JUDGMENT : **Barrett J** : New South Wales Supreme Court : 10th December 2004

1 By an originating process filed on 26 August 2004, the plaintiff makes application under s.459G of the **Corporations Act** 2001 (Cth) for an order setting aside a statutory demand dated 4 August 2004 served on the plaintiff by the defendant. In making that application, the plaintiff contends that it has an "offsetting claim" as defined by s.459H(5), against the defendant (that is, "a genuine claim … by way of counterclaim, set-off or cross-demand)", and that the "amount" of that claim exceeds the sum the subject of the statutory demand. The claim under s.459G is thus based on s.459H(1)(b), read in the light of s.459H(2).

2 The debt referred to in the statutory demand is a judgment debt which arose by virtue of filing in the District Court at Lismore of an adjudication certificate issued under s.24 of the **Building and Construction Industry Security of Payment Act** 1999. Section 25(1) of that Act says: *"An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly*."

The sum specified in the statutory demand is $97,640.39, being the certified sum of $96,540.19 plus costs of $886.00 and interest under the **District Court Act** to the date of the demand.

3 The defendant performed building work for the plaintiff. The sum referred to in the adjudication certificate under the **Building and Construction Industry Security of Payment Act** was, in accordance with s.22 of that Act, determined by an adjudicator to be the amount of a progress payment to be paid by the plaintiff to the defendant. The manner of calculation to be employed in such a case is prescribed by s.13. That section deals with two alternative cases. The second of them is relevant here, that is, the case where the contract under which the building work was done makes no express provision for the calculation of progress payments. In such a case, the amount of a "progress payment" is, under s.9(b), "the amount calculated on the basis of the value of construction work carried out or undertaken by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract".

4 In general terms, therefore, the adjudicated amount which later became the principal component of the judgment debt upon which the statutory demand was based was an amount assessed by the relevant functionary "on the basis of the value of" work done under the building contract and related goods and services supplied.

5 The offsetting claim propounded by the plaintiff arises from what it says was overcharging by the defendant in invoices that the plaintiff has already paid. The plaintiff has paid fifteen invoices (designated GREE-01 to GREE-15) totalling $552,203.91. Upon subsequent examination of those invoices, the plaintiff has formed an opinion that it has been overcharged by a substantial amount. In the hearing before me, three categories of supposed overcharging were relied upon. Those categories account, it is said, for overcharging to the extent of $102,597.90.

6 The first category of overcharging involves instances in which the same item was charged twice. To illustrate this, I was taken to the defendant's invoice GREE-02 dated 13 August 2003 which included a charge for six hours truck hire from Broken Head Quarry (abbreviated to "BROQUA") in the sum of $432.48 by reference to that supplier's own invoice number 68. Exactly the same charge for exactly the same item and amount by reference to exactly the same BROQUA invoice number was also included in the defendant's invoice GREE-03 dated 2 September 2003.

7 The second category of overcharging relates to instances where a charge is included in a particular amount for a particular item identified by reference to a supplier's invoice which is in fact for a lower amount than that charged. An example is again found in invoice GREE-02 dated 13 August 2003 where there is a charge for $3,933.83 for truck hire by reference to BROQUA invoice number 255 whereas the attached copy of BROQUA invoice 255 shows a sum of $374.16.

8 The third category of overcharging concerns cases in which there is a charge for an item billed by another party and reference to an invoice issued by that other party but no copy of any such invoice is attached. Again, an example from the defendant's invoice GREE-02 may be quoted. It contains yet another entry for truck hire from Broken Head Quarry (BROQUA). The entry is for $707.07 by reference to the supplier's invoice BROQUA 258. But among the several BROQUA invoices attached to the defendant's invoice GREE-02 there is none numbered 258.

9 The several instances within these three categories have been analysed by the plaintiff. The results, as they emerge from the several GREE invoices, appear in consolidated form at pages 144 to 146 of the exhibit AG1 to the affidavit of Mr Greenaway sworn on 17 November 2004. Also tendered by the plaintiff in the proceedings as exhibit A was a large folder containing each of the GREE invoices and all supporting materials. I granted an adjournment of several days to enable the defendant to examine this voluminous material. Upon the resumption, there was no submission on behalf of the defendant that the summary at pages 144 to 146, insofar as it dealt with the fifteen invoices GREE-01 to GREE-15, did not correctly reflect, in an arithmetical and compilation sense, the items within the three categories said by the plaintiff to entail overcharging. In respect of those items in the fifteen invoices, the total amount is $102,597.80.

10 This aggregate of $102,597.80 represents the offsetting claim on which the plaintiff seeks to rely for the purposes of s.459H(1)(b). The plaintiff says, quite simply, that each of the fifteen invoices submitted to it by the defendant (which it has paid) represented, in part, that the defendant was recouping, through the charge in the invoice, sums it had outlaid to or become responsible to pay to others, that the plaintiff paid those fifteen invoices

on an assumption that that representation was true but, as now appears from the detailed analysis the plaintiff has carried out, the representation was false because, on the verification material provided, some of the disbursements were never incurred, some are overstated (i.e., were incurred in an amount less than that represented) and others have been on-charged twice. It is the plaintiff's contention that, as a result of the misrepresentations, it has paid on the fifteen invoices $102,597.80 more than it should have been charged and that sum is properly recoverable by it from the defendant.

11 Section 25(4) of the **Building and Construction Industry Security of Payment Act** limits the extent to which a person in the position of the present plaintiff may cross-claim and mount defences against someone in the position of the present defendant. But those constraints apply only in proceedings in which it is sought to have a judgment resulting from filing of an adjudication certificate under the Act set aside. It may be ignored in the present context as there is no suggestion that pursuit of the offsetting claim that the plaintiff considers itself to have involves any attempt to have the District Court judgment set aside.

12 Section 32(3) of the Act deals with proceedings "in relation to any matter arising under a construction contract". Proceedings in which the plaintiff sought to agitate its offsetting claim would be proceedings of that kind. But all the section says is that the court must allow for any amount paid to a party to the contract under Part 3 of the Act when formulating the relief to be granted and may make restitutionary orders. Again, therefore the Act would not have any impact on the pursuit of the offsetting claim: see ***Tooma Constructions Pty Ltd v Eaton & Sons Pty Ltd*** [2002] NSWSC 514.

13 It was submitted on behalf of the defendant that the offsetting claim is not a genuine offsetting claim because the general issues and some of the specific matters relating to it were referred to by the adjudicator and that there was otherwise no reference to those matters in the material put to the adjudicator by the plaintiff, with the result, it is said, that they have, as it were, been disposed of by the adjudicator's determination and cannot now be advanced by way of offsetting claim.

14 I do not accept that submission. As I have said, the adjudicator was, in this case, working under s.9(b). His task was to determine, as a progress payment, "the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out" together with related goods and services. Section 10 says how that value is to be assessed. In a case such as the present, s.10(1)(b) applies to require a determination "having regard to" a number of matters. In no sense whatsoever does the adjudicator's assessment of value represent a determination of legal liability, as a matter of contract, between the parties.

15 The aim of the **Building and Construction Industry Security of Payment Act** is to ensure that progress payments are made, whether or not provided for in the contract, so that the party carrying out building work receives, on account, a summarily assessed sum as compensation for work done. That the adjudicator does or does not take into account a particular item or treats it in a particular way is irrelevant to ultimate questions of the contractual liabilities of the parties to one another. In ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140, Palmer J summarised the system embodied in the legislation as "pay now, argue later". *In* ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394, Hodgson JA said that the Act reflects a legislative intention "to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay", the payments themselves being "only payments on account of a liability that will be finally determined otherwise".

16 It is pertinent here to quote what was said by Campbell J in ***Demir Pty Ltd v Graf Plumbing Pty Ltd*** [2004] NSWSC 553 about the interaction between the **Building and Construction Industry Security of Payment Act** (which his Honour labelled "the BACISOP Act") and the provisions of the **Corporations Act** concerning the setting aside of statutory demands: *"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 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."*

I respectfully adopt his Honour's conclusions and reasons.

17 The task of a plaintiff seeking to show an "offsetting claim" for the purposes of s.459H(1)(b), was described by Palmer J in ***Macleay Nominees Pty Ltd v Belle Property East Pty Ltd*** [2001] NSWSC 743 as follows: *"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."

18 The need for such a claim to be sufficiently quantified in money terms is emphasised by the definition of "offsetting claim" in s.459H(2) where it is assumed that every such claim has an "amount". I said, in relation to this, in ***No 96 Factory Bargains Pty Ltd v Kershel Pty Ltd*** [2003] NSWSC 146: *"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."*

19 I am satisfied that the plaintiff has, by reference to the three categories of anomalies identified in the fifteen invoices GREE-01 to GREE-15, identified an aggregate claim having the characteristics referred to by Palmer J in ***Macleay Nominees***. In this case, the question of quantification, which can pose difficulties in other cases, is straightforward. The items of overcharging covered by the three categories are quantified by readily intelligible means at a total of $102,597.80.

20 The plaintiff has therefore shown, in terms of s.459H(3), that the substantiated amount is less than the statutory minimum, with the result that, subject to a matter I am about to mention, the court must make an order setting aside the statutory demand.

21 The defendant by which the statutory demand was served is subject to the form of creditors voluntary winding up that follows on from Part 5.3A administration. The administration commenced on 24 September 2004. The winding up commenced on 21 October 2004. These proceedings were commenced on 26 August 2004. Leave to continue them became necessary under s.440D as from 24 September 2004 and under s.500(2) as from 21 October 2004.

22 The plaintiff has made an application for such leave. I am satisfied that leave may be granted *nunc pro tunc* (as in ***Emanuele v Australian Securities Commission*** (1997) 188 CLR 114) and that a grant of leave should be made in this case. The object of the provisions precluding, without the court's leave, continuation of legal proceedings against a company once a relevant form of external administration is imposed is to create a screening mechanism to ensure that the proceedings do not interfere unduly with the due progress of the administration. Here, the setting aside of the statutory demand so that the defendant, through its liquidator, does not have the benefit of a presumption of insolvency if and when it comes to initiate winding up proceedings will have no impact on the orderly conduct of the winding up and the performance of the liquidator's functions. In that respect, I adopt the reasoning of Palmer J in ***Home Corp Projects (No 100) Pty Ltd v Australian Home Mortgage Corporation Pty Ltd*** (2001) 19 ACLC 1491.

23 I should refer, in conclusion, to the submission on behalf of the defendant that, if an order is made setting aside the statutory demand, it should be on condition that the plaintiff take defined steps to make good the claim. Such a condition (which may be imposed under s.459M) may be appropriate where the court sees a need for greater precision to be given to the offsetting claim and for the plaintiff to show a commitment to pursuing it: see, for example, ***Macleay Nominees Pty Ltd*** *(above) and* ***Asia Pacific Glass Pty Ltd v Sindea Trading Co Pty Ltd*** [2003] NSWSC 334. In the present case, however, the claim relied upon before me is quite straightforward as to both the alleged basis of liability and the calculation of the sum of $102,597.80. In addition, pursuit of it, at this stage in the life of the defendant, involves no more than lodgement of a proof of debt in the winding up. I therefore see no need for any condition of the kind suggested.

24 The orders of the court are:

1. Grant leave to the plaintiff *nunc pro tunc* under ss.440D and 500(2) of the **Corporations Act** 2001 (Cth) to continue these proceedings after 24 September 2004 and 21 October 2004 respectively.
2. Order that the statutory demand dated 4 August 2004 served on the plaintiff by the defendant be set aside.
3. Order that the defendant pay the plaintiff's costs of the proceedings.

Mr R.D. Marshall – Plaintiff instructed by Teitzel & Partners
Mr J.T. Johnson – Defendant instructed by Sally Nash & Co