

JUDGMENT : Campbell J : New South Wales Supreme Court : 11th June 2004

- 1 This is an application to set aside, or vary, a statutory demand, on the basis that the plaintiff has an offsetting claim.
- 2 The plaintiff is a company which operates a bakery business. It entered into a building contract with the defendant on 24 July 2002, whereby the defendant was to carry out certain renovation works to the bakery. That contract was a lump sum contract for \$36,000, including GST. It had a provision in it requiring a formal procedure to be gone through if there were any variations to the contract, involving the submission of quotations and approval of them, and it also had an arbitration clause.
- 3 There were numerous variations carried out in the course of the building works, and it seems that it was only at the beginning of the works that there was any attempt to comply with the procedure laid down by the contract for variations. The plaintiff has ended up paying a total of about \$65,000 to the defendant for work done.
- 4 The defendant claims that an additional amount is due to it for the work which has been done. The defendant has obtained an adjudication under the **Building and Construction Industry (Security of Payment) Act 1999** ("BACISOP Act"), whereby the plaintiff owes it the sum of \$27,564.58. That adjudication determination has resulted in a judgment issuing against the plaintiff from the Local Court at Ryde for that amount. The amount of the judgment relates to an amount found due for building work of \$23,995.76, with the balance of the award being made up of costs and interest. It is the amount of the judgment debt which was the subject of the statutory demand.
- 5 There is one particular invoice which was submitted by the defendant to the plaintiff which has been a source of contention for months. It is an invoice submitted on 17 September 2003, entitled "*Variation number 2 - progress claim number 1*", for an amount, inclusive of GST, of \$13,103.56. It relates to work which the defendant did, and concerning which the plaintiff says the defendant has charged too much. The amount of the invoice is made up of some \$8,552.50, as the pre GST claim for labour, which is made up of 155.5 hours at \$55 per hour. The balance is for materials.
- 6 Mr Demir, the moving force in the plaintiff, took the view, comparatively soon after the invoice was served, that it claimed too high an amount. He obtained alternative quotations for what he says was the same work, for \$3,700, plus GST, on 4 November 2003, and \$4,200, plus GST, on 1 November 2003. On the basis of those quotations, he has been contending, since early November 2003, that that particular invoice is too high.
- 7 On 3 November 2003 a site meeting was arranged between Mr Demir and Mr Graf, who is the moving force of the defendant. Mr Demir did not attend the meeting because he overslept. On arriving at the bakery that day, he found that the gas meter servicing the premises was missing. Mr Graf made no secret of the fact that it was he who had taken it, and he said he had taken it because, with the gas supply in its then condition, it was unsafe to leave it as it was. Mr Demir's contention is that its removal was an attempt to apply pressure to pay the disputed invoice.
- 8 On 6 November 2003, after Mr Demir had made a complaint to the police and to AGL, Mr Graf returned the gas meter, fixed a "*danger*" label to it, and refused to issue a compliance certificate in relation to the works which had been undertaken by him. Mr Demir says that, in consequence of the removal of the gas meter, the plaintiff was delayed in being able to operate the bakery business.
- 9 It is common ground between the parties that the judgment debt is a debt owing by the plaintiff. It is also conceded by the defendant that there was a dispute concerning overcharging at the time that the statutory demand was served.
- 10 The plaintiff says that it has an offsetting claim in relation to the judgment debt. The offsetting claim it identified, in an affidavit of Mr Demir affirmed on 25 March 2004, as made up of three components. The first was an overpayment on the disputed invoice, in the amount of \$9,033.58. The principle by which that amount is arrived at is readily ascertainable - Mr Demir has taken the lower of the two quotations which he obtained, which would result in the work being done for \$4,070, inclusive of GST, and subtracted that from the amount of the invoice. I assume that the difference of two cents is a typographical error.
- 11 The second component which was referred to in Mr Demir's affidavit was described as "*overpayment by me to the defendant in relation to other works in the amount of at least the claimed amount of \$7,200*". I will return to that second component later.
- 12 The third component of the claim is a claim for loss said to have been sustained in consequence of Mr Graf removing the gas meter. The plaintiff says that the circumstances of removal of the gas meter amount to unconscionable conduct on the part of the defendant, within the meaning of section 51AC of the **Trade Practices Act 1974** (Cth), and that it has suffered loss in consequence. The plaintiff relies, in particular, on an allegation that unfair tactics were used against it in relation to the supply, or possible supply, of goods or services, and thus that section 51AC(3)(d) is attracted. The plaintiff also asserts that it was in a weaker bargaining position than the defendant, and hence that section 51AC(3)(a) is attracted. The defendant, for its part, says that it was the one which was in the weaker bargaining position, because it had performed the work, but had not been paid.
- 13 The plaintiff says that the loss which it has suffered in consequence of the gas meter being removed arose from delay in being able to open the premises. The claim which it made has been shown to be not supported by the evidence in some respects, but I am satisfied that the plaintiff has a claim in relation to wages paid to an employee who could not work during the period, in the sum of \$2,400, for loss of profit because bread could not

be made in the bakery and had to be bought from other sources of \$2,415, for rent paid while the premises were idle of \$3,300, and for an amount paid to a contractor to get the gas system operational again of \$612. The total of those amounts is \$8,727.

- 14 I also mention that, pursuant to the arbitration clause in the building contract, the plaintiff, on 18 February 2004, served on the defendant a notice of dispute, which has initiated arbitration proceedings. Those arbitration proceedings have reached the stage where an arbitrator has been appointed, but no further advance seems to have been made.
- 15 A question arises of how the **BACISOP Act** interacts with the provisions of the **Corporations Act 2001** (Cth) concerning setting aside of statutory demands by reason of offsetting claims. I accept that the law has been correctly stated by Master Macready in *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* [2003] NSWSC 929; (2003) 47 ACSR 696; (2003) 202 ALR 680, in deciding that section 25(4) of the **BACISOP Act** only applies to proceedings actually brought to set aside a judgment debt and not, as is the case here, where a plaintiff, in separate proceedings, seeks to set aside a statutory demand made in respect of the debt.
- 16 It was submitted, for the defendant, that I should construe the definition of "offsetting claim" in section 459H(5) of the **Corporations Act 2001** (Cth) so that it did not relate to a claim alleged to offset a judgment debt arising from the **BACISOP Act**. I do not accept that submission.
- 17 The fact that there is a judgment debt is no reason to deny a claim the status of being an "offsetting claim". The definition of "offsetting claim" is perfectly general, and it frequently happens that a company is a judgment debtor, but has an offsetting claim arising by reason of transactions separate to those which gave rise to the judgment debt.
- 18 It was submitted that, if it were possible to set aside a statutory demand founded on a judgment debt arising from a notice of determination under the **BACISOP Act**, then that Act would be rendered toothless.
- 19 As a first step in the submission, I was reminded that the purpose of Parliament in introducing that legislation was to ensure that, once a quick, and possibly rough, adjudication by a neutral person had taken place, a progress payment in the amount found by the adjudicator should be made to a builder, and that the ultimate correctness of the progress payment being made should be argued afterwards. I was reminded that the **BACISOP Act** was concerned with maintaining a builder's cashflow, not determining its ultimate rights. I accept, in broad terms, that first step.
- 20 Next, it was submitted that, if it were possible to rely upon an offsetting claim to set aside a statutory demand, the object of the **BACISOP Act** would not be achieved. I do not accept that this is so. There are means of enforcement, short of a winding up action, which are open to a judgment creditor. When a judgment has been obtained pursuant to the **BACISOP Act**, if the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the **Corporations Act 2001** (Cth), to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Division 3 of Part 5.4 of the **Corporations Act 2001** (Cth) set out a regime whereby a statutory demand is set aside whenever there is an offsetting claim, as defined.
- 21 Before there is an offsetting claim, there needs to be a genuine dispute concerning the debt, or a genuine offsetting claim. In deciding whether there is an offsetting claim, the test is whether the claim is not frivolous or vexatious: *Edge Technology Pty Ltd v Lite-on Technology Corporation* [2000] NSWSC 471; (2000) 34 ACSR 301 at 307.
- 22 In the present case I am satisfied that there is a genuine claim that the plaintiff has against the respondent by way of counterclaim, setoff, or cross-demand, concerning the disputed invoice, and concerning the alleged consequences of removal of the gas meter.
- 23 I return to the claim for \$7,200. Mr Demir's affidavit, affirmed on 25 March 2004, did not particularise how that amount was made up. In an affidavit sworn today, he has given some detail. He says that it relates to a further invoice dated 17 September 2003, which is for an amount of \$9,902.95. He says, in relation to that, that he disputes the amount charged by the defendant, and disputes the hours alleged to have been worked. He says that, on the basis of the quotations which I have earlier referred to of 1 and 4 November 2003, "and the fact that Mr Graf had represented himself to me as experienced in the work that he was contracted to do, I should have paid no more than \$2,700 for the work as detailed on this invoice, and I was overcharged by him to the amount of \$7,200."
- 24 Before a claim can be accepted as giving rise to a genuine cross-claim, it should be supported by some evidence to show the basis on which it is made, and how its quantum is made up. I do not regard the generalities of the affidavit of 25 March 2004 concerning that claim for \$7,200, and the only slightly more particular statements in today's affidavit on that topic, as showing that there is a genuine dispute concerning that matter. Thus, it is only in relation to the first and the third of the alleged grounds of dispute that I find that there is an offsetting claim.
- 25 The offsetting claim thus amounts, in total, to \$17,760.56. This reduces the amount of the statutory demand to \$9,804.02. That amount is greater than the statutory minimum. Pursuant to section 459H(4) **Corporations Act 2001** (Cth), I vary the statutory demand so that it relates to an amount of \$9,804.02, and declare the demand to have had effect, as so varied, from the date when the demand was served on the company.

- 26 Both parties apply for costs. The plaintiff says that it has been substantially successful, in that it has succeeded in establishing that there is an offsetting claim in relation to two out of the three heads that it put forward, and that it has been successful on the question of law which was debated about the interaction of the **Corporations Act 2001** (Cth) with the **BACISOP Act**. The plaintiff also points out that before the end of last year it offered to pay an amount of \$9,862.20. I cannot regard the latter offer as of any significance now, as there has been a lot of water under the bridge since then.
- 27 The defendant seeks costs, saying that it has been substantially successful, because the amount of the judgment debt is owing, and the defendant needed to come to Court to take steps to test the solvency of the plaintiff. I do not regard either of the matters put forward by the defendant as justifying an order for costs. The point of particular significance that was argued in the case was the question of law, on which the defendant has lost. The plaintiff has succeeded only in reducing the amount of the statutory demand, not in having it completely set aside. In all these circumstances, I order the defendant to pay one half of the plaintiff's costs.

M Tyson – Plaintiff instructed by Kydon Segal
D Ziman, solicitor – Defendant instructed by David Landa Stewart