

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHU ROHE**

**CIV-2022-409-412
[2023] NZHC 834**

BETWEEN	SIKA (NZ) LIMITED Plaintiff
AND	PEGASUS ENGINEERING LIMITED First Defendant
AND	GAVIN ERNEST LAWRY Second Defendant

Hearing: 20 March 2023

Appearances: A W Johnson and C W Gambrill for Plaintiff
D J C Russ for First and Second Defendants

Judgment: 19 April 2023

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 19 April 2023 at 3.00 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] Sika (NZ) Ltd (Sika) supplies a range of specialty products for construction and industrial purposes including intumescent coatings.

[2] Pegasus Engineering Ltd (Pegasus) is an engineering company. Gavin Lawry is a shareholder and director of Pegasus.

[3] Pegasus was contracted to undertake the supply and fabrication of structural steel for the construction of buildings at Lincoln University. This included the application of an intumescent coating to the structural steel to protect its load bearing capacity against fire.

[4] On 24 June 2021, Mr Lawry completed a credit account application form (the credit application) with Sika on behalf of Pegasus. The credit application was accepted by Sika. Pegasus thereafter placed orders with Sika for goods relating to the Lincoln University project. Between September 2021 and April 2022 Sika supplied Pegasus with intumescent coatings and related products at a total price of \$518,536.82 for which Pegasus has paid Sika \$274,406.02, leaving a balance of \$244,130.80.

[5] Sika applies for summary judgment against Pegasus and Mr Lawry to recover the \$244,130.80 along with contractual interest and costs. It brings its claim against Pegasus as the party to whom the product was supplied under the terms of the credit application. It claims against Mr Lawry on the basis he signed the credit application form as a guarantor of Pegasus's obligations. Both Pegasus and Mr Lawry dispute the claims.

[6] There is no dispute that Sika supplied the product that was ordered by Pegasus and at the correct price. Pegasus says, however, that in placing orders with Sika it relied upon representations made by Sika that the intumescent coatings were suitable for both off-site and on-site application. It says such representations were false and misleading as the products were unsuitable for on-site application or incapable of being applied on-site to the specifications required for the project. Pegasus says as a result of the false and misleading representations it has suffered losses that exceed the

amount claimed by Sika. It says it has crossclaims which are a defence to summary judgment.

[7] Sika does not accept that any false or misleading representations were made but says, in any event, Pegasus is unable to oppose summary judgment because the credit application included an effective no set-off clause. Sika says Pegasus must pay the balance owed and pursue its crossclaims in other proceedings. Responsibly, Sika accepts that if it is arguable that the no set-off clause is ineffective, summary judgment cannot be granted.

[8] Mr Lawry defends Sika's claim on the basis that he signed the credit application form as director of and on behalf of Pegasus and not as guarantor of Pegasus's obligations.

[9] Pegasus pleads that should summary judgment be entered, enforcement of the judgment should be stayed, but that argument is not now pursued.

[10] Broadly then, the issues that arise are:

- (a) Does the no set-off clause in the credit application form preclude Pegasus from raising its crossclaims against Sika in defence of summary judgment?
- (b) Did Mr Lawry guarantee Pegasus's obligations to Sika?

Summary judgment principles

[11] The Court of Appeal in *Krukziener v Hanover Finance Ltd* summarised the correct approach to summary judgments:¹

[26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried ... The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated ... The Court will not normally resolve

¹ *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307.

material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable ... In the end the Court's assessment of the evidence is a matter of [judgement]. The Court may take a robust and realistic approach where the facts warrant it.

(citations omitted)

The claim against Pegasus

The no set-off clause

[12] Clause 3.1 of the credit application states:

You shall pay the price:

- (a) No later than the 30th of the month following the date of the invoice or, if where required, immediately after the Goods or Equipment have been delivered in accordance with clause 9 (**Payment Date**);
- (b) In full without deduction or set-off of any kind;
- (c) To the bank account nominated by us in writing from time to time.

[13] There has been a handwritten change to clause 3.1 so that payment was to be made on the 30th rather than the 20th of the month following invoice. It is not clear who made that change. The no set-off clause (but without the change) appeared on the invoices issued by Sika to Pegasus for the supply of products.

Sika's submissions

[14] Sika says the effectiveness of no set-off clauses has been recognised in the High Court and Court of Appeal. It relies particularly upon the High Court and Court of Appeal decisions in *Browns Real Estate Ltd v Grand Lakes Properties Ltd* to which I shall refer below.² Sika's position is that the no set-off clause is a total answer to Pegasus's defence to summary judgment.

² *Browns Real Estate Ltd v Grand Lakes Properties Ltd* HC Invercargill CIV-2009-425-670, 10 March 2010 and *Browns Real Estate Ltd v Grand Lakes Properties Ltd* [2010] NZCA 425, (2010) 20 PRNZ 141 (CA).

[15] Sika argues the no set-off clause is drafted widely and, consistent with the principles recognised in *Grant v NZMC Ltd*,³ designed to cover off any possibility of a purchaser avoiding its payment obligations by raising disputes by way of set-off or crossclaim as Pegasus seeks to do here. It says there is nothing to prevent Pegasus from pursuing a claim against it, but it cannot avoid its obligation to make immediate payment for products supplied without deduction or set-off of any sort.

[16] Pegasus argues the no set-off clause is ineffective for two reasons. First, it contends that a no set-off clause will not operate to prevent affirmative defences which do not involve a countervailing money claim, such as where the Court may avoid or vary a contract under s 43 of the Fair Trading Act 1986, or where there has been a total failure of consideration. Second, it says that the no set-off clause is ineffective to contract out of Sika's obligations under the Fair Trading Act.

Analysis

[17] No set-off clauses have been held to be enforceable and effective according to their terms.⁴ They regularly appear in contracts for the supply of goods between commercial parties, such as that entered into between Sika and Pegasus.

[18] In *Browns Real Estate Ltd v Grand Lakes Properties Ltd* the issue was whether a statutory demand issued by Grand Lakes in respect of outstanding rent should, notwithstanding a no set-off clause in the lease, be set aside on the grounds that Browns had a counterclaim against Grand Lakes arising from misrepresentations as to quality and characteristics of the retail premises during negotiations for the lease.⁵ The Court of Appeal dismissed an appeal from a decision of Associate Judge Osborne refusing to set aside the statutory demand.⁶ The Court of Appeal said:

[14] In our view, by raising the counterclaim in response to the statutory demand, Browns is seeking to justify the non-payment of the rent. In so doing, Browns are in breach of cl 3.1 which prohibits withholding of rent (and any other payments due under the lease) on any account. Associate Judge Osborne was correct to conclude that the clause at issue in this case precludes this.

³ *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA).

⁴ See as examples *Patrick v Bank of New Zealand* [2018] NZCA 122 and *Bromley Investments Ltd v Fitzsimmons* [2009] NZCA 382, (2009) 19 PRNZ 850.

⁵ *Browns Real Estate Ltd v Grand Lakes Properties Ltd* (HC), above n 2.

⁶ *Browns Real Estate Ltd v Grand Lakes Properties Ltd* (CA), above n 2.

...

[17] ... 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. ...

(footnote omitted)

[19] Here, the no set-off clause is unremarkable and designed to prevent Pegasus disputing its obligation to pay the price for products supplied in full no later than the 30th of the month following invoice (or earlier if Sika so required) “without deduction or set-off of any kind”. On its face, Pegasus’s refusal to pay the balance of the price for products supplied is a breach of the no-set off clause.

Avoidance of the contract

[20] Pegasus argues that it has rights of action against Sika for breaches of ss 9, 12A and 13 of the Fair Trading Act. Other than to refer to those provisions, Mr Russ did not advance any submissions as to the application of them to the facts of this case. For present purposes, I will assume that such claims are arguable.

[21] Mr Russ then submits that the relief Pegasus will be seeking under s 43 for breaches of the Fair Trading Act may include an order setting aside or avoiding the contract between Sika and Pegasus or varying the contract in any way the Court deems fit.⁷ He says such relief is not barred by a no set-off clause.

[22] In support of his submission, Mr Russ referred to several decisions of Associate Judge Bell, but recognised the most helpful from Pegasus’s perspective is *Harcourts Group Ltd v Grewal*.⁸ There, Harcourts sought summary judgment against Mr and Mrs Grewal. The Grewals were guarantors for loans and franchise fees payable by their company to Harcourts. The Grewals admitted giving the guarantees and the fact of loans but disputed liability for franchise fees. In part, their defence was that Harcourts had breached the Fair Trading Act. The relief sought under s 43(3)(a) of that Act included an order declaring the guarantees and loan agreements to be void.

⁷ Fair Trading Act 1986, s 43(3)(a) and (c).

⁸ *Harcourts Group Ltd v Grewal* [2018] NZHC 2983.

Harcourts argued that contractual no set-off provisions prevented the Grewals raising defences to the claims.

[23] Associate Judge Bell recognised that *Grant v NZMC Ltd* was authority that in equity an unliquidated crossclaim may be run as a defence and equitable set-off can be excluded by agreement.⁹ However, he considered that no set-off clauses do not prevent a defence being raised to liability under a guarantee where it is said the taking of the guarantee was itself affected by a vitiating circumstance:

[61] In my [judgement], the better view is that the no set-off clause does not prevent Mr Grewal saying in defence that he is not bound by the guarantee at all because it should be set aside under s 43 of the Fair Trading Act. A contractual no set-off clause is procedural. It suspends a party's right to raise a matter of opposition to a claim, as opposed to extinguishing those rights. A defendant barred from raising a cross-claim because of a no set-off clause may run its claim later, as it is only barred from raising the matter in reduction of its liability to the plaintiff. Set-off is used to reduce a liability which is otherwise binding. Set-off does not, however, invalidate the original obligation on which the defendant is sued. When a defendant denies any liability at all to the plaintiff — as when the defendant alleges the obligation never arose or that, if it arose, it should be set aside — the defendant is not raising a set-off. Instead, the defendant is asserting a defence which goes to the foundation of the plaintiff's claim, not just to reduction of an established liability.

[62] Misleading or deceptive conduct under the Fair Trading Act does not automatically avoid the contract induced by that misleading conduct. The contract is avoided only if the court makes an order declaring the contract to be void, in whole or in part, under s 43(3)(a). A party sued under an agreement, wishing to have the agreement avoided under s 43(3)(a), will need to claim that relief expressly. ...

[63] Applying the no set-off clause to bar Mr Grewal from obtaining an order avoiding the guarantee in this proceeding would not just suspend his right to obtain that relief. It would take it away altogether, because once judgment is given against him, he would lose the right to say he is not bound by the guarantee. He could not have the judgment re-opened. That would go beyond the suspensory effect of the no set-off clauses. "Pay now, argue later" would become "pay now" without the opportunity to challenge liability later.

(footnote omitted)

⁹ At [55] citing *Grant v NZMC Ltd*, above n 3, at [12]–[13].

[24] However, on the facts of the case before him, Associate Judge Bell considered it implausible that a court would make a declaration avoiding the loan agreements and guarantees so the claim under s 43(3)(a) would undoubtedly fail.¹⁰ He held:¹¹

While the no set-off provisions in the loan agreement and guarantee do not prevent Mr Grewal from making a claim that the court should make orders avoiding the contracts under s 43(3) of the Fair Trading Act, Harcourts has shown that he does not have an arguable case for that relief.

[25] Mr Russ also took me to another decision of Associate Judge Bell in *HSK Trading Ltd v Carter Building Supplies Ltd* which was an application to set aside a statutory demand issued by Carters for building materials supplied.¹² In the course of his decision the Associate Judge appeared to adopt a concession by counsel that Carters could not rely upon a no set-off clause in circumstances where there was a total failure of consideration. He said:¹³

Carters accepted, however, that the clause does not operate when there is a total failure of consideration. There could arguably be a total failure of consideration if there is no delivery at all, if what was delivered is not what was ordered or if what was delivered is so defective that it is no use at all to the customer.

[26] Not referred to by counsel is *Hosking Trailers Ltd v HT 2017 Ltd*.¹⁴ There HT entered into an agreement to sell its business to Hosking Trailers pursuant to a sale and purchase agreement (SPA). It also agreed to provide vendor finance. On settlement, the parties entered into a loan agreement in respect of the vendor finance portion of the sale price. Hosking Trailers' obligations under the loan agreement were guaranteed by Mr Jackson. The loan agreement contained a no set-off clause. Shortly after settlement, a significant customer terminated its contract with the business. Hosking Trailers stopped making payments under the loan agreement on the basis that it had been induced to enter into it by misrepresentations about the contract.

[27] In the District Court, summary judgment was entered against Hosking Trailers and the guarantor on the basis that the no set-off clause prevented them from raising the alleged misrepresentations in defence of HT's claim. On appeal, it was argued the

¹⁰ At [79].

¹¹ At [79].

¹² *HSK Trading Ltd v Carter Building Supplies Ltd* [2021] NZHC 1897.

¹³ At [19].

¹⁴ *Hosking Trailers Ltd v HT 2017 Ltd* [2021] NZHC 3559.

no set-off clause did not apply because Hosking Trailers and the guarantor were not attempting to claim a set-off, rather they were arguing that HT's claim under the loan agreement was impugned or rendered null and void as a result of breaches of s 120 of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and s 43 of the Fair Trading Act.¹⁵

[28] Gault J followed the approach in *Harcourts Group Ltd v Grewal*.¹⁶ He said:¹⁷

As the above passage in *Harcourts* indicates, the remedial nature of the orders sought in a counterclaim should not obscure the point that the counterclaim is attacking the very agreement on which the claim is based. I consider the same reasoning applies whether the attack is to avoid the agreement entirely or to vary it insofar as the variation impugns the very payment obligation on which the claim is based. Thus, [the no set-off clause] does not preclude such a defence even though it precludes a set-off in respect of a counterclaim for damages under the SPA. I accept Mr Gustafson's submission that the Judge needed to address the defendants' claims that breach of CCCFA and FTA impugned the loan agreement. The real issue is whether there is an arguable defence on the basis that the alleged breaches impugn the loan agreement.

[29] However, again, on the facts Gault J concluded that it was implausible that the Court would address Hosking Trailers' complaint by reopening or varying the terms of the loan agreement.¹⁸ He said it was not the terms of the loan agreement that gave rise to the alleged loss but the purchase of the business at an alleged overvalue and relief in respect of the SPA was the appropriate relief.¹⁹ He considered it also relevant that Hosking Trailers had not sought to avoid the SPA but wanted to keep the benefit of performance as they were in effect seeking to reduce the purchase price under the SPA by impugning the loan agreement.²⁰ Hosking Trailers was not, in effect, seeking statutory rescission, or to expunge the loan agreement, but rather to adjust their rights under it.²¹ It followed that the District Court was correct to enter summary judgment.²²

[30] Just as in *Harcourts* and *Hosking Trailers* the Court was satisfied that the no set-off clause was effective because it was implausible that the Court would exercise

¹⁵ At [17].

¹⁶ At [21] citing *Harcourts Group Ltd v Grewal*, above n 8.

¹⁷ At [22].

¹⁸ At [39].

¹⁹ At [36].

²⁰ At [37].

²¹ At [38].

²² At [40].

its power under s 43 to avoid the contract in question, I am satisfied that no such order would be made in Pegasus’s favour in this case. There are several reasons for this.

[31] First, as noted by Associate Judge Bell in *Harcourts*, a party in the position of Pegasus wishing to have an agreement avoided under s 43(3)(a) will need to claim that relief expressly.²³ There is no such pleading in this case. The relevant pleading is Pegasus’s notice of opposition which makes no specific reference to s 43 or to an entitlement to relief of the kind that Pegasus now maintains it will seek.

[32] This is more than a pleading issue, as it is plain from the notice of opposition that what Pegasus is in fact seeking is recovery of monetary losses rather than avoidance of its contract with Sika. At para 3.7 of its notice of opposition Pegasus pleads that it has suffered loss “in an amount in excess of the plaintiff’s claim” and at para 3.10 it pleads a crossclaim “exceeding the plaintiff’s claim”.

[33] This is consistent with the manner in which Pegasus dealt with Sika throughout. In an email of 14 June 2022, which was after the product had been supplied and the dispute between the parties over payment had arisen, Pegasus’s Chief Executive, Mr Nicholas Cairns, wrote to Sika setting out the compensation that was sought in these terms:

...we reaffirm the following:

1. The quality and performance of Sika products, in this instance Sika Unitherm Platinum and Platinum 120 on this project, have not met the specifications / parameters stated in the technical literature.
2. Pegasus Engineering have been used as a “guinea pig” for the “introduction” of Sika Unitherm Platinum.

Due to the product problems Pegasus Engineering seek compensation for the financial impact incurred our remedy to the issue again as follows:

1. An outstanding amount of approximately \$244,000 for product.
2. \$200,000 for additional labour costs to apply product, both “in shop and onsite”.
3. \$22,000 for product purchase from a third party to use as a substitute coating for connections onsite.

²³ *Harcourts Group Ltd v Grewal*, above n 8, at [62].

[34] Also, in his affidavit, Mr Cairns identifies Pegasus's crossclaim as a money claim. He provides a spreadsheet of the amount of costs incurred by Pegasus.

[35] Second, as was the case in *Hosking*, at no stage did Pegasus ever seek to cancel the contract with Sika. Rather, the evidence is there were significant attempts made over a long period of time to work with Sika to overcome problems with the application of the intumescent coatings which were successful in respect to off-site work.

[36] Relevantly, Mr Cairns identifies that the connections coated on-site (as opposed to the work done off-site) were a small component of the overall intumescent coating process. He says:

It is also important to note that the majority of the intumescent coating was applied to the steel members in Pegasus's paint shop. The connections coated on-site are a small component of the overall intumescent coating process. The failure of the Sika product in the on-site coating of connections is reflected in a cost which significantly exceeded the costs of coating the full steel members. Pegasus maintains this is because of the failure of the Sika product to be suitable for on-site application.

[37] To similar effect is the evidence of Melanie Blewett, Pegasus's Coatings and Logistics Manager who says:

The initial coating application was carried out in the Pegasus paint shop. The Unitherm Platinum product presented some challenges to work with. This was a combination of the product preparation/mixing and short drying times. Pegasus, with input from Sika, was able to manage the issues and the coating of steel members in the workshop was able to proceed. The finished product met all the project's required specifications.

...

Fundamental problems with the Sika product developed once the steel had been transported to site and erected. Once the steel had been erected, Pegasus moved to the final coating stage, applying the intumescent coating to the connections on-site.

[38] While Ms Blewett also says that eventually Pegasus decided to move to another product to complete the on-site work, it appears from Mr Cairns' evidence that the cost of the alternative product was around just \$19,000, which is a very small sum relative to the cost of the product supplied by Sika.

[39] Third, Ms Blewett confirms that most of the product supplied by Sika was consumed by Pegasus. She says:

I am aware that Sika has said that Pegasus did not raise issues with the product until March 2022, and by this time had consumed the majority of the product it had ordered. This is correct because the majority of Sika's product was used in the off-site spraying of the large steel members with the connections spraying not beginning until late February 2022.

[40] Pegasus, therefore, received substantial benefits under the contract with Sika and wishes to retain those benefits, while at the same time refusing to perform its obligations under it to make full payment in accordance with the no-set off clause.

[41] I do not consider there is any prospect the Court would deal with the matter in the way Pegasus now contends and void the contract under s 43(3)(a) of the Fair Trading Act. Pegasus's correct remedy, should it establish its crossclaims, is monetary compensation.

Total failure of consideration

[42] I do not accept, either, that there was a total failure of consideration. As noted above, most of intumescent coatings were applied off-site and satisfactorily, albeit there were issues associated with that.

[43] I have not overlooked Mr Russ's written submission that there was a total failure of consideration in respect to "product supplied for on-site application". While in some instances it may be possible to argue there has been a total failure of basis in relation to some severable parts of a contract, there is no suggestion that there was any distinction between product supplied for on-site and off-site application and no basis to apportion distinct values to on-site and off-site elements of the consideration in this case.

Contracting out

[44] The next argument Pegasus advances is that the no set-off clause is ineffective as an attempt to contract out of the prohibitions in the Fair Trading Act. It said the

provisions of the Act are mandatory in nature and cannot be contracted out of except in limited exceptions in s 5D of the Act which do not apply.

[45] Section 5C of the Act provides:

5C No contracting out: general rule

- (1) The provisions of this Act have effect despite anything to the contrary in any agreement.
- (2) A provision of any agreement that has the effect of overriding a provision of this Act (whether directly or indirectly) is unenforceable.
- (3) Subsections (1) and (2) are subject to subsection (4) and section 5D.
- (4) Nothing in subsection (1) or (2) applies in respect of a provision that—
 - (a) imposes a stricter duty on the supplier than would be imposed under this Act; or
 - (b) provides a more advantageous remedy against the supplier than would be provided under this Act.
- (5) In this section and section 5D, **agreement** includes any contract, arrangement, or understanding.

[46] Section 5D relevantly provides:

5D No contracting out: exception for parties in trade

- (1) Despite section 5C(1) and (2), if the requirements of subsection (3) are satisfied, parties to an agreement may include a provision in their agreement that will, or may (whether directly or indirectly), allow those parties to engage in conduct, or to make representations, that would otherwise contravene section 9, 12A, 13, or 14(1); and in that case—
 - (a) the provision is enforceable; and
 - (b) no proceedings may be brought by any party to the agreement for an order under section 43 in relation to such a contravention of section 9, 12A, 13, or 14(1).
- (2) A provision of the kind referred to in subsection (1) includes, for example,—
 - (a) a clause commonly known as an entire agreement clause:
 - (b) a clause that acknowledges that a party to the agreement does not rely on the representations or other conduct of another party

to the agreement, whether during negotiations prior to the agreement being entered into, or at any subsequent time.

- (3) The requirements referred to in subsection (1) are that—
- (a) the agreement is in writing; and
 - (b) the goods, services, or interest in land are both supplied and acquired in trade; and
 - (c) all parties to the agreement—
 - (i) are in trade; and
 - (ii) agree to contract out of section 9, 12A, 13, or 14(1); and
 - (d) it is fair and reasonable that the parties are bound by the provision in the agreement.
- (4) If, in any case, a court is required to decide what is fair and reasonable for the purposes of subsection (3)(d), the court must take account of all the circumstances of the agreement, including—
- (a) the subject matter of the agreement; and
 - (b) the value of the goods, services, or interest in land; and
 - (c) the respective bargaining power of the parties, including—
 - (i) the extent to which a party was able to negotiate the terms of the agreement; and
 - (ii) whether a party was required to either accept or reject the agreement on the terms and conditions presented by the other party; and
 - (d) whether the party seeking to rely on the effectiveness of a provision of the kind referred to in subsection (1) knew that a representation made in connection with the agreement would, but for that provision, have breached section 12A, 13, or 14(1); and
 - (e) whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of the negotiations leading to the agreement or at any other relevant time.

...

[47] The issue is whether the no set-off clause “has the effect of overriding a provision of [the Fair Trading Act] (whether directly or indirectly)” for the purposes of s 5C.

[48] Pegasus has not identified how, in the circumstances of this case, the no set-off clause overrides any of the provisions of the Act, nor has it identified any provision that is overridden. Pegasus baldly asserts the no set-off clause is a contracting out provision for the purposes of s 5C(2) without any analysis of why that is the case. In my view, the no set-off clause does not override any provision in the Fair Trading Act to which Mr Russ referred. The no set-off clause does not purport to bar any claim that Pegasus may bring, nor does it impose constraints upon it contrary to any provision in the Act. What it does do is require payment of the price of product supplied leaving Pegasus's rights to pursue claims under the Act wholly intact.²⁴

[49] For completeness, a further argument which was raised by Sika is that if the no set-off clause was regarded as an attempt to contract out of the Act for the purposes of s 5C(2) then it was valid and enforceable under s 5D(3). The submission faces a difficulty because there is authority that s 5D(3)(c)(ii) requires evidence that the parties turned their minds to the contracting out of ss 9, 12A, 13 or 14(1).²⁵ Here the no set-off clause makes no reference to those provisions and there is no other indication the parties turned their minds to them. However, it is not necessary for me to express a view on the matter.

Conclusion

[50] In my view the no set-off clause is effective and prevents Pegasus raising its crossclaims in defence of summary judgment.

Interest and costs

[51] The credit application provides that in the event that payment is not made on or before the payment date, Pegasus will:

- (a) indemnify Sika for all costs (including legal costs on a solicitor/client basis), expenses and other sums reasonably incurred to exercise any right or remedy available to it; and

²⁴ See *H & H Contractors Ltd v Leighton Contractors Pty Ltd* [2013] NZHC 2225 at [52].

²⁵ *Phillip Moore & Co Ltd v Surridge* [2018] NZHC 562, [2020] NZCCLR 10 at [145].

- (b) charge interest by way of liquidated damages on all overdue amounts at 2 per cent per month calculated on a daily basis from the date on which payment was due until payment is made.

[52] Pegasus did not raise any matters disputing Sika's entitlement to either contractual interest or solicitor/client costs and expenses. In the absence of challenge, they shall be awarded.

The guarantee claim

[53] Sika argues Mr Lawry signed the credit application form both on behalf of Pegasus and as guarantor of Pegasus's obligations under it.

[54] The credit application is a two-page document. The second page contains Sika's standard terms and conditions of sale which also appear on its invoices. They include the no-set off clause. However, for present purposes it is the front page that is in issue.

[55] The front page of the credit application is divided into four parts. The first part contains customer details. The second part is for the customer's trade references to be listed. The third part is headed "Deed of Guarantee". This part contains the terms of a guarantee of the customer's obligations. It provides for the guarantor(s) to sign and for the signatures to be witnessed. The fourth part is headed "Application signed for and on behalf of the customer". Below it are the words:

The Customer, and each Guarantor listed above, has read, understood, accepted and agreed to the terms of trade contained on the following page to this form.

[56] The completed credit application is distinctive in several respects. In the first part it contains Pegasus's contact details as you would expect, although Mr Lawry says they were not completed by him. Mr Lawry's details are also included in this part of the document and he is identified as "director(s)/owner". Mr Lawry has deleted the word "Guarantor(s)" that appears on the form before his name and also before his mobile telephone number. Mr Lawry then signed the part of the document headed "Deed of Guarantee" but he deleted the word "Guarantor" in front of his signature and

also in the line below his signature. His signature has been witnessed by his personal assistant. Mr Lawry did not sign the fourth part of the document on behalf of Pegasus at all.

[57] Mr Lawry says he does not give guarantees of credit applications and that is the reason he signed the form in the manner that he did. Specifically he says:

I signed the form on behalf of Pegasus with my usual signature, having been listed on the form as a director. Before signing the form, I deleted the reference to “guarantor” next to each of the signature spaces by drawing a line through the words “*by Guarantor*”.

[58] It appears that the credit application was received and considered by Sika. Craig Pelham, who is identified as a Controller at Sika, signed the bottom of the completed credit application on 14 July 2021, some weeks after it was signed by Mr Lawry. Mr Pelham has not given evidence of what his signature is intended to signify but it is a reasonable inference that it was an acknowledgement he considered the credit application was in order and accepted by Sika as tendered as the basis upon which it would trade with Pegasus. There is no evidence of any objection raised by Sika to the credit application form as it was received by it.

Pegasus’s submissions

[59] Sika argues that on an objective assessment of the credit application as completed, both Sika and Mr Lawry intended to enter into a contract of guarantee. It contends Mr Lawry’s evidence that he did not intend to give a guarantee was never conveyed to Sika and is not relevant. Sika submits the fact of the parties’ intention to be bound to a contract of guarantee can be found in the following factors:

- (a) the credit application form anticipates that a guarantee will be given;
- (b) Mr Lawry signed the part of the credit application entitled “Deed of Guarantee”;

- (c) although Mr Lawry crossed out the word Guarantor in four places he did not delete that word everywhere it appeared in the third part of the credit application; and
- (d) Mr Lawry's signature was witnessed so as to suggest it constituted a deed, whereas the witnessing of his signature would not be necessary for a mere contract.

[60] Sika suggests the same result is arrived at if the matter is looked at as one of contract interpretation, applying the principles in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*.²⁶ I consider what is in issue is whether Sika and Mr Lawry entered into a binding contract of guarantee and not a matter of contractual interpretation and I need say no more about this.

[61] The relevant principles can be found in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*.²⁷ The pre-requisites to the formation of a binding contract are, first, an intention to be immediately bound at the point in time when the bargain is said to have been agreed and, second, agreement, express or found by implication on every term which was legally essential to the formation of such a bargain, or was regarded by the parties themselves as essential to their particular bargain.²⁸ Whether parties intend to enter into a contract and whether they have succeeded in doing so are questions to be determined objectively.²⁹ In making that assessment the Court may go beyond the words used by the parties' to the background circumstances, as well as their subsequent conduct towards one another.³⁰ The Court takes a neutral position when determining whether the parties intended to enter into a contract, but having decided that they had that intention, it will do its best to give effect to their intention.³¹ The intention of the parties, as discerned by the Court, to be bound or not bound, should be paramount.³²

²⁶ *Bathurst Resources Ltd v L&M Coal Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

²⁷ *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA).

²⁸ At [53].

²⁹ At [54].

³⁰ At [54] and [56].

³¹ At [58].

³² At [60].

[62] Sika has failed to satisfy me that Mr Lawry does not have any arguable defence to the claim made against him. There are several reasons for this.

[63] In the first part of the document, concerned with the customer details, Mr Lawry is identified as a director/owner of Pegasus. Importantly, he has deleted the word “Guarantor”. This suggests that he was signing the credit application as a director/owner of Pegasus but not as a guarantor. Support for this is found in the words that appear at the bottom of the credit application that are set out at [55] above. They distinguish between the “Customer” and “each Guarantor listed above” which logically must refer to any guarantor listed in the first or third part of the credit application. Mr Lawry is not listed as a guarantor anywhere in the credit application.

[64] Ultimately Sika’s argument is that Mr Lawry signed the credit application in the dual capacity as a director of Pegasus and as a guarantor of its obligations. In *Vuletic v Contributory Mortgage Nominees Ltd* the Court of Appeal recognised that it is possible for a person to sign a contract in a dual capacity.³³ It said:

No one disputes that it is possible for a person to sign a contract once but in a dual capacity. But there is a presumption that, if a signer purports to sign on behalf of a company or another, he or she is signing only in that capacity. Such presumption may be displaced by clear words within the contract or by extrinsic evidence from which may be inferred the signer’s intention when affixing his or her signature.

[65] Sika effectively argues the presumption to which the Court of Appeal referred is displaced in this case because Mr Lawry signed in the part of the credit application headed “Deed of Guarantee”. I do not accept that submission. In my view, the fact Mr Lawry deleted the word “Guarantor” both before and below his signature is a strong indication that no guarantee was intended to be provided. In this regard, the following points from the judgment in *Vuletic* are apposite:³⁴

The third reason we find it fairly arguable that she signed only as director is that, when she signed at that part of the sale agreement where the purchaser was required to sign, she added the word “Director” immediately under her name. That could be said to create a presumption that she has signed solely as director of the purchasing company. Such presumption could be displaced only if there were evidence of relevant extraneous material, such as conversations or correspondence, indicating a contrary intention. It is

³³ *Vuletic v Contributory Mortgage Nominees Ltd* (2006) 2 NZCPR 552 (CA).

³⁴ At [28].

common ground that there is no such extraneous material available, at least at this stage.

[66] I do not consider that the fact Mr Lawry's signature was witnessed takes the matter any further in Sika's favour. There is no requirement that a guarantee be executed as a deed.

[67] There is very little that can be made of the fact Mr Lawry did not delete the word guarantee everywhere it appeared in the credit application. He had made it sufficiently clear he was not signing the document as a guarantor so as to make such an exercise unnecessary.

[68] The next matter is that Mr Lawry has not signed the fourth part of the credit application on behalf of the customer. Mr Russ argues that one view is that Mr Lawry has signed the form as a guarantor only, but without acceptance of those terms by Pegasus. He submitted that would defeat Sika's claim as it is axiomatic that a guarantor cannot guarantee obligations not accepted by a principal. However, I consider the more obvious inference to be drawn is that Mr Lawry has signed the credit application, intending to do so on behalf of Pegasus, but in the wrong place.

[69] Finally, there is the fact that the form was received by Sika, apparently perused by Mr Pelham and found to be satisfactory for Sika's purposes notwithstanding that on its face Mr Lawry was not signing as a guarantor. In my view, the fact Sika accepted the document with the word "Guarantor" crossed out in four places suggests that Sika was prepared to proceed without Mr Lawry's guarantee. Related to this, it appears Mr Lawry or someone else on Pegasus's behalf changed one of Sika's standard terms of sale in relation to the date payment was to be made, and there is no suggestion that Sika is not bound by that change to its terms.

[70] The application for summary judgment against Mr Lawry is dismissed.

Result

[71] Sika's application for summary judgment against Pegasus is granted. There shall be judgment in favour of Sika and against Pegasus as follows:

- (a) in the sum of \$244,130.80;
- (b) contractual interest under s 22 of the Interest on Money Claims Act 2016 at the rate of 2 per cent per month from 30 April 2022 until payment is made; and
- (c) Sika is entitled to solicitor/client costs against Pegasus along with reasonable disbursements. In the event there is a dispute as to the quantum of such costs and disbursements, I reserve leave to the parties to file memoranda of no more than five pages and I will determine costs on the papers.

[72] In respect of Mr Lawry:

- (a) Sika's application for summary judgment is dismissed.
- (b) I reserve costs on the basis that counsel are to confer and if there is no agreement in relation to costs, then they may file memoranda, again no more than five pages, and I will decide the matter on the papers.

[73] Sika must decide if it will pursue its claim against Mr Lawry. I direct that the Registrar set down the claim against him for a **case management telephone conference on 7 June 2023 at 12.30 pm**. By that date Sika shall have made a decision about the matter and, if it chooses to proceed with the claim, counsel shall have conferred and agreed on a timetable for the future conduct of the case to a hearing. Counsel shall file a preferably joint memorandum of proposed timetabling directions at least three working days prior to the telephone conference.

O G Paulsen
Associate Judge

Solicitors:
Martelli McKegg, Auckland
Fletcher Vautier Moore, Richmond