IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002031
[2014] NZHC 2786

BETWEEN	GLOVER NO. 2 LIMITED Applicant
AND	CIT HOLDINGS LIMITED Respondent

Hearing: 31 October 2014

Appearances: R C Knight and T Chubb for Applicant
M D Pascariu and C L Haemmerle for Respondent

Judgment: 10 November 2014

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

This judgment was delivered by me at 1.00 pm on 10 November 2014 pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Lane Neave, Auckland
Minter Ellison, Auckland

[1] Glover No. 2 Limited (Glover No. 2) applies to set aside a statutory demand issued against it by CIT Holdings Limited (CIT) dated 29 July 2014 and served 1 August 2014. The sum demanded is $14,486.88.

[2] The demand is for payment of costs which Glover No. 2 has been ordered to pay to CIT by the High Court,[1] the Court of Appeal[2] and the Supreme Court.[3] There are no outstanding appeals in relation to the costs orders, nor have any of the orders been stayed.

[3] The disputes between Glover No. 2 and CIT stem from business arrangements put in place during the former marriage of a Mr Olliver and a Ms Sparks. Through trusts in which they respectively had interests (the Glover Trust[4] for Mr Olliver, and the Waimarie Trust for Ms Sparks) they entered a joint venture agreement to develop residential properties in St Heliers, Auckland. The intention was that on conclusion of the intended development the proceeds, including cash assets and the family home, would be divided between the two trusts.

[4] CIT was set up to purchase and hold the properties which were to be developed, on behalf of the Glover Trust and the Waimarie Trust. It spent approximately $10m buying properties. This was funded by an advance from the Bank of New Zealand and funding from the Waimarie Trust.

[5] The shares in CIT are owned by the Glover Trust. Mr Olliver is its sole director.

[6] These arrangements were put in place early in 2009. In 2011 Ms Sparks set up the Glover No. 2 Trust, assigned to it the interests of the Waimarie Trust, and arranged for some of the development properties to be transferred to it. Litigation ensued in relation to the transfers of property, and resulted in directions that the properties be transferred back to CIT. Eventually, and not without difficulty, this

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1 *The Glover Trust Ltd v Glover Trust Corp Ltd* [2013] NZHC 545.
2 *Glover No 2 Ltd v The Glover Trust Ltd* [2013] NZCA 608.
3 *Glover No 2 Ltd v Glover Trust Ltd* [2014] NZSC 54.
4 This is a separate trust from the applicant, Glover No. 2 Trust, see [9].

occurred. It is this litigation which has given rise to the costs orders which are now the subject of the demand by CIT.

[7] Since this application was filed a further costs order has been made in favour of CIT against Glover No. 2 in the sum of $37,689.60 and a further demand under s 289 of the Companies Act has been issued. This application does not relate to this demand.

[8] Section 290 of the Companies Act provides:

> **290 Court may set aside statutory demand**
>
> (1) The Court may, on the application of the company, set aside a statutory demand.
>
> (2) …
>
> (3) …
>
> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that –
>
> (a) …
>
> (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
>
> (c) The demand ought to be set aside on other grounds.

[9] Glover No. 2 does not dispute that it is indebted to CIT in the sum sought in the demand. It says, however:

- It is solvent, its primary asset being a debt of, now, $3.312m owed to it by CIT, being the balance of the funding I have referred to.
- It has a counterclaim, set-off or cross-demand for this debt.
- CIT is using the statutory demand procedure in an unfair and oppressive manner in order to bring undue pressure and financial hardship on Ms Sparks.

[10] CIT says that the funding supplied by the Waimarie Trust at the outset was by way of capital, and not by way of a loan. Its fundamental position in relation to

this application, therefore, is that there is not a counterclaim, set-off or cross-demand in respect of the debt claimed in the notice. It is convenient to deal with this issue first.

[11] In *Industrial Group Ltd v Bakker*,[5] the judgment of the Court given by Fogarty J included the following passage:[6]

> We note that the statutory scheme is for applications to set aside statutory demands to be a summary proceeding. The application must be made within 10 working days of the date of service of the demand: s 290(2)(a). No extension of time may be given: s 290(3). It follows that it would be unusual for the High Court to engage in detailed analysis of the merit of any counterclaim set-off or cross demand. The section calls for a prompt judgment as to whether there is a genuine and substantial dispute. It is not the task of the Court to resolve the dispute. The test may be compared with the principles developed in cognate fields such as applications to remove caveats, leave to appeal an arbitrator's award and opposition to summary judgment.
>
> The approach required by the "appearance" test in s 290 is a review with a low threshold. The tight time constraints distinguish the s 290 discretion from that to be exercised on, say, a summary judgment application, where the presence of complex legal issues is not necessarily a bar to a remedy. As with leave to appeal an arbitrator's award, the hearing should, in the normal course, be short and to the point, and the judgment likewise.

[12] There is no dispute that when the joint venture was being put in place, two groups of properties were bought by CIT, and for that purpose Waimarie provided $1.89m and, later, $1.65m, none of which has been paid back to Waimarie. Mr Pascariu confirmed that there is no dispute that whatever entitlement Waimarie may have to receive these monies in due course, if any, that entitlement has been validly assigned to Glover No. 2. The argument for CIT is that the funds were provided as capital and not as a loan, and are not therefore repayable except by way of the ultimate distribution of the joint venture proceeds, after sale of the properties, repayment of indebtedness including bank funding and commitments to the IRD, and other creditors.

[13] In support of this Mr Pascariu refers first to the joint venture agreement itself. An undated and unsigned copy of a document purporting to be a joint venture

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5 *Industrial Group Ltd v Bakker* [2011] NZCA 142, (2011) 20 PRNZ 413.
6 At [24] and [25].

agreement was produced so I proceed on the basis that there is a dated and executed version of this document in existence.

[14] Recital C to this agreement says:

> Glover and Waimarie intend to contribute to the Joint Venture by investing capital and borrowing on current account loans to the Joint Venture on the basis set out in this agreement.

[15] Self-evidently this sentence is clumsily worded but it does refer to investing capital.

[16] Clause 2.3(a) says:

> Waimarie shall contribute the initial capital of $2,000,000.

[17] Again, there is reference to capital. There is no indication on whether this would be share capital for CIT, or an advance to a capital account with CIT.

[18] Clause 3.1 is in the following terms:

> The funding requirements of the Joint Venture shall be met:
>
> (a) By the initial capital contribution and borrowing by the parties.
>
> (b) Borrowing by the parties for the purposes of the Joint Venture shall include the initial loan advances received by CIT for the purchase of the Property. Such borrowing to be a charge against the remainder of the Property to the exclusion of the residential portion to the extent that is possible.
>
> (c) Further funding requirement shall be from time to time determined by parties.

[19] Mr Pascariu relies on the reference to the "initial capital" in (a) as support for CIT's position. I note, however, the reference to "initial loan advances" received by CIT for purchase of the property in (b). There seems to be room for argument that this is a reference to monies provided initially by Waimarie.

[20] To assist in deciding the partners' intentions on the status of the sums paid by Waimarie, it is instructive to consider the way the parties have recorded the position in CIT's accounts.

[21] The accounts for CIT for the nine months ending 31 March 2014 are in evidence. Under the heading "Advances from Related Parties" the sum of $2,518 is shown to be owing to Glover No. 2. This appears to be consistent with the notion that the larger sums paid by Waimarie were not by way of advances.

[22] This information is contained in note 8 to the accounts. Note 9 refers to share capital, but the figure columns simply record dashes, which I take to mean zero share capital.

[23] However, in the statement of financial position, whilst the share capital is similarly marked, there is an entry "JV Partners contributed equity", to which $3,655,000 is ascribed. There is no explanation of the status of this figure. It is not shown as share capital and it is not shown as a liability. Rather, it is under the heading "Equity". There is a reference of possible relevance in note 10 to the accounts:

> CIT Holdings Limited trades as bare trustee for assets owned by Waimarie Joint Venture. The funds contributed by the joint venture partners were used to enable the purchase of the properties in Waimarie Street. These properties have provided security for bank finance to support the company's continued operations.

Against that entry the figure of $3,655,000 is shown.

[24] There is no indication on this set of financial statements of who prepared them. Certainly, they were prepared well after the parties separated and indeed well after their disagreements in relation to their financial affairs had been aired in the High Court and the Court of Appeal. Mr Olliver is the sole director of CIT Holdings Limited now, and it may be taken that he arranged the preparation of this set of accounts. The sums which his ex-wife says were advances by her trust are not thus classified. I consider the entries I have referred to are obscure.

[25] However, Ms Sparks has produced as an exhibit to her affidavit in support of this application an affidavit affirmed by Ms A E Dew on 22 March 2013, in opposition to an application then before the Court for a freezing order. Ms Dew is an accountant. She says she has known "Greg and Sarah Olliver", that is Mr Olliver and Ms Sparks, since 2008. She then says:

> I was employed by them when they were together as a couple as senior accountant for various of the entities operated by them or under their effective control including all of the parties to this proceeding as well as the CIT group of companies, the shares in which are owned by the [reference is made to the trustees of the Glover Trust].
>
> Throughout their various commercial and personal trials and tribulations I have been a trusted employee of the Ollivers. I like and respect them both.

[26] After discussing other matters Ms Dew then says at paragraphs 7 and 8:

> Based upon my knowledge of the financial affairs of all of the entities in the Olliver group (specifically the plaintiff, the Waimarie Trust and the CIT group of companies) I have been asked to comment on discrete financial transactions between the Waimarie Trust and CIT Holdings Limited in 2009 in respect of the JVA.
>
> I can confirm that the trustees of the Waimarie Trust have advanced the sum of $3,655,000 to CIT Holdings Limited as follows:
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> (a) In or about March 2009, the sum of $1,980,000 in respect of acquisition of properties [*then described*] ("the first advance") and
>
> (b) In or about April 2009 the sum of $1,675,000 in respect of its acquisition of the subject properties ("the second advance") ("the Waimarie advances").
>
> During 2012 a part repayment of $342,100 was made in respect of the Waimarie advances leaving a balance owing as at today of $3,312,900.

[27] The final passage in her affidavit, of present relevance, is paragraph 12:

> In the book of accounts for CIT Holdings Limited and the Waimarie Trust respectively, the Waimarie advances are recorded as follows:
>
> (a) For CIT Holdings Limited – as an advance from the Waimarie Joint Venture, and
>
> (b) for the Waimarie Trust – as an advance to the Waimarie Joint Venture.

[28] That affidavit was affirmed by Ms Dew on 22 March 2013. Plainly the accounts have been materially altered on behalf of CIT, without any explanation being given, since Ms Dew gave her evidence. Clarity has been replaced by obscurity.

[29] Mr Pascariu says that Glover No. 2 must lay an evidentiary foundation for its claim to a set-off, as it is for an unliquidated sum. He relies on *Covington Railways*

Ltd v Uni-Accommodation Ltd.[7] In discussing set-offs and cross-claims in terms of s 290, the Court said:

> … Where there are liquidated sums due each way, that is simply an arithmetical exercise. It is more difficult if, on the applicant's side, there is an indisputable liquidated sum, but the other party's claim is for an unliquidated sum with liability and/or quantum in dispute. Then, in order to impeach the statutory demand and overcome the presumption in s 287(a) that the company is unable to pay its debts when it has failed to comply with the demand, it must be able to do more than merely assert that there is an available set-off. It must be able to point to evidence before the Court showing that it has a real basis for the claimed set-off and that accordingly the applicant's claim to be a creditor is, to the extent of the set-off, seriously in doubt. In the words of Buckley LJ in *Bryanston Finance Ltd v De Vries (No. 2)* [1976] Ch 63, 78, it must show that there are "clear and persuasive grounds" for the set-off claim …

[30] Mr Pascariu says there is not only an issue over whether the sums paid to CIT were advances, or had some other character, but also in relation to the amount that may now be recoverable, if any. Whilst he does not take issue with the sums paid initially, he notes that in his affidavit Mr Olliver sets out a table showing the estimated financial position of CIT at the present time. The table shows a deficit of $3,196,577.38. The only sum shown as owing to Glover No. 2 is $2,517.90. The table shows a sale price for the properties of $10,570,000. Mr Olliver says that CIT has sold the properties for this sum.

[31] Mr Knight says that is not accepted. Although the properties were publicly offered for sale in May 2014 and no offers were received, the current alleged sales are to Mr Olliver, or entities associated with him. Ms Sparks in her affidavit briefly rejects the accuracy of the statement of position. She notes that CIT holds the properties as bare trustee for the trusts which are parties to the joint venture agreement, yet they have allegedly been bought by the director of CIT and entities associated with him. This, she says, is a breach of trust by CIT.

[32] Nonetheless, relying on this statement, Mr Pascariu says that repayment of any sum to Glover No. 2 is what he describes as contingent, which I take to mean that there is only a prospect of any repayment if the financial position turns out to be materially better than Mr Olliver's statement of position suggests it is. Plainly it

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7 *Covington Railways Ltd v Uni-Accommodation Ltd* [2001] 1 NZLR 272 (CA) at [11].

would need to improve by the stated shortfall plus the sums claimed by Glover No. 2, a total of well over $6,000,000.

[33] For the purposes of this application I am satisfied that of the two sums paid by Waimarie to the joint venture for use in purchase of the first and second tranches of property respectively, a sufficient evidentiary foundation has been shown that the second payment of $1,650,000 was an advance to the joint venture, in other words an advance to CIT. I do not exclude the possibility that the first payment should be similarly characterised. However, there is less doubt in relation to the payment of $1,650,000:

- In the judgment of the Court issued on 20 March 2013, the learned Judge described the first payment of $2,000,000 by the Waimarie Trust as a "contribution", and the second payment of $1,650,000 as an "advance".

- Although clause 2.3 of the joint venture agreement describes the $2,000,000 payment as capital, funding beyond that is described as borrowing.

- Although the supplementary joint venture agreement refers to Waimarie contributing further capital of $1,675,000, it is only (at least on the evidence before me) in the recent accounts for nine months to 31 March 2014 that this sum has been thus characterised.

- Ms Dew is quite clear that both the payments made were advances and were thus recorded in the accounts.

[34] It is not possible, or necessary, on this application to reach a concluded view on the present financial position with the joint venture. Ms Sparks raises doubts in relation to the table of position given by Mr Olliver. Whilst her comments are not specific they must be seen in context. She is estranged from Mr Olliver and he is the sole director of CIT. Her ability to challenge what he says is necessarily limited. She is faced with his having apparently bought the properties from the trustee of

which he is the sole director. On any view of it, this is a transaction which warrants independent examination.

[35] Further, the statement of financial position for the nine month accounts to 31 March 2014 shows CIT having net assets of $908,134. This is based on "work in progress" of $10,761,167 which, on the face of the statement, could only represent the value of the land. This figure is very close to the figure at which Mr Olliver says he has bought the properties, yet in his table of the financial position, in his affidavit, a resulting position differing by many millions of dollars is disclosed. I am not prepared to accept his assessment of the position at face value.

[36] My examination of Mr Olliver's table and the nine month accounts to 31 March 2014 is necessarily discursive, because no professional analysis was put in evidence. To a sufficient extent, however, the figures given speak for themselves.

[37] Approaching an assessment of the evidence in accordance with the principle enunciated in *Industrial Group Ltd v Bakker*,[8] I find that in terms of s 290(4)(b) of the Companies Act, Glover No. 2 Limited appears to have a counterclaim or cross-demand exceeding the sum claimed in the statutory notice. Absent any reason not to do so, the statutory demand should be set aside.

[38] Mr Pascariu submits that any rights that Glover No. 2 may have are against Glover. I disagree. However one characterises the payments, they were made to CIT and are variously described either as working capital of CIT or as advances to it. There is more than sufficient evidence before me to show an apparent liability by CIT.

[39] Mr Pascariu notes that the scheme of the High Court Rules, and the Court of Appeal (Civil) Rules 2005 exhibit an intention that once costs have been ordered and fixed they must be paid immediately. I accept that submission. There is no question that the costs orders are just that and, as I have noted, none of the orders has been stayed. The issue before me, however, is different, as it arises under the Companies Act and concerns a statutory notice which has a specific statutory effect. Unless the

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[8] *Bakker*, above n 5, at [12].

notice is set aside, it seems inevitable that an application would be made to wind up Glover No. 2. The status of the debt must be given due weight but in the circumstances of this case there are a number of factors which, in my opinion, outweigh it:

- There is an arguable cross-claim or counterclaim for at least 100 times the present debt.
- There are well-founded reasons to express concern over the representation of the financial position put before the Court by Mr Olliver.
- At present Mr Olliver has sole control over the realisation of the assets, yet his actions stand to materially adversely affect Glover No. 2.
- The parties are not at arms-length, because of the fiduciary duty CIT owes to Glover No. 2, and to Glover. It describes itself as a bare trustee.
- There is a further layer of complication as the relationship between the Glover Trust, the Glover No. 2 Trust and CIT is necessarily intertwined with the relationship between Mr Olliver and Ms Sparks. There is scope in the circumstances of this case for undue pressure to be brought to bear by use of a notice under s 289.

Outcome

[40] For the reasons given, the statutory notice dated 29 July 2014 is set aside.

[41] Glover No. 2 is entitled to costs against CIT Holdings Limited on a 2B basis plus disbursements fixed by the Registrar.

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J G Matthews
Associate Judge