JUDGMENT : Associate Justice Macready : New South Wales Supreme Court : 23rd June 2005.

1 This is an application to set aside a statutory demand under s459G of the **Corporations Act.** The demand was dated 1 November 2004 and claimed $21,833.57 being a judgment debt of the Local Court, Hornsby in the State of New South Wales dated 10 September 2004. The demand was served on 8 November 2004. Initially there was a dispute about service but that was resolved and the parties accept that the proceedings were commenced within time.

2 The judgment debt arose out of an adjudication determination made pursuant to the **Building & Construction Industry Security of Payment Act** 1999 ("the Act").

3 The factual background giving rise to the dispute concerns building work carried by the defendant company for the plaintiff company which was a contractor in respect of building work which was carried out at 23 to 25 Chesterfield Parade, Bronte.

4 The plaintiff had entered into a contract with the owner of the site in about July 2003. The defendant was engaged as a sub-contractor to the plaintiff to carry out part of the relevant works.

5 There are conflicting accounts of the arrangements under which this work was to be carried out given by the principals of the two companies. Mr Paul Sussanna for the defendant gave evidence of giving a written quote which priced the job at $128,760.90. He discussed the quote with Mr Rocco Gattellaro of the plaintiff company who said it was too much. The matter proceeded no further at that stage. Mr Sussanna says that a few days to a week later he had a telephone call from Mr Gattellaro to come and see him at the premises and during the course of that visit he says that Mr Gattellaro said to him that he wanted him to come and do the job. There is no doubt that thereafter the job proceeded and the work was done up until such time as work on the site ceased.

6 Mr Gattellaro's evidence is quite to the contrary. In a slightly more detailed account of the conversation he indicated that the quote was too high and he could not do a lump sum contract. He concluded by saying that he would only give Mr Sussanna the job if he would do it on a cost plus basis. He alleges that Mr Sussanna agreed to his proposal. Clearly the parties are at issue on this fundamental question of what were the terms of their contract.

7 There were three invoices submitted during the course of the job and in Mr Gattellaro's evidence he complained that the form of the invoices were not sufficient as they did not include backup invoices to enable him to properly assess the amount payable under what he described as a cost plus contract.

8 The plaintiff's contract with the owner of the property was terminated on 5 December 2003. By that stage according to the plaintiff there had been paid some $65,000 on account to the defendant.

9 On 15 April 2004 the defendant commenced proceedings in the Consumer Trader & Tenancy Tribunal to recover the balance, which it claimed then owed. On 19 May 2004 directions were made by the Tribunal for the supply of invoices to the defendant so that the defendant could see the basis for the claim.

10 On 9 June 2004 there was served on the plaintiff company a progress claim under the Act. That claim was for a sum of $20,541.49. Although in the form of a tax invoice it clearly included the relevant statement under the Act, namely, that "This claim is made under the New South Wales Building & Construction Security of Payments Act 1999 No 46". According to Mr Gattellaro at the time he received the claim he believed it was simply a statement sent to his company by the defendant setting out the previous invoices that were sent in answer to the Tribunal directions.

11 Although in response to the letter the plaintiff sent a letter to the defendant demanding supply of delivery dockets for steel and concrete in the context of the proceedings in the Tribunal there was no payment schedule served by the plaintiff under the Act.

12 On 16 July 2004 the defendant sent a letter to the Master Builders Association with a copy to the plaintiff. It was an adjudication application. This clearly was the notice required under s 17 (2) of the Act although there may be some question as to whether or not it gave the plaintiff an opportunity to provide a payment schedule to the claimant within five business days after receiving the notice.

13 On 4 August 2004 there was an adjournment of the Tribunal proceedings as relevant invoices demanded by the plaintiff in these proceedings, the defendant in the Tribunal proceedings, had not been supplied.

14 On 9 August 2004 the plaintiff received a letter from the Adjudicator dated 6 August 2004 stating that he had been appointed and proposed to consider the matter on 11 August 2004. This gave the plaintiff the opportunity to put in a response but as it had not put in a payment schedule it would probably have been of limited use to it.

15 On 6 September 2004 the Adjudicator issued his certificate. On 10 September 2004 the certificate was registered as a judgment in the Local Court at Hornsby.

16 In the meantime the matters were still proceeding in the Tribunal. On 20 September 2004 the plaintiff in these proceedings did a calculation of what he alleged was due to him and forwarded the documents to the Tribunal.

17 On 28 September 2004 a letter was sent to the Tribunal by the defendant in these proceedings in which he advised the Tribunal as follows: *"We write to advise that the above matter between Masterform Pty Ltd & Falgat Constructions Pty Ltd has been settled.*

Action at the CTTT is no longer required."

18 The matter was back before the Tribunal on 5 October 2004 when the plaintiff attended to find that the hearing date had been vacated because the Tribunal had decided that as there was a settlement the matter was not proceeding.

19 It is plain that there was no agreement for a settlement and probably what was intended by Mr Sussanna in his letter which used an unfortunate choice of words was that the proceedings in which he was the moving party no longer needed to be continued because he had obtained his judgment under the Act.

20 The statutory demand was issued on 1 November 2004 as I have already recounted.

21 On 29 March 2005 proceedings were commenced in the Construction List in this Division of the Court to set aside or stay the adjudication and the judgment obtained pursuant to that adjudication. However, at this stage there is no evidence before me that a stay has been granted and thus I have to assume that the judgment remains in full force and effect.

The claims of the parties

22 The plaintiff submits that there is a genuine dispute as to the amount due between the parties. It also submitted that there was an off-setting claim based upon documents in which the plaintiff sought a refund of some amounts from the defendant.

23 For its part the defendant resisted any notion of genuine dispute pointing to a number of matters touching on the genuineness of the plaintiff's claim. It also raised a preliminary matter which was whether or not there was a res judicata between the parties as a result of the judgment in the Local Court. It is appropriate to deal with that aspect first.

The effect of the Local Court judgment in the context of the Act

24 Normally if there is a judgment between the parties settling a question of liability the principal of res judicata would prevent the parties agitating the same issues in another action. The effect of such res judicata in the context of statutory demands was dealt with in ***Barclays Australia (Finance) Pty Ltd v Gaffikin Marine Pty Ltd*** (1996) 21 ACSR 235. At page 238 the Chief Judge in Equity, McCelland J had the following to say: *"The assertion that there is a genuine dispute about the existence of the debt is in turn based on two grounds. The first relies on the existence of the undetermined appeal, in which orders are sought by Dan (inter alia) that the proceedings brought by Gaffikin Marine be dismissed and that Gaffikin Marine pay the costs of those proceedings. If the appeal succeeds, it is possible that the costs orders of 16 July 1995 (including the order against Barclays, although it is not an appellant) may be set aside. The answer to this submission is that the possibility that a presently existing and enforceable debt may be set aside in the future pursuant to a subsisting appeal does not give rise to a genuine dispute about the existence of the debt within the meaning of s 459H; see eg* ***Hoare Bros Pty Ltd v DCT*** *(1995) 16 ACSR 213; 13 ACLC 358;* ***Wilden Pty Ltd v Greenco Pty Ltd*** *(1995) 13 ACLC 1039. The position would of course be different if there were a stay of proceedings under, or stay of execution of, the costs order against Barclays, but there is not, and in the absence of any such stay and notwithstanding the pendency of the appeal, the costs orders of 16 July 1995 against Barclays (together with the judgment of 16 5 May 1996), unless and until set aside on appeal, operate as res judicata determining the matter of Barclays' costs liability to Gaffikin Marine; see Spencer-Bower & Turner Res Judicata 2nd ed p 144; Lahoud v B & M Quality Constructions (22 July 1994, SC(NSW) McLelland CJ in Eq, unreported)."*

25 These principles were recently cited with approval by the Court of Appeal in ***Meehan & Ors v Glazier Holdings Pty Limited*** [2005] NSWCA 24 at 51.

26 For some years there has been a series of cases in which Courts in this Division have allowed offsetting claims against amounts due or said to be due under provisions of the Act. I dealt with the matter in detail in ***Max Cooper v Booth*** [2003] NSWSC 929 where I allowed a contractual offsetting claim to be used to set aside the demand. That decision has been followed in ***M&D Demir Pty Limited v Graf Plumbing Pty Limited*** Campbell J [2004] NSWSC 553. This decision was followed in ***Greenaways Australia Pty Ltd v CBC Management Pty Ltd*** [2004] NSWSC 1186.

27 It is the extension of these concepts to challenging the statutory demand by asserting a genuine dispute in respect of the amount due under the Act which has led to further litigation. In ***Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd*** [2005] NSWSC 284 a case where there had in fact been no judgment registered, Palmer J decided that the system set up under the Act did not prevent a plaintiff in proceedings seeking to set aside a statutory demand, raising a genuine dispute in respect of the claim advanced in the demand.

28 In the present case there is, of course, a judgment and this squarely raises the question of whether such a judgment gives rise to a res judicata such that there can be no dispute before me in an application to set aside a statutory demand unless the judgment is either set aside or stayed.

29 Although it was unnecessary to my decision I did refer to the question of res judicata in **Max Cooper** in these terms:

> *"29 In respect of the defendant's claim that res judicata will apply as a result of the adjudicator's determination an initial question is whether the adjudicator's decision is a "final judicial decision". There were no submissions to the effect that the adjudication was not a "Judicial Tribunal" for the purposes of the rule. Normally, a domestic tribunal such as an arbitrator is such a body but the procedure under the Act is more akin to a statutory tribunal.*

*In **Pastras v Commonwealth** (1966) 9 FLR 152 Lush J stated the test for distinguishing between decisions which are judicial for present purposes and those which are purely administrative. He said at 155:*

"The underlying principle of this form of estoppel is that parties who have had a dispute heard by a competent tribunal should not be allowed to litigate the same issues in other tribunals. When the decision-making body is an administrative body not affording the opportunity of presenting evidence and argument, it seems to me there is no room for the operation of this principle. In New Brunswick Railway Co. v. British and French Trust Corporation Ltd. [1939] A.C. 1 Lord Maugham L.C. said this: "If an issue has been distinctly raised and decided in an action in which both parties are represented it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them".

It appears to me that both upon the general language of the authorities to which I have referred and upon the principle which I have endeavoured to describe, no estoppel can arise from a decision of an administrative authority which cannot be classed either as "judicial" or as "a tribunal", and that an authority cannot be given either of those classifications if it is one which is under no obligation to receive evidence or hear argument."

*30 Given the procedure set out in sections 20 and 21 of the Act it is at least arguable that the adjudication is judicial in the relevant sense. A contrary view was mentioned in passing in **Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd** [2003] NSWSC 365 at Para [43]. Rather than decide the matter on this basis in the absence of argument I will consider the other aspects.*

*31 To be a final decision the decision must finally declare or determine the defendant's liability for an ascertained amount leaving nothing to be judicially determined, to fix the amount recoverable and render the judgment effective and capable of execution. See Spencer Bower, Turner and Handley "**The Doctrine of Res Judicata**" at 69.*

32 It may be that an adjudicator's determination will be final for the purposes of payment of a progress claim under the Act but not in respect of the final determination of the contractual claim. The specific provisions for adjustment in s32 (3) (a) and (b) allow correction of the amounts ordered to be paid by an adjudicator. Such amounts may or may not have involved a consideration of claims for defective work. The terms of s32 (2) are: "(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3)."

*33 These are extremely wide words and on their face are apt to include the effect of res judicata between the parties. In **Beckhaus v Brewarrina Council** [2002] NSWSC 960 I analysed the nature of the statutory scheme and its interplay with the contractual rights of the parties. I concluded at para 60 in these terms: The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3 (1), 3 (4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s 13(1) refers to a contractual entitlement.*

*34 I note that there is a very limited right of challenge to an adjudicator's decision (see **Musico** above). But that does not mean it is not a final decision: see **McGregor v Telford** [1915] 3 KB 237. A proper construction of the Act as a whole would mean that the adjudicator's decision does not give rise to res judicata on such matters in respect of the latter civil proceedings. The adjudicator's decision is nothing more than an interim determination for the purpose of progress payments under the Act."*

30 As can be seen from my comments I did not have full argument in **Max Cooper** on the question of whether or not an Adjudicator was a judicial tribunal. There were further submissions in this matter from the defendant which included submissions on the extent to which an adjudicator's decision is subject to review. That question is, I think, a matter which does not assist in determining whether there is a judicial tribunal for the purpose of res judicata.

31 The submissions also referred to the matters which the Act provides in relation to the procedures to be followed by the Adjudicator in the adjudication process and determination. Critically these do include obligations on the Adjudicator to receive submissions. Under s 17 (3)(h) the adjudication application "may contain such submissions relevant to the application as the claimant chooses to include". The adjudication response under s 20 (2)(c) "may contain such submissions relevant to the response as the respondent chooses to include". Under s 22 (2) matters that the Adjudicator is to consider include "all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim". It is plain therefore that the appropriate submissions must extend to documentary evidence and, indeed, it would be hard to see how the Adjudicator could make a decision without having some evidence before him.

32 The use of submissions satisfies the criteria set out by Lush J to the extent that he refers to the obligation to hear argument. The Adjudicator may as well as having submissions under s 21(4) call a conference of the parties and may carry out an inspection of any matter to which the claim relates. Plainly, the liquidator does not have power to call evidence orally from witnesses. However, given the obligation to receive any documentation it seems that there is an obligation on the Adjudicator to receive written evidence. In these circumstances it would seem to me that an adjudicator is a judicial tribunal.

33 It does not seem to be denied that there was a judicial decision as a result of the Adjudicator's determination. He decided the amount of an interim payment pursuant to the provisions of the Act. Of course there has to be a final decision on the merits for res judicata to apply. There was a submission by the plaintiff that this was not a decision on the merits in that it was dealt with by the Adjudicator in default of receiving any submissions from the plaintiff. It is plain that a judgment obtained by default, like one obtained by consent, will, unless and until set aside, conclude between the parties the matters expressly decided by its operative or declaratory parts. See ***Linprint Pty Ltd v Hexham Textiles Pty Ltd*** (1991) 23 NSWLR 508 at 517-8. There is debate in the cases as to whether a default judgment will give rise to an issue estoppel in respect of any questions in the decision rather than the relief awarded. Accordingly, it seems to me that the decision of the Adjudicator, to the extent that it is represented by the adjudication certificate, was a final judicial decision on the merits. In these circumstances there is res judicata as to that matter. However, that does not determine the controversy because the real question seems to me is the extent of the estoppel resulting from that res judicata. On this question I have already expressed the view in ***Max Cooper*** which is set out in paragraph 34 of that judgment that the Adjudicator's decision is nothing more than an interim determination for the purpose of progress payments under the Act.

34 I have earlier referred to the fact that in ***Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd*** [2005] NSWSC 284 Palmer J dealt with the extension of the cases that dealt with off-setting claims where there was simply a genuine dispute. After referring to that difference, His Honour said the following:

*10. The decisions are referred to and summarised by Barrett J in **Greenaways Australia Pty Ltd v CBC Management Pty Ltd** [2004] NSWSC 1186. His Honour quotes with approval from the judgment of Campbell J in **Demir Pty Ltd v Graf Plumbing Pty Ltd*** [2004] NSWSC 553 as follows: *"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.*

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.

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 Div 3 of Pt 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."

11. As I have observed, in my opinion the rationale underlying those observations is not affected by the circumstance that the ground for setting aside a statutory demand is said to be an offsetting claim rather than a dispute as to whether the debt has been contracted in the first place. It seems to me, with respect, that both Campbell and Barrett JJ are correct in their conclusion that it is not possible for the provisions of the Corporations Act, a Commonwealth statute, to be limited by reference to the provisions of the BACISOP Act, a State Act, and that the question for the Court in an application under s.459G is simply whether, as a matter of fact, a genuine dispute exists.

12. For those reasons, I am of the opinion that the Plaintiff is not precluded by the provisions of s.15(4) of the BACISOP Act from endeavouring to prove a genuine dispute in order to set aside the Defendant's statutory demand under the provisions of s.459G.

35 Plainly in ***Aldoga*** there was no judgment as a result of an adjudication determination. However, this fact does not qualify His Honour's conclusions because, in my view, there is a very limited estoppel which arises out of the issue of the adjudication certificate. It is an order for payment of an adjudicated amount and such an order has, by reference to the terms of the Act, only a limited operation which has been consistently pointed out in respect of the Act, namely, that it is interim and on account.

36 The ability of the parties to litigate the final amount due and ultimately receive an order for restitution by a Court under s32 (2)(3) of the Act is another reason why a genuine dispute about liability might lead to an off-setting claim under the **Corporations Act**. In **Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd** [2005] NSWSC 559 White J was concerned with a statutory demand which relied upon a judgment following upon an adjudication under the Act. His Honour dealt with it briefly in paragraphs 11 and 12 of his judgment in the following terms:

11 Part 3 of the Building and Construction Industry Security of Payment Act provides a summary procedure for determining what payments should be made on an interim basis, but it does not preclude the right of the parties to a building contract to have their rights and liabilities under that contract determined in accordance with the usual civil procedures. Thus, sub-sections 32(2) and (3) of that Act provide, inter alia, for restitution to be ordered by a court or tribunal hearing the matter arising under a construction contract, of any amount paid in accordance with Pt 3 of that Act.

> *12 It follows that whilst a party against whom a certificate requiring it to pay money has been issued, and against whom a judgment is entered in accordance with Pt 3 of that Act, is undoubtedly indebted to the other party to the contract who has obtained the certificate, nonetheless, if such a person has a genuine claim that it is not, in truth, indebted for the amount certified, it can maintain that claim as an offsetting claim under s 459H(1)(b) of the Corporations Act: see* ***Max Cooper & Sons (Builders) Pty Ltd v M & E Booth Pty Ltd*** *(2003) NSWSC 929;* ***Demir Pty Limited v Graf Plumbing Pty Limited*** *(2004) NSWSC 553;* ***Greenaways Australia Pty Ltd v CBC Management Pty Ltd*** *(2004) NSWSC 1186; and* ***Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd*** *(2005) NSWSC 284.*

37 His Honour then went on to consider whether there was a genuine dispute which gave right to a restitutionary claim when the rights of the parties were finally settled under procedures referred to in s 32 of the Act.

38 It seems to me that there is no doubt that the effect of the judgment obtained is limited and a genuine dispute, for instance, as to the terms of the contract may give rise to a genuine claim which would be a foundation for an off-setting restitutionary claim to be brought pursuant to the contract. I turn to whether there is such a claim.

39 In these reasons I earlier referred to the dispute between the parties as to the terms of the contract into which they had entered. Plainly on the conversations there is a serious question to be tried on this matter. I have also mentioned that Mr Gattellaro for the plaintiff carried out an exercise of assessing for the purposes of his claim in the Consumer Trader & Tenancy Tribunal how much he had been overcharged by the defendant. He did an analysis of the three invoices in question and came up with a total overcharge of $20,902.90. This assessment was supported with documentary evidence. This is clearly an assessment of what he alleges is the amount recoverable if his version of the contract were to prevail. It would thus be the amount of what was described by Mr Justice White as a restitionary claim in proceedings between the parties in some forum under s 32 of the Act. The defendant raises a question as to whether any such dispute was genuine within the terms of the authorities.

40 In **Macleay Nominees Pty Ltd v Belle Property East Pty Ltd** [2001] NSWSC 743 Palmer J usefully described a genuine off-setting claim in these terms:

> "*18. In my opinion, a genuine offsetting claim for the purposes of CA s.459H(1) and (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 s.459H(1) and (2).*"

41 The first matter raised is the failure of the defendant company to complain about the charges at the time of submission of invoices. However, on the evidence of Mr Gattellaro of the plaintiff, he did make an oral complaint at the time the invoices were submitted to him.

42 The next matter that the defendant raised was the fact that the plaintiff did not respond to the payment claim served on it although, plainly, it admits it received it. Mr Gattellaro has given two different versions of what happened in relation to the payment claim. In his first affidavit he initially said that it was enclosed with a bundle of documents and he did not notice it. He withdrew that and said that he did receive it on its own but thought it was simply a statement setting out the previous invoices sent in answer to the Tribunal's directions. It is also plain that he received notification from the Adjudicator. It appears strange that he did nothing. However, it would seem that his involvement in the Consumer Trader & Tenancy Tribunal demonstrated that he was vigorously, at least to his understanding, disputing the matter. In the face of this activity I would hesitate to suggest that the failure to respond to the payment claim was evidence that the dispute was not genuine.

43 The third matter relied upon was the terms of correspondence between the parties' solicitors in October 2004. That started with a letter from the defendant's solicitors which discussed a proposal not to commence winding up proceedings on the basis that a letter was received under which the plaintiff would acknowledge the outstanding debt and that it would be paid within a month from the date of the letter. There then followed a response of 27 October 2004 from the plaintiff's solicitor which was not in those terms and objection was taken to that in a further letter dated 26 October 2004 but faxed on 27 October 2004. On 27 October 2004 an amended letter was sent by the plaintiff's solicitor in these terms: "*We refer to our recent discussions and confirm that our client acknowledges that your client has obtained a judgment in the Local Court at Hornsby dated 10 September 2004 in the sum of $21,833.57.*

> *We note that your client may be prepared to hold off any action to enforce this judgment against our client for a period of one month and on the basis that our client pays your client the total judgment amount plus any due interest at that time. Please confirm that this proposal is accepted by return.*"

44 There was further correspondence between the solicitors and ultimately that offer to which I have referred was not accepted.

45 The correspondence was not headed "Without Prejudice" but it is plain on the face of the correspondence and the discussions between the solicitors that it was in truth "Without Prejudice" correspondence directed to resolving the threatened commencement of proceedings to wind up the plaintiff. The plaintiff went into evidence on the issue and any privilege was thereby waived. However, the statements should be seen in the context that there was an attempt to settle a small claim. Given the costs involved this may have been a sensible approach. Bearing these considerations in mind I do not think the letter indicates that the dispute is not genuine.

46 Accordingly, I am satisfied that the dispute is genuine and there is an off-setting claim amounting to $20,902.90. The amount of the demand is for $21,833.57. As the substantiated amount is less than the statutory minimum the demand should be set aside.

47 The orders that I make are as follows:
1. The statutory demand dated 1 November 2004 served by the defendant on the plaintiff be set aside.
2. The defendant to pay the plaintiff's costs of the proceedings.

Ms V. Culkoff for plaintiff instructed by Julie A Orsini
Mr S.A. Benson for defendant instructed by Marks Griffiths & Bova