] Mr Barker highlighted that the Court in *Hamilton Ice* was not laying down an absolute rule requiring identity of parties saying:[14]

> While we would not wish to rule out the possibility that in some unusual circumstance it might be appropriate to allow equitable set-off where there is no identity of parties, any such circumstance (other than one justifying the lifting of the corporate veil) would have to be consistent with the extinguishment rationale.

[51] Mr Barker submitted that the reference to the extinguishment rationale appears to be to the interdependence of the two claims. Mr Barker submitted the focus is on the interdependence of the claims and the resulting unconscionability in accepting one claim without regard to the other. Mr Barker submitted that here the circumstances meant that interdependence between Northland's claim against NBL and NBL's claim against Supermega was as close as it was possible for it to be. Mr Barker relied on Mr Wu owning and controlling both Supermega and Northland. Mr Barker submits that the non-payment of the rent by Supermega was at the direction of Mr Wu even though Supermega continued to occupy the premises for its own commercial benefit

---

13 *Hamilton Ice Arena Ltd v Perry Developments Ltd* [2002] 1 NZLR 309 (CA).
14 At [9].

and Mr Wu knew NBL required the "sub tenancy" rental to meet its obligations to Northland. Mr Barker submitted this and other factors meant that this was a clear situation of interdependence between the claim NBL has against Supermega and Northland has against NBL.

[52] However, the claim of interdependence is not borne out by the contemporary actions of the parties. This is not a situation where Northland treated the non-payment of rent by Supermega as cancelling out NBL's obligation to pay rent under the head lease. Supermega stopped paying rent in April 2023 which NBL would have it is why it could not pay rent to Northland from when it became lessor. However, when Northland called for the rent in July 2023 (see [20] above), NBL's response was not to refer to the default by Supermega but to invite Northland to have recourse to the bank guarantee.

[53] Accordingly, this is not a situation where Northland's present action in issuing a demand for the unpaid rent is rendered unconscionable by its prior history of set-off.[15] NBL itself treated Supermega's obligation to pay rent as separate from its obligation to pay Northland.

[54] Of course the no set-off clause remains a difficulty for Mr Barker's submission even if the absence of identity of parties could be overcome. It is not uncommon for a defendant in resisting a plaintiff's claim for summary judgment to rely on a claim the defendant says it has against an entity related to the plaintiff. Commonality of control of entities does not create interdependence of claims. What might be called a practical interdependence of the claims of the type relied on here is, in my view, not of itself enough to override the need for identity of parties. The practical submission that if a party related to the plaintiff paid a disputed debt to the defendant then the defendant could pay the plaintiff would become a substitute for the requirement of identity of parties. This is because such an argument would always be available where there was not identity of parties but identity of control. The existence of commonality of control is not the type of unusual circumstance contemplated in

---

[15] See *Le Fleming v Awataieri Holdings Ltd* HC Dunedin CIV-2009-412-848, 19 March 2010; [2016] NZAR 802 where in the absence of identity of parties a history or agreed set-off or "squaring" was critical to finding an arguable set-off in the absence of identity of parties.

Hamilton Ice. Mr Barker's submission would equate identity of control with identity of parties effectively cutting across *Hamilton Ice*.

[55] Accordingly, I do not accept the submission that NBL can arguably set-off what it is owed by Supermega against what it owes Northland because; (i) there is no identity of parties; (ii) there is a no set-off clause; and (iii) the claims were treated by NBL as being independent when Supermega stopped paying rent.

Implied term

[56] Mr Barker relies on the following principle from *Mackay v Dick*:[16]

> … as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done *unless both concur in doing it*, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.
>
> (emphasis added)

[57] Mr Barker here submits the above principle means Northland had a duty to do all that it could reasonably do to empower NBL to perform the lease, that is, to pay rent.

[58] Mr Barker recognises there is a need here to "look through" NBL and Supermega. I will return to that point. However, in my view, the fundamental difficulty with Mr Barker's proposition is that the payment of rent is not an obligation NBL could only do if Northland concurred in it doing so — to use the language of *Mackay v Dick.*

[59] The primacy of the obligation on NBL to pay rent is clear from cl 1 of the lease and the no set-off clause. The existence of the no set-off clause is inconsistent with the idea that both landlord and tenant had to concur, that is, co-operate in or facilitate the payment of rent — that is NBL's obligation to pay rent was not one it could only meet or was dependent on Northland's co-operation.

---

[16] *Mackay v Dick* (1881) 6 App Cas 251 at 263.

[60] Further, Mr Barker recognises that the situation is complicated by the fact that Northland and Supermega are separate corporate entities. However, Mr Barker submitted it is established that the Court can look through corporate entities for the purpose of determining the substance of a party's actions.

[61] Mr Braker relied on the "concealment principle" from *Prest v Petrodel Resources Ltd* as follows:[17]

> … It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. **The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "façade", but only looking behind it to discover the facts which the corporate structure is concealing.** The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.
>
> (emphasis as per Mr Barker's submissions)

[62] Mr Barker submitted that it is at least arguable that the principle applies here, given the two companies are owned and controlled by Mr Wu. Further, Mr Barker submits Northland and Mr Wu knew that Supermega was required to pay rent to NBL and that if Supermega did not pay the rent then NBL would not be able to pay rent to Northland. Again, I note Northland did not raise Supermega's non-payment of rent as the reason it could not pay rent — and NBL invited Northland to have recourse to the bank guarantee.

[63] Accordingly, Mr Barker submits that through the actions of Mr Wu, Northland is in breach of its implied term to assist in performance of the lease. Therefore, Mr Barker asserts Northland cannot claim any unpaid rent as a result of having caused NBL's inability to pay rent due to its controller, Mr Wu, directing Supermega not to pay its "sub-tenancy" rent.

---

17 *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

[64] Assuming this analysis is correct, a breach of the implied term would sound in damages which NBL would seek to set-off against Northland. That brings us back to the no set-off clause.

[65] But the obligation to pay rent is not one that can only effectively be met by NBL if both concur in it being done. The *MacKay v Dick* principle is aimed at situations where it must have been contemplated that both parties would co-operate or do what had to reasonably be done to allow one of them to meet their contractual obligations. The payment of rent cannot be characterised as such an obligation as is clear from the passage in *Bountiful Holdings Ltd* at [34] above.

[66] Mr Barker gave the example of a tenant being unable to prevent a landlord from fulfilling repair obligations. Mr Barker also referred to *CF & SP Pty Ltd v FAI General Insurance Co Ltd.*[18] In that case, a lessee was contractually entitled to use premises as a night club. The lessee wanted to undertake work on the premises for its night club operation which required local authority consent. Before granting approval, the local authority required that the lessor give consent. The Court held that the lessor was under an implied obligation to furnish the consents sought by the local authority because a night club was a permitted use of the premises under the lease.

[67] These are cases where the co-operation or facilitation of one contracting party is required to permit the counter party to meet their own obligation or take advantage of a contractual right under their contract. Here, NBL says it can "look through" the companies to say that Northland via Mr Wu is obliged to ensure Supermega pays its sub-tenancy rent.

[68] Two further authorities referred to by Mr Barker make it clear that the *MacKay v Dick* term must still meet the requirements for an implied term. Those cases are *Gardiner v Gould*,[19] and *Devonport Borough Council v Robbins,* both Court of Appeal authorities.[20]

---

18 *CF & SP Pty Ltd v FAI General Insurance Co Ltd* (NSWSC) 4086/98, 17 December 1998.
19 *Gardiner v Gould* [1974] 1 NZLR 426 (CA).
20 *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 (CA).

[69] Mr Johnson submitted that the implied term argued for here does not meet the test for implication.[21] The legal test for implication of a term is a standard of strict necessity which is a high hurdle to overcome. The implied term must also not contradict any express term of the contract. Making NBL's obligation to pay rent effectively conditional on the implied term contended for is, in my view, inconsistent with the strict obligation to pay rent. Nor is the implied term strictly necessary as the rent payment provisions of the lease otherwise function perfectly well.

[70] There is also merit in Mr Johnson's submission that NBL's obligation to pay rent was not conditional upon receiving payment from Supermega because when Northland made demand for payment of rent in July 2023, NBL agreed Northland could deduct rent from the bank guarantee. NBL did not assert the implied term it now asserts exists when Supermega stopped paying rent.

[71] Supermega may have had legitimate reasons for not paying rent. Northland cannot be deprived of the benefit of its entitlement to rent protected by the no set-off clause because of apparently disputed issues between NBL and Supermega. That is all the more so when there is no evidence NBL complained to Northland of Supermega's non-payment of rent when it first occurred— rather it at least acquiesced in Northland assessing the bank guarantee.

[72] It follows from the above conclusions that I am satisfied the application to set aside Northland's statutory demand should be ***dismissed***.

[73] Time for NBL to meet the demand is pursuant to s 291(1)(a) of the Act is extended for *20 working days* from the date of this judgment. If the demand is not satisfied, Northland may apply to have NBL put into liquidation.

---

[21] *Bathurst Resources Ltd v L&M Cole Holdings Ltd* [2021] NZLR 696 at [116].

Costs

[74] Northland has the benefit of a solicitor-client cost clause in its lease. If costs cannot be agreed, memoranda may be filed *within 10 working days*.

_____

Associate Judge Lester

Solicitors:
Righteous Law Limited, Auckland (for Applicant)
Crimson Legal, Auckland (for Respondent)

Copy to counsel:
J W Johnson, Barrister, Auckland (for Respondent)