SUPREME COURT OF QUEENSLAND

CITATION:	*JJMMR P/L v LG International Corp* [2003] QCA 519
PARTIES:	**JJMMR PTY LTD** ACN 010 171 945 (applicant/respondent) **v** **LG INTERNATIONAL CORP** (respondent/appellant)
FILE NO/S:	Appeal No 4017 of 2003 SC No 2185 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2003
JUDGES:	de Jersey CJ, McPherson JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	APPEAL AGAINST ORDER SETTING ASIDE STATUTORY DEMAND – WHAT AMOUNTS TO A GENUINE OFFSETTING CLAIM – WHETHER AFFIDAVIT FILED WITHIN PRESCRIBED 21 DAY PERIOD SUFFICIENTLY RAISED THE CLAIM – EXTENT AND QUALITY OF EVIDENCE NECESSARY TO ESTABLISH SUCH A CLAIM *Corporations Act* 2001 (Cth), s 459G, s 459H *Sale of Goods Act* 1896 (Qld), s 54 *Trade Practices Act* 1974 (Cth), s 52, s 82, s 87 *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367, approved *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, considered *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, approved *Graywinter Properties Pty Ltd v Gas and Fuel Corporation Superannuation Fund* (1996) 21 ACSR 581, approved *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, approved

John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd (1994) 14 ACSR 250, approved
Meadowfield Pty Ltd v Gold Coast Holdings Pty Ltd (in liq) [2001] WASCA 360, approved
Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] 2 VR 290, approved
Raffles Co Pty Ltd v CECH [2001] QSC 129; SC No 2678 of 2001, 4 May 2001, approved
WEC Pty Ltd v Cypriot Community of Queensland [2002] QCA 506; Appeal No 2929 of 2002, 22 November 2002, approved

COUNSEL: P A Keane QC, with K E Downes, for the appellant
D C Andrews SC, with I A Erskine, for the respondent

SOLICITORS: Blake Dawson Waldron for the appellant
Gateway Lawyers for the respondent

[1] **de JERSEY CJ**: The respondent applied to the learned primary Judge for an order setting aside a statutory demand dated 17 February 2003 served on the respondent. The amount demanded was $US458,918.89, the unpaid price of laundry detergent products supplied by the appellant under a distribution agreement dated 21 November 2001 between the appellant and the respondent. The learned Judge set aside the demand on the basis the respondent had a genuine offsetting claim for damages for false and misleading conduct, under ss 52 and 82 of the *Trade Practices Act*, valued in the order of $A1.542 million. That offsetting claim rests in alleged representations by agents of the appellant during the negotiations which preceded the execution of the distribution agreement, to the effect that the standard of the laundry product to be supplied would be comparable with that of OMO; and allegations that the representations were misleading, that the respondent relied on them in entering into the distribution agreement and importing the product, and that it consequently suffered trading losses.

[2] The respondent challenged the demand on three other grounds: first, that amounts totalling $US306,240 had not fallen due for payment by the date of the demand, which is now conceded by the appellant, so that the amount of the demand would in any event need to be reduced from $US458,918.89 to $US152,678.89; second, that the appellant failed to account for the value of goods reclaimed by the appellant, the respondent putting their value at $US205,784.44; and third, that the appellant wrongly took possession of product for which the respondent had paid, in an amount of $US230,205.20. The appellant disputes those second and third challenges. It was unnecessary for the learned Judge to deal with any of these separate challenges to the demand, because he upheld the respondent's position as to the existence of a genuine offsetting claim overtopping the amount demanded by the appellant.

[3] As to the evidentiary approach to establishing a genuine offsetting claim, reference may be made to *WEC Pty Ltd v Cypriot Community of Queensland Inc* [2002] QCA 506, where McMurdo P said (paras 11 and 12):

> "… a mere assertion of an oral agreement deposed to in an affidavit will not necessarily suffice to set aside a statutory demand.

> Something beyond implausible assertion is required from an applicant to demonstrate the genuineness of its claim. A genuine dispute is one that really exists in fact and is not spurious, hypothetical, illusory or misconceived. It was not necessary for the court to be satisfied that the agreement deposed to … was reached but merely the existence of a genuine dispute as to the demand … An oral agreement by its very nature will depend on assertion. In assessing the genuineness of the dispute raised in [the] affidavit it is necessary to examine all the material before the primary judge."

[4] The purpose of tendering evidence in these cases is, notwithstanding what might on one reading be drawn from s 459H(1)(b) and (5) of the *Corporations Act*, not to establish the facts necessary to constitute a counter or cross claim, but to establish the existence of a genuine claim to be able to counter the demand. Of course to do so, facts will have to be established. But the objective is not to secure adjudication of what if any amount is owing, but to establish a genuine cross or counter or offsetting claim such as would warrant subsequent adjudication. See *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 290, 293; *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787; *John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250, 253; *Graywinter Properties Pty Ltd v Gas and Fuel Corporation Superannuation Fund* (1996) 21 ACSR 581, 587-8; *Meadowfield Pty Ltd v Gold Coast Holdings Pty Ltd (in liq)* [2001] WASCA 360, para 21.

[5] To establish its offsetting claim, the respondent relied on two affidavits sworn at different times by its managing director, Phillip Raymond Roberts. Only the earlier in time was filed within the 21 day period from service of the demand. The learned Judge held however that because that earlier affidavit sufficiently asserted the existence of the facts on which the offsetting claim was grounded, recourse could also be had to the later affidavit (cf. *Raffles Co Pty Ltd v CECH* [2001] QSC 129 para 8). That is so notwithstanding the strict approach taken to the procedure prescribed by this statutory scheme, as illustrated by *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 276. The Judge took the view that the later affidavit added strength to the claim of misrepresentation, and made it clearer that the amount of the offsetting claim exceeded the amount demanded.

[6] The appellant sought in its written material to reagitate objections to the admissibility of many parts of the affidavits, the objections being contained in a five page document which was handed to the learned Judge. It is complained that his Honour failed to rule on the objections. It may be taken that, to the extent to which he relied on the affidavit material to find a sufficiently arguable case that the representations were made, that they were misleading, that the respondent relied on them, and that the respondent suffered consequent loss in an amount exceeding the amount demanded, he rejected those objections, in that he was implicitly satisfied that the evidence adduced was of sufficient quality to warrant his reliance upon it. There is no suggestion that Counsel for the appellant voiced any discontent over his Honour's not formally ruling on the respective objections. Much of the submissions contained in the five page document is argumentative, and depends on the appellant's overall primary contention, which is that the sworn material on critical points amounted to no more than mere assertion and was therefore inadequate to warrant the conclusions reached by the Judge. I consider it appropriate to approach the matter as did his Honour.

[7] This is what the learned Judge found as to the evidence of the allegedly misleading conduct:

> "The evidence of the making of the representations which is within the first affidavit is contained in paragraphs 15 to 21. That evidence consists of more than mere assertion by Mr Roberts. It contains evidence of some documents passing between the parties from which it fairly appears that the applicant was making it clear to the respondent that it was requiring a product "similar in quality to Omo".
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> The respondent was told that the product should be of the same standard as Omo with which the applicant could compete successfully by its price being some five to ten per cent lower. The applicant was asked by the respondent to send to it samples of Omo, and it did so. By paragraph 20, Mr Roberts swears that:-
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> > "As a result of the meeting … it was agreed that the detergent to be supplied by the respondent to the applicant would be of a similar standard to the OMO product referred to."
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> Read alone, this is a mere assertion, but it must be read with the balance of the affidavit and by keeping in mind that it is legitimate for the section 459G affidavit to be sworn in terms which resemble a pleading. Although paragraph 20 refers to what was "agreed", paragraph 21 refers to representations. Within paragraph 21 there is a reference to, "The meeting referred to in paragraph 6 hereof." But this seems an intended reference to the meeting when item 6 of Exhibit PRR1 was presented, that being the meeting, the subject of paragraphs 19 and 20 of the affidavit.
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> When paragraphs 15 to 21 are considered together in the context of the whole affidavit, it seems to me that the affidavit sufficiently evidences for present purposes the making of the representations relied upon."

[8] Looking at the critical paragraphs of Mr Roberts' first affidavit, paras 15 to 21, one sees evidence of the respondent referring to "the leading brand of OMO"; of a meeting between the parties in July 2000 at which the respondent presented its strategy as being to "emulate the market leader OMO in most respects … and importantly, quality"; that on 4 August 2000, the appellant requested the respondent to send samples of OMO, so that the appellant could "recheck with packing size, colour, containers …"; that the respondent provided those samples; that at a meeting between the parties in September 2000, the respondent presented a marketing and sales plan which spoke of a strategy to offer "detergent powder similar in quality to OMO"; that at that meeting, representations were made to that effect on behalf of the appellant (para 21), and that became a matter of agreement (para 20). While the form of para 20 might be criticized, and while it is true that the presentation of the evidence could have been more detailed, in identifying for example those who made the representations referred to in para 21, his Honour's analysis was supportable.

[9] There was sufficient evidence of the respondent's reliance on the representations, to be drawn from paras 20, 21 and 29 of that affidavit.

[10] The appellant submitted in its written material that the respondent's reliance on the representations for the purposes of establishing the offsetting claim was in any event precluded by cl 20 of the distribution agreement subsequently executed. That clause provides:

> "This agreement constitutes the entire understanding of the parties relating to the subject hereof and supersede any other previous agreements and understandings whether written or oral. This agreement may be amended or modified only in writing signed by the duly authorised representatives of the respective parties."

There is sufficient authority, however, that such a provision cannot deprive a party in the position of this respondent of a remedy for breach of the *Trade Practices Act* as alleged here: *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367, 371; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, 98-9. Mr Keane QC, appearing for the appellant, orally conceded that.

[11] For the misleading character of the appellant's conduct, the respondent relied on paras 27 and 28 of Mr Roberts' first affidavit:

> "27. The applicant received numerous oral and written complaints from consumers about the quality of the product, given that it was priced near the top end of the laundry detergent market.
>
> 28. Subsequently testing of the product by JALCO Australia Pty Ltd has revealed the detergent is substantially inferior to OMO."

[12] While that evidence was plainly limited, and could have been more precisely articulated, it did provide a sustainable basis for the learned Judge's conclusion that there was a genuine case for consideration that the appellant's conduct was misleading. Mr Keane contended for a number of particular deficiencies, for example the absence of evidence of complaint, but they did not exclude his Honour's taking the view he did. It was, additionally, of some potential significance that no contrary evidence was filed for the appellant, in response to Mr Roberts' first affidavit. (His Honour did not in his reasons for judgment advert to that matter.)

[13] As to the claim of consequent loss, his Honour provided this analysis, based again on Mr Roberts' first affidavit:

> "… the appellant has adduced evidence of its profit and loss statement for July 2002 to March 2003 which demonstrates for present purposes its losses during that period and that they were solely attributable to this business of importing the respondent's product.
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> As the distributorship agreement was made only seven months prior to the commencement of this period, that statement is of some value

> in demonstrating the applicant's losses from this venture. The losses during the period were approximately 1.95 million Australian dollars.
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> The first affidavit does not show the trading figures for the period to June 2002, so that absent other evidence, the applicant has not purported to quantify its losses from the entire venture to date. However, in the present context, the applicant has, by this first affidavit, sufficiently disclosed facts showing a genuine counterclaim of the order of 1.95 million dollars.
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> There may be other causes of the applicant's trading losses, but, in principle, that is not a bar to recovery of all of the losses under section 82 if they have been relevantly caused by the section 52 contraventions: *Henville v. Walker* (2001) 206 CLR 459."

[14] The respondent's profit and loss schedule for that period, taken with para 30 of Mr Roberts' first affidavit, provided sufficient evidence of the claimed losses consequent upon the respondent's reliance on the appellant's misleading representations, in an amount substantially exceeding that of the demand.

[15] Passing then to Mr Roberts' second affidavit, as I consider the Judge was in those circumstances entitled to do, one sees in paras 3, 4 and 5 identification of the appellant's representative who made the representations, and more detail of them (the product "Super Ti" is obviously being referred to as the product to be supplied, the product intended to match – or "be similar to" – OMO); more evidence in para 6 of reliance, and of the relationship between the losses and the misleading representations; more, detailed evidence that the product supplied was inferior to OMO, especially in its being unsuited to the cold water machine washing often done in Australia, but apparently less so in Korea where the product originated (paras 17-21 and Ex PPR3); and further, more comprehensive evidence of the losses claimed, and their relationship with the misleading representations (paras 25-28). To the extent that he relied on that second affidavit, the learned Judge was as I have said entitled to do so, and what he drew from it was justified.

[16] In my view the appeal should be dismissed, with costs to be assessed.

[17] **McPHERSON JA:** I agree. The question is whether the respondent company has shown it had an "offsetting claim" under s 459H(1)(b) of the *Corporations Act 2001*. The expression is defined in s 459H(5) to mean "a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand …" Here the company claims to have a right of set-off, which, taken with other matters that go to reduce the amount of the indebtedness demanded by L G International Corp, is said to overtop that amount. If that is the fact, then the demand must be set aside.

[18] Anyone can make a claim to a right of set-off against a creditor. What the definition in s 459H(5) requires, however, is that it be "genuine". The same word in s 459H(1) has already elicited so many synonyms and shades of meaning that it will not help to add more. Its antithesis is to be seen in the word "artificial". The claim to set off against the debt demanded must not have been manufactured or got up simply for the purpose of defeating the demand made against the company. It must

have an existence that is objectively demonstrable independently of the exigencies of the demand that evoked it.

[19] As appears from the analysis and reasons of the Chief Justice, both the debt and the offsetting claim arose out of a distribution agreement by which the company agreed to buy washing power from L G International Corp and in doing so incurred a liability to pay the price of the goods when delivered. The company asserts that the washing powder did not conform to the quality or standard that was promised or represented that it had or would have on delivery. There is some independent evidence supporting the hypothesis that what was delivered is not as effective as the product Omo marketed by its principal competitor when it is used in cold water at temperatures below 20°C, with the consequence that it encountered and was likely to continue encountering buyer resistance in the Australian market.

[20] The statements said to amount to promises, representations or misleading conduct on the part of L G International Corp are not established in the principal affidavit with the degree of clarity that might have been expected or hoped for; nor is the prospective loss proved with precision; but, like the Chief Justice, I am persuaded that the available evidence is enough to show that the company has an offsetting claim of a sufficient amount that is capable of being regarded as "genuine" and is not simply one that has been fabricated and brought forward for the occasion. If established at trial, the loss sustained would go in reduction or extinction of the price under s 54(1)(b) of the *Sale of Goods Act 1896*, or ss 82 and 87 of the *Trade Practices Act 1974*, or under the general law governing set-off of damages arising out of the same transaction.

[21] The appeal should be dismissed with costs.

[22] **HOLMES J:** I agree with the reasons for judgment of the Chief Justice and McPherson JA and the orders they propose.