JUDGMENT : Barrett J: Supreme Court of New South Wales. 13th March 2003.

Introduction

1 The plaintiff claims an order setting aside a statutory demand served on it by the defendant on 8 October 2002. The demand is in the form contemplated by s.459E of the **Corporations Act** 2001 (Cth) and relates to two separate sums – one of $30,000 and the other of $7,734.30 – said to be due and payable by the plaintiff to the defendant. The first sum is described as "the deposit in respect of the lease between the creditor as Lessor and the debtor as Lessee dated on or about 1 January 2002 being registered lease 8975277". There is a reference to the relevant provision of the lease. The second sum is described as "Amount of stamp duty payable by the debtor in accordance with clause 13.1.3 of the Lease", with a reference to the relevant sum having been paid by the defendant to the Office of State Revenue "on behalf of" the plaintiff. It is common ground that the plaintiff and the defendant are respectively lessee and lessor under a registered lease of certain warehouse or factory premises.

2 The plaintiff asserts an entitlement to an order setting aside the statutory demand on two alternative bases, namely, the existence of a genuine dispute as to the existence of the debt (s.459H(1)(a) and the existence of an offsetting claim on the plaintiff's part (s.459H(1)(b)).

3 The plaintiff's originating process was filed on 29 October 2002. The affidavit in support is an affidavit sworn on 28 October 2002 by Mr Norbury, manager and director of the plaintiff. It emerges with sufficient clarity from that affidavit that the alleged dispute and the alleged offsetting claim arise from the same facts and circumstances and centre upon certain representations allegedly made on behalf of the defendant by Mr Lowe, a director.

4 The essence of the s.459H(1)(a) case is an alleged misrepresentation by Mr Lowe to Mr Norbury that the lease would not start to run until the parties agreed it should start running and there has been no such agreement. The offsetting claim case is advanced on the basis of alleged causes of action under ss.51AC and 52 of the **Trade Practices Act** 1974 (Cth).

The genuine dispute case

5 The genuine dispute the plaintiff asserts is a dispute as to the existence of the debt. That case is advanced on the basis that the defendant is estopped from asserting that the plaintiff is bound by the lease until such time as the parties expressly agree that it is to operate; also that the plaintiff is entitled to an order avoiding the lease (based on s.87 of the **Trade Practices Act**). Those forms of relief are said to arise because of a representation by Mr Lowe, on behalf of the defendant, that the lease would not start running until the parties agreed that it should. The representation is said by the plaintiff to have been made in the following conversation that Mr Norbury deposes to having had with Mr Lowe at Mr Lowe's office "at on [sic] about mid December 2001" ("Penny", it should be noted, is Ms Zhou, Mr Norbury's partner):

"*Lowe said: 'This is the Lease that Kershall wants. I want you and Penny to sign it before I give you the keys.'*
I said: 'I can't get legal advice now because everyone is on holidays.'
Lowe said: 'We don't need solicitors. I told you there is a Cooling Off period. We'll hold the Lease undated, so it won't have any legal effect until we all agree it should start running.'
I said: 'That sounds fair. Besides Kerry, you have to do quite a few things to the roof and it is conditional on us working out a proper deal for the sale of your Mylow Stock. If there were any problems there we would probably want to back out or water down the terms. I'm not going to get stuck here for 5 years if these things don't all add up.'
Penny said: 'Roy you have to be careful it's a lot of money. We got to sell a lot of stuff.'
Lowe said: 'If you have any problems I am a fair man. Give me a cheque for $36,000 for the stock. We are going away on holidays. You can then have the key; now sign the lease.' "

6 Mr Norbury says in his affidavit that He and Ms Zhou then signed the lease in the presence of one John Hosking-Rowell (an employee of the plaintiff) and Mr Lowe. Mr Norbury also says that the plaintiff was incorporated "around late November 2001". It is by reference to that event that he places the conversation and signing at mid-December.

7 The defendant's position is that any conversation in "mid December 2001" when it was impossible to get legal advice "because everyone is on holidays" could not have been the source of anything that would cut across the clear provisions of the lease as to payment of the bond and stamp duty. This is because such a conversation, if it took place at all, took place long after the lease had been executed and had become binding on the parties.

8 It is the defendant's contention that the lease was signed on 31 October 2001. Mr Lowe, in his affidavit sworn on 3 December 2002, says that he signed it on that date. Mr Hosking-Rowell, in his affidavit of 4 February 2003, says that he signed on that day. His signature appears in the lease in each of the spaces reserved for the signatures of the witnesses to the signatures of the lessee's guarantors, being Mr Norbury and Ms Zhou. The signatures of Mr Norbury and Ms Zhou as guarantors are appended. The statement by the witness is the usual attestation that the guarantors signed in the witness's presence. Mr Hosking-Rowell pinpoints the date as 31 October 2001 because it is his daughter's birthday and he recalls having taken an item of furniture from the factory as a present for her. Mr Hosking-Rowell's affidavit does not mention any conversation as alleged by Mr Norbury having taken place when the lease was signed.

9 Ms Zhou deposes that she returned to Sydney from China on 30 October 2001. She says that she did not sign any lease on 31 October 2001. She says she signed it in mid-November 2001 when she, Mr Norbury, Mr Lowe and Mr Hosking-Rowell were all present. She does not recount any conversation in the terms stated by Mr Norbury.

10 With the evidence in this state, I do not consider it possible to say that there is a serious question to be tried on the issue of the alleged representation by Mr Lowe as to the deferral of the effectiveness of the lease. Four persons were supposedly involved, being Mr Norbury, Ms Zhou, Mr Lowe and Mr Hosking-Rowell. None of the others asserts any conversation in the terms alleged by Mr Norbury. Two of the persons (Mr Lowe and Mr Hosking-Rowell) say that the lease was signed by them on 31 October 2001, with Mr Hosking-Rowell pinpointing it by reference to his daughter's birthday and the present he took for her. Mr Hosking-Rowell's attestation on the document is that Mr Norbury and Ms Zhou signed in his presence. Ms Zhou returned to Australia the previous day but says she signed, with the other three present, in "mid November". Mr Norbury alone maintains that he signed in "mid December" when absences on holidays meant he could not get advice.

11 The substantial weight of the evidence is against Mr Norbury's version of events. That version does not have sufficient prima facie plausibility to merit further investigation as to its truth, to adopt one of the formulations followed by McLelland CJ in Eq in **Eyota Pty Ltd v Hanave Pty Ltd** (1994) 12 ACSR 785. The consequences, in terms of possible avoidance of the lease on the basis of the alleged representation that there was to be a delayed commencement, therefore have not been shown to have the degree of real possibility of emerging to warrant a finding of genuine dispute as to the existence of the debt. The plaintiff has failed to show a genuine dispute as to the time of commencement of liability under the lease and accordingly fails in its claim to have the statutory demand set aside on the basis of a genuine dispute as to the existence of the debts for the bond and stamp duty payments expressly called for by the lease.

The offsetting claim case

12 The offsetting claim asserted by the plaintiff is based on certain representations said to have been made by the defendant to the plaintiff or, more precisely, by Mr Lowe on behalf of the defendant to Mr Norbury and Ms Zhou on behalf of the plaintiff. The representations are said to have been to the effect that:

(a) the asbestos roof of the leased premises was very sound;
(b) the defendant would install ventilators in the roof;
(c) the defendant would give the plaintiff the exclusive right to sell the defendant's furniture throughout South Sydney;
(d) the defendant would not sell its furniture to outlets outside the South Sydney area for less than it sold its furniture to the plaintiff;
(e) the plaintiff would be able to hang its advertising signs over all the railway overpass bridges in the Sutherland Shire;
(f) the defendant would let the plaintiff use the defendant's forklift on the premises while the plaintiff was lessee;
(g) the plaintiff would achieve sales of $3.1 million per annum and a net profit of $535,000 per annum from the leased premises; and
(h) if the plaintiff paid for certain stock to be sold to it by the defendant, the bond under the lease would not be payable until the end of 2002.

13 As to (a), Mr Lowe says that he did not make any comment about the roofing material and whether it was safe.

14 As to (b), Mr Lowe says that he agreed to install four "whirlybirds" in the roof and that they were being installed in the week commencing 15 November 2002. In his affidavit of 14 February 2003, however, Mr Norbury says that the work was not done.

15 As to (c), Mr Lowe says that he gave Mr Norbury a list of the defendant's stock that he suggested the plaintiff should carry and that the defendant would leave with the plaintiff consignment stock of $140,000 for which the defendant expected "to be paid on a weekly basis of sales achieved".

16 As to (d), Mr Lowe denies having made any such representation.

17 As to (e), Mr Lowe says that he did not make any such statement and, in any event, that the defendant has no right or power to enable anyone to display signs in locations throughout the Sutherland Shire.

18 As to (f), Mr Lowe says that he did agree to allow the plaintiff to use one of the defendant's forklifts together with a quantity of pallet racking, but only until the plaintiff had established itself in the business; also that the forklift was removed in October 2002 as the plaintiff had failed to service and maintain it.

19 As to (g), Mr Lowe says, "I certainly did not make any guarantee concerning his turnover". He also denies having made the representation in (h). He says that he did agree to take a post dated cheque for the bond.

20 Ms Zhou has given evidence of being present at (and part of) conversations between Mr Lowe and Mr Norbury. She deposes that Mr Lowe said he would give the plaintiff exclusive rights to sell Mylow furniture throughout the South Sydney area (see item (c) above); also that he would put ventilators in the roof (see item (b)). As to item (c), Ms Zhou says that the defendant left some stock on consignment in January and February 2001 and when the plaintiff placed new orders for stock, after the consignment stock had been sold, the defendant demanded COD payment for all future stock orders, which she considered contrary to Mr Lowe's promises. Ms Zhou also refers to

an agreement that the lease should remain undated "until we were satisfied that the projected sales targets were met".

21 Mr Hosking-Rowell was present during a conversation between Mr Lowe and Mr Norbury. His evidence is as follows:*"During that conversation, Kerry Lowe indicated the terms of the sale, the lease and the continuing business relationship. I understood the offer to be as follows:*

a) To purchase stocks from Kerry Lowe's wholesale company Mylow Overseas Furniture for $72,000.00 and pay 50% on order and the balance on arrival from overseas. This stock would be required to maintain the existing continuity of sales;

b) Consignment stock worth $140,000.00 was to be left on the floor at the time of takeover and further consignment stocks would be left on the basis of payment on a weekly basis for any stock sold;

c) Kerry Lowe would give Roy Norbury the exclusive right to sell Mylow products in Sydney on the basis that Roy would open another 2 store locations in Sydney and comply with the payment terms. I recall that Roy was thinking of opening stores in Narellan and in Narrabeen.

d) Kerry Lowe would loan the business a walk behind forklift for 3 months.

e) Kerry Lowe would leave the pallet racking, lunch table and chairs, signs and banners and printed invoices (stationery) plus a Mazda van for advertising purposes.

f) That the bond on the Lease could be paid on the basis of a cheque post dated for 3 months to assist Roy in his cash exposure."

22 Mr Hosking-Rowell also gave evidence relevant to Mr Norbury's assertion of having received assurances as to sales and profit levels to be achieved:

"5. Kerry Lowe allowed Roy and myself to inspect No 96 Factory Bargain Centre trading records for the previous years. That inspection occurred on or about 22 November 2001. We didn't receive any copies because there was no charge for the goodwill of the business.

6. I also requested Roy to obtain a spreadsheet from Kerry Lowe to indicate the expenses for operating based on turnover for $60,000.00 per week."

23 On this evidence, the assertion of genuine offsetting claim by the plaintiff is problematic as to a number of matters. The issue about the roofing material involves Mr Norbury's word against Mr Lowe's word. In relation to the roof ventilators, Mr Lowe says they were in the course of being installed in the week beginning 15 November 2002 and Mr Norbury contradicts that. As to the alleged representation that the defendant would give the plaintiff the exclusive right to sell the defendant's furniture throughout South Sydney, Mr Lowe refers to some limited consignment arrangement and there is some confirmation of Mr Norbury's version by Ms Zhou, but Mr Hosking-Rowell, while confirming reference to a consignment arrangement, says that any such representation included a condition that the plaintiff open another two stores and comply with payment terms. The alleged representations (d) and (e) are denied by Mr Lowe and the evidence does not take the matter further. Alleged representation (f) is said by both Mr Lowe and Mr Hosking-Rowell to have referred to a limited period only.

24 As to the alleged representation (g) concerning the plaintiff's achieving a stated level of annual sales and annual profit, Mr Lowe says he did not "make any guarantee concerning his turnover", which does not directly address the question of motivating representation, as distinct from "guarantee". Mr Hosking-Rowell's evidence is that Mr Lowe allowed Mr Norbury and him to inspect figures showing historical performance. He says nothing about representations as to the future. Mr Norbury has put into evidence a handwritten sheet (annexure B to his first affidavit) given to him by Mr Lowe showing, on a monthly basis, items of income and expenditure.

25 The alleged representation (h) is to be approached, in the plaintiff's submission, against the background of the statutory demand by which demand for the bond was made on 2 October 2002 and the lease was registered, apparently upon lodgment by the defendant as lessor and without the plaintiff's concurrence, in September 2002.

26 The plaintiff's case is that the various representations allegedly made by Mr Lowe on behalf of the defendant were false and misleading and made without a reasonable basis so as to be actionable under ss.51AC and 52 of the **Trade Practices Act** 1974 (Cth).

27 The first thing to be said about the way the plaintiff puts its case is that, while the definition of "offsetting claim" in s.459H(5) refers, in general terms, to a claim "by way of counterclaim, set-off or cross-demand", it is clearly contemplated by the section as a whole that the claim must be one capable of being quantified in money terms. It need not be a liquidated claim but it must be one to which a monetary liability can be attached. This is because of the directive in s.459H(2) that the court determine, among other things, "the amount of that claim" or, where there are several claims, "the total of the amounts of those claims". It follows that only claims sounding in debt or damages or other monetary consequences (such as may be available under the **Trade Practices Act**) may be taken into account for the purposes of s.459H. I again adopt as instructive in cases of this kind the following passage from the judgment of Palmer J in **Macleay Nominees Pty Ltd v Belle Property East Pty Ltd** [2001] NSWSC 743: "*In my opinion, a genuine offsetting claim for the purposes of CA s459H(1) and s459H(2) means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. 'Good faith' means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful. In a claim for unliquidated damages for economic loss, the Court will not be able to determine whether the amount claimed is claimed in good faith unless the plaintiff adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. If such evidence is entirely lacking, the Court cannot find that there is a genuine offsetting claim for the purposes of s459H.*"

28 How should the "amount" of the plaintiff's asserted offsetting claim (or claims) be calculated in this case? In relation to representations (a) to (f), let it be assumed, for the moment, that all those representations were made and that the roof is not very sound, that the roof ventilators were not installed, that the defendant did not give the exclusive distribution right, the defendant did sell its furniture to outlets outside the South Sydney area for less than it sold its furniture to the plaintiff, that the plaintiff is unable to hang its signs from the railway bridges and the defendant did not let the plaintiff use the forklift. What follows in money terms? The evidence shows nothing. It is impossible for the court to make any assessment of the financial consequences of the false or misleading character of those representations, assuming them to have been of that character.

29 When it comes to alleged representation (g) as to annual sales and profit, the plaintiff says that the false or misleading nature of the representations is shown by comparing those representations with the financial performance, on an historical basis, of the defendant's associated entity, Katenel Pty Ltd, which operated substantially the same business using an area which included (but was greater than) the area let by the defendant to the plaintiff. Certain financial statements of Katenel are in evidence. The appendix to this judgment shows a comparison of figures in the handwritten sheet given by Mr Lowe to Mr Norbury (Column A) with apparently corresponding items in the Katenel accounts for 2001 (Column B) and 2000 (Column C). Items of more than $2000 each included in the Katenel financial statements but not included in the document given by Mr Lowe to Mr Norbury were accountancy fees, bank charges, borrowing costs, consultancy fees, depreciation, freight and cartage, fringe benefits tax, hire of plant and equipment, hire purchase charges, interest, legal costs, motor vehicle expenses, rates and taxes, repairs and maintenance, tax, travel and accommodation. Many of these involve discretionary outgoing that might well not be incurred by an operator of the core business. Others may be taken to be of a one-off nature. For present purposes, I am content to leave them to one side as not relevant to an appreciation of the expenses associated with the core business.

30 The totals of the various expense items in Column B (2001) and Column C (2000) of the appendix below are $2,439,000 and $3,052,000 and the average of those two is $2,745,500. This compares with $2,585,000 in Mr Lowe's document. If those expense totals are applied against the sales revenue figures in Column B and Column C (and other expenses actually incurred by Katenel but not reflected in the appendix are disregarded), the notional profits emerging are $150,000 for 2001 and $368,000 for 2000. This compares with a profit figure of $535,000 – "adjusted to "$517,000" – in the document given by Mr Lowe to Mr Norbury. The Katenel revenue figures are $2,589,000 for 2001 and $3,420,000 for 2000 (average $3,004,500) against $3,100,000 in Mr Lowe's handwritten document.

31 Even on this basis, it can be said that there is apparently, on the surface at least, an appreciable difference between the expense figures and the profit figures recorded in Mr Lowe's handwritten document and those emerging from the financial statements of Katenel, even though the revenue figures demonstrate a degree of consistency. No final conclusions are possible at this stage but it is nevertheless shown that the claim by the plaintiff foreshadowed by reference to the figures in Mr Lowe's handwritten sheet is not "frivolous or vexatious", to adopt the words used in cases such as **Chadwick Industries South Coast Pty Ltd v Condensing Vaporisers Pty Ltd** (1994) 13 ACSR 37 and **Edge Technology Pty Ltd v Lite-on Technology Corp** (2000) 34 ACSR 301 to describe the quite low threshold that applies in cases of this type.

32 In the case of the alleged misstatements as to revenue and profit, the plaintiff does offer a quantification of foreseen financial impact by reference to the asserted entitlement to an order avoiding the lease under s.87 of the **Trade Practices Act** or varied in the manner suggested by the decision of the High Court in **Kizbeau Pty Ltd v WG&B Pty Ltd** (1995) 184 CLR 281. The plaintiff has paid rent for over a year at the rate reserved by the lease, being $389,400 per annum. If the lease were declared void, it might follow that the plaintiff had a claim to recover the whole of the rent paid, although total recovery is probably unlikely. There is, however, a more reliable indicator when it comes to the claim based on **Kizbeau**. In that case, a plaintiff who established misleading and deceptive conduct as a causal factor in the acquisition of a business and the taking of an associated lease was successful in obtaining an order that the lease be varied so as to reduce the rent by taking into account the effect of the proscribed conduct on the business revenue.

33 In the present case, the plaintiff has chosen profit, rather than revenue, as the factor to be applied in approaching the question of possible lease revision. The profit figure chosen is Katenel's actual profit in 2001, namely, $73,000. However, I do not consider that to be an apprpriate figure because of the impact of the various items that do not seem to have been demonstrably related to the business itself. The profit figure I would consider more suitable for such a calculation is the average of the notional $150,000 for 2001 and the notional of $368,000 for 2000, that is, $259,000.

34 The plaintiff points to the fact that the premises the subject of the lease represent only half the premises in which the Katenel business was conducted. It deduces from that that the profit from conducting business in the premises the subject of the lease would have been half the Katenel profit – that is, half the average $259,000 I have adopted for this purpose, being $129,500. The plaintiff then ascertains a ratio of rent to profit on the basis of the actual rent of $389,4000 and the represented $517,000 profit, calculating it to be a ratio of $389,400 to $517,000, being 1 to 1.32. Applying that ratio to the postulated profit of $259,000, the appropriate annual rental figure is the figure that bears to $259,000 the ratio that one bears to 1.32, that is, $196,212 – say $196,000.

35 On the basis of this calculation, the plaintiff would say that there is an arguable case for variation of the lease by reducing the annual rent from $389,400 to $196,000 so that, leaving aside altogether adjustment of the bond, the result of success in the claim based in general terms on **Kizbeau** would be a finding of rent overpaid to the extent of $193,400, representing an offsetting claim in that amount.

36 I am satisfied there is a sufficient degree of substance in the plaintiff's case based on the representations in Mr Lowe's handwritten document and the above calculation approach by analogy with **Kizbeau** to warrant a finding of "offsetting claim" within s.459H(1)(b) according to the low threshold to which I have referred as applying in such cases. The "offsetting total" is $193,400 and the "admitted total" (having regard to s.459H(2)), is $37,734.30. The "substantiated amount" is accordingly less than the "statutory minimum" and the court must, in obedience to s.459H(3) set aside the statutory demand.

Orders

37 The orders of the court are accordingly that the statutory demand dated 2 October 2002 in the sum of $37,734.30 be set aside and that the defendant pay the plaintiff's costs of the proceedings.

APPENDIX

	A (Mr Lowe)	B (2001)	C (2000)
	$000	$000	$000
Purchases	1922	1692	2262
Salary	213	296	297
Superannuation	18	14	14
Insurances	10	17	62
Postage/cleaning	4	4	2
Rent	354	352	300
Advertising	26	29	64
Printing stationery	3	3	5
Phone fax	9	8	14
Merchant fees	20	20	21
Electricity	4	4	11
Sales	3100	2589	3420

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