MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Products For Industry P/L v Comgroup Supplies P/L* [2014] QMC 13
PARTIES:	**PRODUCTS FOR INDUSTRY PTY LTD** (Plaintiff) **v** **COMGROUP SUPPLIES PTY LTD** (Defendant)
FILE NO/S:	M13472/13
DIVISION:	Magistrates Courts
PROCEEDING:	Claim – Application for Summary Judgment
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	8 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2014
MAGISTRATE:	The Honourable Judge Tim Carmody QC
ORDER:	**The order of the Court is that:** **1. summary judgment in the proceeding be given in favour of the plaintiff against the defendant pursuant to rule 292 of the *Uniform Civil Procedure Rules* 1999.** **2. the defendant pay to the plaintiff the sum of $45,621.77 comprising:** **(a) $39,459.77 being for the value of the claim; and** **(b) $6,162.00 interest on the value of the claim from the dates payments were due as specified in the claim until 8 April 2014.** **3. the defendant pay the plaintiff's costs of the proceedings, including the costs of and incidental to the application for summary judgment filed 18 February 2014 to be assessed on the standard basis if not agreed.**
CATCHWORDS:	PRACTICE AND PROCEDURE – SUMMARY JUDGMENT – GROUNDS OF DEFENCE - where set off claimed against an unpaid commercial debt – whether

	preconditions for equitable set off satisfied.
COUNSEL:	M Long for the Plaintiff
	C Coveney for the Defendant
SOLICITORS:	Tucker and Cowan Solicitors for the Plaintiff
	HWL Ebsworth Lawyers for the Defendant

The application

[1] The Plaintiff (PFI) applies for summary judgment against the Defendant (Comgroup) under Rule 292 for a debt of $39,459.77 allegedly owing for the price of work performed under a contract (the claimed amount).

[2] For the application to succeed PFI has to prove *prima facie* entitlement to the claimed amount and that a full trial of the claim is unnecessary because, for example, the pleaded grounds of defence do not have a real prospect of success.

The context

[3] Comgroup admits failing or refusing to pay the claimed amount but denies liability because, it says, either (a) no debt was owed when the claim was filed or, alternatively, (b) it is entitled to set off a District Court cross-claim for $277,483.99 (the overpayment).

[4] Comgroup's District Court action to recover the overpayment from PFI commenced in late 2012. The claim is based on a series of 31 false invoices issued between 3 November 2010 and 29 June 2012 by a fraudulent PFI sub-contractor (GTAK) for work that was ordered by Comgroup but never done.

[5] As well as defending that action PFI instituted proceedings in this court in late 2013 for the claimed amount which is the unpaid balance of 12 unpaid invoices submitted between 14 May 2012 and 11 October 2012 (the genuine invoices).

[6] The GTAK scam came to light in August 2012; that is, about six weeks or so after payment of the last false invoice (#1338905) on 25 June 2012 and sometime between the due date for payment of the first three unpaid genuine invoices and the placement by Comgroup of the last three PFI purchase orders.

[7] No issue is raised about the value of the work billed for in the genuine invoices or the quantum of the disputed debt.

Summary judgments

[8] The summary judgment jurisdiction must be used with great care (*Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99). The decisive question whether the defence has no real chance of success at trial is to be answered by reference to the overriding objectives of overall justice.

[9] A high degree of certainty is required. The court must be sure that the defendant's cause is not likely to be assisted by the advantage of the usual interlocutory steps or the benefit of testing adverse testimony at a full hearing on the merits.

[10] Comgroup is entitled to defend unconditionally if its unlitigated unliquidated District Court damages claim can validly be set off in equity against the PFI's liquidated common law debt.

[11] Conversely, consistently with the philosophy and purpose of Rule 5, PFI should have judgment if the cross-claim does not really qualify as a *set off* (a true defence) as distinct from a counter claim (cf Rule 173(1)).

Does PFI have an actionable debt?

[12] Comgroup submits that PFI has failed to demonstrate an entitlement to judgment because of the real prospect that the alleged debt was fully satisfied or offset by the overpayment. In other words unsuspecting payment of the false invoices amounted to an unwitting and unintended prepayment of the genuine invoices.

[13] Unsurprisingly, no authority was cited in support of this intriguing but unlikely proposition. Accordingly, I am unwilling to accept or act on it as a correct statement of the law.

[14] As far as I am concerned the debt is clear. The only question to be resolved is whether or not the overpayment gives Comgroup a viable ground of defence with a real prospect of success.

[15] This is a question of law which is decided according to established principle and not by the language used in the pleadings (*Hanak v Green* [1958] 2 QB 26).

Equitable set-offs

[16] A set off is essentially a cross-claim or competing demand used by defendants to reduce or extinguish liability for a plaintiff's legitimate money claim. The mechanism is an example of the laws readiness to intervene in commercial transactions to prevent unfairness by stopping a party in breach of a contract from suing for the price without taking into account the loss he has caused to another party to the same contract.

[17] A real equitable set off does not deny the claimed debt. On the contrary, it assumes the indebtedness but raises reasons (or equities) as to why it would be unjust in the circumstances for the plaintiff to proceed while the cross-claim remains unresolved.

[18] In *Henriksens A/S v Rolimpex* [1974] 1 QB 233, Denning MR, suggested that, strictly speaking, a cross-claim that does not reduce the value of the work but causes other damage is an equitable defence rather than a set off but the distinction is or little practical importance here.

[19] Equitable set off is to be distinguished from the rule in *Mondel v Steel* [1841] 8 M&W 858; 151 ER 1288 at 1293-1294 under which a defendant sued for the price of goods or work may show that they are worth less than the contract price by reason of the plaintiff's conduct. The defendant's plea is not strictly a cross-claim but merely for abatement or reduction of the price equal to the damage suffered.

The current Australian position

[20] *Knockholt v Graff* [1975] Qd R 88 is said to have confirmed the availability of the defence in Queensland (see *re Partnership Pacific Securities Ltd* (1994) 1Qd R 412, 424).

[21] According to *Hill Corcoran Constructions Pty Ltd v Navarro* (unreported, Court of Appeal, (Davies and Pincus JJA, Thomas J) (Qld), 6 March 1992) the starting point of any discussion of the doctrine is *Rawson v Samuel* [1841] Cr & Ph161 at 178-179; 41 ER 451 at 458.

[22] The defendant in *Rawson v Samuel* was sued for breach of contract which he sought to counter by an action for account. He failed to establish an equitable set off because the competing claims were held to be too separate and unconnected to give rise to any special equity against the plaintiff.

[23] In a highly influential judgment Lord Cottenham LC noted that in all past cases where equitable set offs were allowed the defendant had shown "some equitable ground for being protected from his adversary's demand".

[24] Those cases involved equities such as a landlord's damage to his tenant's crops preventing him from paying rent in an action for ejectment for non-payment, misappropriation by bankrupt bankers whose trustee sued the defrauded debtor on a promissory note and, in *Piggot v Williams* (1821 6 Madd 95; 56 E R 1027, professional negligence of a solicitor suing for the foreclosure of an estate pledged by the client as security for unpaid fees.

[25] However, the nature of the required "equitable ground" has never been clearly defined but in general terms, what is needed, according to Dr Rory Derham, *Sett – Off* (at 4.03) is an equity, such as, fraud or inseparability. Whatever it is it must impeach[1] the title of the plaintiffs demand:

> "...in the sense that it makes it positively unjust that there should be recovery without deduction".[2]

[26] Despite its vagueness Lord Cottenham's so called principle of impeachment is regarded in Australian courts as the standard test for determining whether a defendant can rely on equitable set off as a defence to an undisputed money claim (*Walker v Secretary Department of Social Security* [1995] 56AL FLR 354 per Drummond J at 364).

[27] The rule was approved and applied by the High Court in *Hill v Ziymack* [1908] 7 CLR 352 at 360-361. There the plaintiff recovered damages in an action for conversion and it was held that equity would not restrain him on the grounds of equitable set off from issuing execution merely because there was an unsettled account pending between the parties relating to dealings in transactions affecting the same property.

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1 The requisite degree of proximity has also been described as "going to be very root" or "calls into question", "impugns", "disparages" or "impedes the title".

2 M Van Der Walt, *The Clarification of Equitable Set Off* (1998) 72 ALJ 516 at 520.

[28] In *James v Commonwealth Bank of Australia* (1992) 32 FCR 445 Gummow J relied on *Hill v Ziymack* to decide that debts that would not have come about but for or were at least contributed to by the claimant's own breaches of duty could properly set off against their claim for receiver's indemnity.

[29] The majority in *Walker v Secretary Department of Social Security* (1995) 56 FLR 354 (Cooper and Spender JJ) also faithfully adhered to *Rawson v Samuel* in holding that a federal government department did not have a "practical" right of set off in advance of the formal issue of legal proceedings justifying its refusal to pay $2,000 in sickness benefit arrears to the plaintiff in reduction of a previous $20,000 overpayment due to fraudulent claims.

[30] Drummond J (dissenting) considered that an equitable set off was available because of the close connection of the claim and the cross-claim in conjunction with the earlier fraud of the claimant and was critical of Gummow J's "narrow fact based test" in *James v Commonwealth Bank of Australia*.

[31] His Honour agreed that more was required to give rise to equitable set-off than "… for the cross demand to flow out of and be inseparably connected with the transactions out of which the plaintiff's claim arose" (at 363) but regarded injustice or unconscionability not impeachability as lying at the heart of the modern doctrine and said (at 365):

> "If the concept of impeachment involves no more than an examination of the connections between claim and cross-claim , and makes irrelevant any reference to discretionary considerations, including those raised by the plaintiff's conduct which touch on his claim, it would give an equitable remedy according to whether claim and costs demand was sufficiently connected, in a factual sense, and without reference to any of the discretionary considerations that are the hallmark of equitable intervention."

[32] Of this analysis Martin Van der Walt[3] says:

> "With the greatest respect…his Honour was putting the cart before the horse: Impeachment is the primary - indeed the essential - criterion from which the consequences of injustice and inequity flow … the same cannot be said for the converse – there are many unjust situations that do not amount to impeachment…conduct like injustice and inequity is subject always to the overriding imperative of impeachment."

[33] In *Galambos & Son v McIntrye* [1974] 5 ACTR 10 Woodward J held that an unliquidated claim for damages for breaching a building contract *might* be recognised as a legitimate equitable set off against a claim for money due for work even where one of the cross-claims is not actually based in the same contract but is a corollary of and directly connected with it.

[34] Whether the nexus between the subject matter of such a set off and that of the demand is close enough to meet Lord Cottenham's requirement is debatable but (at 20) Woodward J did correctly note that, traditionally, the prerequisites of an equitable set-off are:

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3 (1998) 72 ALJ 516, 528

(a) clear cross-claims for debts or damages;

(b) so closely related as to the subject matter that the claim sought to be set-off impeached the other in the sense that it made it positively unjust that there should be recovered without deduction.

[35] In summary, therefore, to establish a right to an equitable set off in this court today's cross demands are necessary but not sufficient. Defendants must show some equitable basis (such as, in the absence of fraud, mutual or closely related, claims) for being protected against the plaintiff's demand (*Rawson v Samuel* [1841] Cr & Ph 161 at 178; 41 ER 451 at 458; *Hill v Ziymack* [1908] 7 CLR 352 at 360-362, 368; J&S *Holdings Pty Ltd v NRMA Insurance Ltd* [1982] 61 FLR 108 at 127). The relevant equity has to be such as to impeach the adversary's title to demand payment to the point that ignoring it would plainly unjust (*Lord v Direct Acceptance Corp, in liquidation* [1993] 32 NSWLR 362 at 367; *Indrisie v General Credits Ltd* [1985] VR 351 at 354 and *James v Commonwealth Bank of Australia* [1992] 37 FCR 445 at 457-460).

[36] It is not simply a question of whether the cross demands had their genesis in the same transactions (*Lord v Direct Acceptance Corp Ltd (in liquidation)* [1993] 32 NSWLR 362). The circumstances must be such that the plaintiff's claim should be made conditional upon the prior acceptance of the defendant's claim.

[37] The type and terms of the contract relied on for the claim and cross-claim may also be relevant to whether or not a set off can be asserted (see *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSW CA 157, [113]-[141]).

[38] A connection beyond the mere fact that the defendant's cash flow (and consequently its capacity to pay the claimed debt) has been impaired due to plaintiff's conduct is required (*Forsyth v Gibb* at 407).

[39] Unlike set off at law (which applies only to mutual liquidated debts) equitable set offs can be invoked by a defendant entitled to unliquidated relief.

[40] A statutory based claim can also be the subject of an equitable set off. In *Murphy v Zanonex Pty Ltd* [1993] 31 NSWLR 439, for example, a borrower was allowed to set off damages for alleged breaches of the *Trade Practices Act* 1974 (Cth) against the lenders money claim.

[41] The general conduct of the respective parties and other discretionary considerations to the granting of such relief are irrelevant unless the nexus between the claim and cross demand is sufficiently close to justify equitable intervention and even then only when the relevant equity goes to the root of or impeaches the title of the plaintiff's claim (*Galambos* at 26; cf *Walker v Department of Social Security* per Drummond J at 365).

[42] Of itself creditor misconduct in relation to previous transactions is insufficient. It has to impeach the legal right to recover the debt in court.

[43] As Dr Spry explains:

> "What must generally be established in such a relationship between the respective claims of the parties that the claim of the defendant has been brought

about by, or has been contributed to by, or is otherwise so bound up with the rights which are relied upon by the plaintiff that it would be unconscionable that he should proceed without allowing a set off. Thus, if conduct of the plaintiff is such to induce the defendant to incur the obligation in favour of the plaintiff, and that conduct is fraudulent, negligent or otherwise wrongful so as to give rise to a cause of action to the defendant, the plaintiff will not ordinarily be permitted to proceed until he has made good the material claims of the plaintiff."

The modern UK approach

[44] Impeachment as an element of equitable set off has been out of favour in the United Kingdom since *Hanak v Green* [1958] 2 QB 9. The concept appears to have fallen into complete disuse in England since the decision of the *House of Lords in Bank of Boston Connecticut v European Grain & Shipping Ltd* [1989] AC 1056. Rix LJ described it as an "unhelpful metaphor in the modern world" in *Geldolf Metaalconstuctie MV v Simon Carves Ltd* [2010] 4 All ER R 857N, 130 Con LR 37; EWCA Civ 667.

[45] In *Hanak v Green* Morris LJ (at 29) identified the two indispensible factors before equitable set off could arise as –

(1) it must be "manifestly unjust" for one claim to be enforced without bringing the other into account and

(2) there must be "a close relationship between the dealings and the transactions which gave rise to the respective claims"(but cf Newfoundland, *Government of v Newfoundland Railway Code* [1888] 13 Appeal Cases 199 and the detailed discussion of the doctrine in by Giles J in *AWA Ltd v Exicom Australia Pty Ltd* [1990] 19 NSWLR 705 at 711-712).

[46] The latest restatement of the prevailing English rule is to the effect that an equitable set-off will be available where the "… cross claims are so closely connected with the plaintiff's demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross claims" (see *Geldorf Metaalconstuctie MV v Simon Carves Ltd* [2010] 4 All ER R 857N, 130 Con LR 37, EWCA Civ 667 at [43]. Compare the "cognate problem of 'retention' under Scots law" in *Inveresk plc v Tullis Russell Papermakers Ltd* [2010] UKSC (19) and the "combined approach" in *Perpetual Trustee Co Ltd v Tripush Pty Ltd* [2010] NSWSC at [21] – [26] per Harrson AsJ).[4]

The doctrine in Queensland

[47] Because of the binding effect of *Hill v Ziymack* "impeachment" remains central to the application of the doctrine in Queensland (*IRM Pacific Pty Ltd v Nudgegrove Pty Ltd* [2008] QSC 195 at [9]; *GEL Custodians Pty Ltd v RQ Consultants Pty Ltd* [2010] QSC 181).

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4 Lee Aitken, "Recognising an Elephant": Equitable set off, "impeaching title" and the modern position on "sufficient connection" (2011) ALJ 51, 56.

[48] As Keane JA observed (at 406-407) in *Forsyth v Gibbs* [2009] 1 Qd R 403 where the defendant failed:

> [9] Consistently with the technique of equity...does not seek to define what an elephant is but knows one when it sees one. So the availability of the set off is "couched in open and textual terms, such as 'sufficient connection' and 'unfairness'. In some cases, it will be necessary to engage in an evaluation of a range of facts which might establish "sufficient connection" or "unfairness" of the relevant kind. But the principles to be applied are not so vague or subjective that it is never possible to determine, for the purposes of an application for summary judgment, that the facts alleged by the defendant simply fall short of what is required.
>
> [10] It is important to emphasise that the availability of an equitable set-off between cross-claims does not depend upon an unfettered discretionary assessment of whether it would be "unfair" in a general sense for a plaintiff to insist on payment of the debt owed to it while the cross-claim remains unpaid. It is essential that there be such a connection between the claim and cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim".

[49] The primary judge dismissed the application for summary judgment in *Forsyth v Gibbs* on the grounds that the set off claim was not so clearly untenable that it could not possibly succeed and that an investigation of the factual circumstances was required to see whether or not there was a sufficient closeness of a connection between the two claims.

[50] However, Keane JA (McMurdo P and Fraser JA agreeing) thought the absence of any sufficient connection was "manifest". The liabilities the borrower had incurred as a result of the alleged negligence of the finance broker could not in any way be said to impeach the claim to be repaid the debt for the monies lent because the transactions which gave rise to the negligence claims were entirely distinct from the loans in respect of which the finance broker sued (see also *Indrisie v General Credits Ltd* [1985] VR 251 at 254).

Are the parties claims closely enough linked here?

[51] In *Bayview Quarries Pty Ltd v Castley Development Pty Ltd* [1963] VR 445 an application to set aside a judgment for the non-payment of goods failed because while amounting to a possible counter claim the defendant's cross demand for breach of the same contract based on alleged defects in materials supplied twelve months did not disclose an arguable defence.

[52] The defendant submitted that because of a running account arrangement the plaintiff was really suing for the balance when the writ was issued which still included, at least in part, the unpaid price of the defective goods.

[53] Sholl J saw nothing to contradict the ordinary rule of appropriation of payments between debtor and creditor and found (at 447) that "it was perfectly clear" that all

earlier deliveries had "long since been paid for" by the time the disputed invoices were rendered and it was "hopeless to suggest" the contrary.

[54] His Honour had also held (at 448) that despite the lack of a "clear and uniform statement of the nexus which much exist before what would otherwise be a counter claim only becomes a matter of set off" the mere fact that the cross-claim arose out of an previous transaction of a similar type between the same parties was not enough to meet the *Rawson v Samuel* test because, crucially, the defendant had no equitable ground for being protected against the plaintiff's claim just because of the allegation that there had been defects in other deliveries over a year previously.

[55] Likewise, in *Eagle Star Nominees Ltd v Merril* [1982] VR 557, Tagell J refused to set off of a defendant's asserted unliquidated damages for breach of a promise to insure against a claim for payment of the balance of the purchase price.

[56] His Honour held (at 561):

> "There is no suggestion on the defendant's part that his purchase was dependant on or induced or even influenced by the (insurance) policy which he says …was promised; and there is no room for an implication to that effect.
>
> The plaintiff's promise, assuming it was made and enforceable, was collateral but subordinate to the contract of sale and no question of fraud or any other question which might cause equity to intervene was raised.
>
> It follows that the plaintiff's claim owes nothing to any right legal or equitable relief which the defendant asserts and is not impeachable by any equity to which the defendant can refer."

[57] In *J and S Holdings Pty Ltd v NRMA Insurance* [1982] 61 FLR 108 a mortgagor failed in a bid to set off the total amount of $36,000 in interest overcharges by the lending bank against outstanding loan repayments.

[58] The Full Federal Court decided that a mortgagor had neither an actionable claim at law to recover the surplus (because of the general rule that money paid voluntarily under mistake is irrecoverable) nor any recognised equitable grounds for setting off that amount against the bank debt.

[59] I cannot see how, on any view of the circumstances in the present case, there is a sufficient degree of connection between the two claims to give rise to an arguable equitable set off of the *Rawson v Samuel* variety or, for that matter, the modern UK version.

[60] As Woodward J pointed out in *Galambos* whether equity will allow damages for breach of contract to be set off against claims for money due under a contract will depend on how closely the respective claims are related, particularly as to time and subject matter.

[61] Both claims admittedly arise out of an ongoing commercial relationship between the same parties and relate to the purchase of the same or similar work but it is far from clear (at least to me) that they are closely enough related in time or content to satisfy the requirement for an impeaching equity.

[62] The supporting materials (including the amended District Court pleadings up to 18 March 2014) show that at first PFI performed works for Comgroup on an ad hoc basis and then more regularly from September 2010 onwards.

[63] It appears that in about November 2010 the companies formalised their arrangements into a partly written and partly oral "agreement".

[64] PFI's Magistrates Court claim relates to the supply of machine safety "goods and services" agreement. Comgroup alleges that the agreement comprises a credit application, a letter signed by the parties representatives and some implied terms to give it business efficacy (par. 2(b) of the Defence filed 24 January 2014).

[65] In the District Court action, by contrast, both parties agree that in the period November 2010 – 29 June 2012 the relevant "agreement" included the issue of purchase orders to PFI for "**specific** works to be undertaken (by GTAKS) along with the price to be paid…" (see par 16(a) of the Second Amended Statement of Claim and 3(b)(i) of the Defence to the Second Amended Statement of Claim filed 18 March 2014).

[66] Not only do the rival claims not arise out of the same contract (or even a related series of transactions) but Comgroup does not even allege that it was induced or even influenced to order the work it now refuses to pay for by any misconduct on PFI's part.

[67] It follows that the alleged overpayment cannot properly be set off against the claimed amount.

[68] It would be contrary to the stated purpose of the UCPR to put PFI to the expense of needlessly proving its claim at trial.

[69] There will, therefore, be judgment for PFI with interest and costs in terms of the signed draft on the file.

Other matters

[70] Under r 173(2)(a) a "set off" may be treated as a counter-claim, whether plead as one or not, and if considered appropriate the court has the discretion to order a stay of enforcement of a judgment pending trial of a plausible counter claim under r 300 (cf *Min Lung Pty Ltd v Moonace Pty Ltd* [2007] QDC 146.

[71] In *Gel Custodians Pty Ltd v RQ Consultants Pty Ltd* [2010] QSC 173 a stay was granted to allow defendants a chance to try to set aside a summary judgment.

[72] However, Comgroup has not asked for a stay of judgment pending the outcome of the District Court proceedings and the question has not been argued.

[73] I should add for completeness that even if Comgroup's cross claim is a viable set off, as a matter of law, it cannot be conveniently dealt within this proceeding and, therefore, if necessary, I would set aside the defence and order it to be dealt with separately under Rule 173(3)(a) (cf *Advance Australasia Pty Ltd v Advance Watch Co. (Far East) Ltd* [2005] QSC 159).

[74] Judge Dodds dismissed an application for summary judgment, no doubt, partly, for similar considerations in *Haskaway Pty Ltd v Hollis Partners Pty Ltd* [1998] 19 Qld Lawyer Reps 64. The defendant purchasers were supposed to indemnify the vendors of a business against stamp duty liability but they claimed to have suffered damages arising from misrepresentations about the profitability of the business in breach of the sale agreement in an amount which considerably exceeded both the plaintiffs claim and the jurisdictional limits of the court.

[75] The order of the Court is that:

1. summary judgment in the proceeding be given in favour of the plaintiff against the defendant pursuant to rule 292 of the *Uniform Civil Procedure Rules* 1999.

2. the defendant pay to the plaintiff the sum of $45,621.77 comprising:

   (a) $39,459.77 being for the value of the claim; and
   (b) $6,162.00 interest on the value of the claim from the dates payments were due as specified in the claim until 8 April 2014.

3. the defendant pay the plaintiff's costs of the proceedings, including the costs of and incidental to the application for summary judgment filed 18 February 2014 to be assessed on the standard basis if not agreed.