SUPREME COURT OF QUEENSLAND

CITATION:	*Cooloola Dairys Pty Ltd v National Foods Milk Ltd and Alait Pty Ltd v National Foods Milk Ltd* [2004] QSC 308
PARTIES:	**COOLOOLA DAIRYS PTY LTD** **ACN 080 125 168** (applicant) **v** **NATIONAL FOODS MILK LTD** **ACN 051 195 272** (respondent) and **ALAIT PTY LTD** **ACN 010 203 979** (applicant) **v** **NATIONAL FOODS MILK LTD** **ACN 051 195 272** (respondent)
FILE NO/S:	SC No 6180 of 2004; SC No 6742 of 2004; SC No 6182 of 2004; SC No 6741 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2004
JUDGE:	Chesterman J
ORDER:	**1. Application SC No 6180 of 2004: Application dismissed with costs;** **2. Application SC No 6742 of 2004: Order that the statutory demand dated 14 July 2004 be set aside. The respondent should pay the costs of the application to be assessed on the standard basis;** **3. Application SC No 6182 of 2004: Order that the amount of the demand should be reduced to $1,102,065.80. It is declared that, as reduced, the demand has had effect as from its date of service. The applicant should pay the costs of the application;** **4. Application SC No 6741 of 2004: Application dismissed with costs.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – where the respondent served the applicant with statutory demands – where the applicant served a defective application on the respondent to set aside the statutory demands – where the applicant subsequently served a complete application on the respondent – where service of the second application was outside the time for service required under s 459G(2) *Corporations Act* 2001 (Cth) – whether service had been properly affected

CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR "SOME OTHER REASON" – where the applicants were served with several statutory demands in respect of several debts owed by the applicants to the respondent – whether the issuing of separate demands amounted to an abuse of process

CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – OFFSETTING CLAIMS – where the applicants alleged to have claims offsetting the respondent's statutory demands – whether claims were genuine

Corporations Act 2001 (Cth), s 459E, s 459G, s 459H, s 459 J(1)(b)
Acts Interpretation Act 1901 (Cth), s 23
Uniform Civil Procedure Rules 1999 (Qld), r 10, r 26(7), r 60(1), Schedule 1A

Sentinel Financial Management Pty Ltd v Intercorp Finance Pty Ltd [1997] 15 ACLC 201
Hooker Cockram Ltd v Minesco Pty Ltd (2001) 3 VR 466
Leda Developments Pty Ltd v Orion Consolidated Pty Ltd [2001] QSC 400
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485
Robowash Pty Ltd v Robowash Finance Pty Ltd [2000] WASCA 409
Universal Trade Exchange Pty Ltd v Westpac Banking Corporation [2002] WASC 36
Benonyx Pty Ltd v Fetrona Pty Ltd [1999] NSWSC 1181
Chelring Pty Ltd v Coombes [2000] WASC 60
LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd [2004] QSC 134

Macleay Nominees Pty Ltd v Bell Property East Pty Ltd [2001] NSWSC 743
Re Morris Catering (Australia) Pty Ltd 11 ACSR 601
Chadwick Industries (South Coast) Pty Ltd v Condensing Vapourisers Pty Ltd 13 ACSR 37
JJMMR Pty Ltd v LG International Group [2003] QCA 519

COUNSEL: Mr D V C McMeekin SC, with Mr B Whitten, for the applicants
Mr S L Doyle, with Mr D G Clothier, for the respondent

SOLICITORS: Greenhalgh Pickard for the applicants
Deacons for the respondent

[1] These four applications raise common questions of fact and law and were heard together. Each is an application to set aside a statutory demand pursuant to s 459G of the *Corporations Act* 2001 (Cth). The respondent creditor is a very substantial public company, whose business includes the processing and packaging of milk and milk products. The applicants are related companies. Alait Pty Ltd ('Alait') is a company the only shareholders of which are Mr & Mrs Graham Ellison. Mr Ellison is the only director. Cooloola Dairys Pty Ltd ('Cooloola') is wholly owned by Alait which holds the shares in trust for the Ellison Family Trust. The general manager of both applicants is Mr Craig Ellison. Alait's business is the purchase of raw milk which it has processed and then distributes to various retail outlets. It entered into an agreement with the respondent by which the latter processed and packaged the raw milk supplied by Alait. Cooloola's business is the distribution of processed milk products manufactured by the respondent. It was common ground that by the terms of the various agreements made between the applicants and the respondent that the applicants were obliged to pay for goods bought or services supplied within seven days of delivery of the invoice.

[2] By a statutory demand which is undated but was accompanied by an affidavit dated 24 June 2004 the respondent demanded from Alait the sum of $1,412,065.80 for goods sold and delivered between 20 February 2003 and 25 May 2004. A schedule to the demand identified fourteen invoices, the amount charged on each invoice and the total debt claimed. The schedule does not identify invoices by date. Rather it lists the end dates of successive weeks in which the dates of the invoices fall and separately lists the 'due dates' by which invoices should have been paid.

[3] By a further statutory demand dated 14 July 2004 the respondent demanded from Alait the sum of $289,122.51 for goods sold and delivered between 24 May 2004 and 16 June 2004. A schedule sets out, in the same format, three debts, the subject of invoices, the due dates for payment of which are set out.

[4] By an undated statutory demand verified by an affidavit dated 24 June 2004 the respondent demanded from Cooloola the sum of $245,345.78 for goods sold and delivered between 12 October 2003 and 6 June 2004. A schedule sets out, again in the same format, seventeen debts separately invoiced and the due date for payment of each.

[5] By a further statutory demand dated 14 July 2004 the respondent demanded from Cooloola the sum of $30,559.54 for goods sold and delivered between 7 June and 16 June 2004, being amounts due pursuant to the delivery of two invoices identified

in a schedule in the identical format. The demand also insisted on the payment of $1,294,399.94 owed to the respondent by Alait, the payment of which had been guaranteed by Cooloola under a deed of guarantee dated 30 March 2004. The respondent had demanded payment by notice of 2 June 2004.

[6] The first point taken by the applicants is that the demands should be set aside because it is an abuse of process for a creditor to issue two or more statutory demands in respect of separate debts owed by the one debtor, one for each debt. The submission is that s 459G requires that one single demand be made for all debts when more than one debt is owed by a company to the creditor. The point is said to be established by authority: *Sentinel Financial Management Pty Ltd v Intercorp Finance Pty Ltd* [1997] 15 ACLC 201; *Hooker Cockram Ltd v Minesco Pty Ltd* (2001) 3 VR 466; *Leda Developments Pty Ltd v Orion Consolidated Pty Ltd* [2001] QSC 400.

[7] Each applicant maintained a running account with the respondent. As goods were bought or services provided, and invoices rendered, a debt was incurred which accumulated. As payments were made the overall debt was reduced. If the applicants' point of law is good it can only apply to debts which were in existence, that is, to amounts which were due and payable by the applicants, at the time the statutory demands were issued. If a debt became payable by the applicant to the respondent after the issue of the first notice it is difficult to see how it could have been included in that notice. The first demand to Cooloola was dated 24 June 2004. It claimed the price of goods sold and delivered up to 6 June 2004. According to the schedule the latest 'due date' for payment of the invoices listed in the schedule was 20 June. The second demand of 14 July claimed payment of debts for goods sold and delivered between 7 and 16 June 2004. The due dates for the two invoices identified were 27 June and 4 July 2004. Both these post date the first demand, so that those debts were not in existence when the first demand was served. However, the second debt demanded, that pursuant to the guarantee, is said to have been payable on 11 June 2004, which of course pre-dates the first demand.

[8] The first demand served on Alait was for the price of goods sold and delivered between 20 February 2003 and 25 May 2004. The second demand, dated 14 July 2004, was the price of goods sold and delivered between 24 May and 16 June 2004. Again, however, the due date for the payments due pursuant to the three invoices specified in the schedule are all later than 24 June. They are respectively 27 June, 4 July and 11 July 2004.

[9] The applicants rely upon the fact that invoices were payable no later than seven days after the delivery of invoice and point out that the first demands were delivered more than seven days after the end of the last period identified as that during which goods were sold and delivered. This is correct, but as the respondent's counsel pointed out, there is no evidence about the date when invoices were delivered. The seven days began to run from the date of invoice, not the date of delivery of the goods. There is no basis in the evidence for doubting the accuracy of the due dates for payment set out in the statutory demands. The applicants' point remains valid with respect to the sum due from Cooloola under the guarantee which was payable prior to the issue of the first notice.

[10] Quite apart from the point whether the debts the subject of the second demands were in fact due prior to the issue of those demands, the applicants' submission

should not be accepted, notwithstanding the authority in support of it. Section 459E of the Act provides:

> '459E (1) [Debt must be due and payable] A person may serve on a company a demand relating to:
>
> (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
>
> (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
>
> 459E (2) [Contents of demand] The demand:
>
> (a) if it relates to a single debt – must specify the debt and its amount; and
>
> (b) if it relates to 2 or more debts – must specify the total of the amounts of the debts; and
>
> (c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days …
>
> (d) …
> (e) …
> (f) …'

[11] In *Sentinel* the respondent Intercorp served four demands on the applicant company and three demands on a related company. Both companies applied to have them set aside 'on the ground that the service of multiple demands … instead of one demand for all of the debts alleged … to be owing, constituted an abuse of the statutory procedure with respect to demands.' Master Mahony accepted the submission and set aside each of the demands. He was impressed by the fact that s 459G(1) required the debtors to bring a separate proceeding in respect of each demand to have it set aside. This course was inconvenient and expensive. The Master's reasons appear in these passages (202):

> 'In contemplating the case of a creditor claiming more than one debt, the legislature clearly had a choice. It could have provided that there should be a separate statutory demand for each debt or one demand for all. By s 459E(1) it clearly chose the latter. The reason … is obvious. … [A] purpose of the statutory demand procedure has been … to provide a simple and inexpensive means of identifying, and, … achieving the winding up of insolvent companies. To have opted for a procedure requiring a separate demand for each debt

> would have been conducive to the … imposition of unnecessary expense and complexity.'

[12] The Master's reasoning depended heavily upon the terms of s 459G(1), which provides that 'a company may apply to the court for an order setting aside a statutory demand' served on the company. The Master emphasised (see footnote 4) the use of the singular indefinite article in the phrase. Having stressed this point the reasons continue (203):

> 'The corollary of the dichotomy in s 459E(1) is that the application provided for by s 459G(1) is an application to set aside "*a* statutory demand". … Again, the legislature might have provided for one application to set aside multiple statutory demands. It may be assumed with confidence that it did not because it elected to provide for the act of consolidation by enacting s 459E(1)(b). If that provision be observed, *one* application to set aside a demand for "2 or more debts" is all that is required.'

[13] The Master was also impressed by the fact that if a creditor could issue demands in respect of several debts, and the debtor had an offsetting claim equal to the largest debt demanded in one of the notices, the debtor could, in separate applications under s 459G, apply his offsetting claim *seriatim* so as to defeat every demand and hence frustrate the purpose of Part 5.4 Division 2 of the Act.

[14] With respect I find the reasoning unconvincing. For a start s 23 of the *Acts Interpretation Act* 1901 (Cth) provides that in any Act, unless the contrary intention appears, 'words in the singular number include the plural'. In other words, s 459G means, unless a contrary intention appears in the Act itself, a company may apply for an order setting aside a statutory demand, or statutory demands. The *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') allow an applicant debtor to include in the one application a claim to have one or more statutory demands set aside. There is nothing in the *Rules for Proceedings Under Corporations Act or ASIC Act* (contained in Schedule 1A of the UCPR) to displace the operation of the UCPR. UCPR 10 obliges an applicant under s 459G to proceed by way of originating application. UCPR 60(1) provides that an applicant may include in the same proceeding as many causes of action as the applicant has against the respondent, subject to the requirement of sub-rule (2) that if separate proceedings had been brought for each cause of action a common question of law or fact might arise in all the proceedings, or that the right to relief relates to or arises out of the same transaction or series of transactions.

[15] In a case where a creditor demands payment of its debts and the debtor alleges it has an offsetting claim and/or disputes that the debts or some of them are due, it is scarcely conceivable that sub-rule (2) would not be satisfied. Indeed the use of one application to challenge a number of statutory demands would overcome the difficulty which Master Mahoney thought he identified in which a debtor might utilise one offsetting claim against a number of separate debts the total of which exceeded the claim. If one application were brought in respect of all demands the offsetting claim could only be applied to the limit of its amount against the aggregate of the debts demanded.

[16] The reasoning in *Sentinel* was based upon what I believe to be a false premise, but it was followed by Warren J in *Hooker Cockram*, the facts of which were that the plaintiff in each proceeding was a building company which had undertaken the construction of a hotel in Melbourne for a very large sum. The defendant in each proceeding had contracted to supply aluminium cladding to the plaintiff. There were disputes concerning the performance of the contract between the parties and the plaintiff withheld two sums as retention moneys. The defendant delivered two separate statutory demands, one in respect of each of the sums retained. The plaintiff issued two separate proceedings, one to set aside each of the demands. Warren J set aside the demands on the basis that the issue of two demands was prohibited by the proper construction of s 459E and s 459G and was, in addition, oppressive.

[17] Warren J expressly accepted the reasoning of Master Mahoney in *Sentinel*. In addition her Honour wrote (469):

> 'Consideration of subs (1) [of s 459E] reveals that a creditor may serve "*a* demand" in relation to "*a single* debt" or "*a* demand" in relation to "*2 or more* debts that the company owes to the person". Subsection (2) of s 459E requires that "*the* demand" specify "*the* debt" and "*its* amount" if it relates to "*a single* debt" and, if it relates to "*2 or more* debts" to specify "the total of *the amounts* of *the* debt". Subsection (3) of s 459E provides that unless "*the* debt" or "each of *the* debts" is a judgment debt the demand must be accompanied by an affidavit that complies with the rules and verifies that "*the* debt" or "the total *amounts* of *the* debts" is due and payable. The words of the section and their meaning are plain.
>
> Section 459E contemplates that a creditor may serve one statutory demand in relation to a single debt or one statutory demand in relation to multiple debts. Section 459E(1) provides that a person "may" serve a statutory demand and then proceeds to set out that the demand can be by way of a demand relating to a single debt or … two or more debts. In so far as the subsection uses the expression "may" it allows a creditor to exercise the discretion to serve a statutory demand. The expression is confined to whether or not to serve a demand. The discretion … does not extend to a discretion to serve a demand relating to a single debt or separate demands for two or more debts. In my view, it could not be said that there is an election by a creditor to serve a demand relating to a single debt or two or more debts provided for by the expression "or" between paras (a) and (b) of s 459E(1). The conjunctive "or" exists between the two alternative scenarios: one demand where there is a single debt *or* one demand where there are two or more debts.'

[18] The first passage quoted appears to overlook the effect of s 23 of the *Acts Interpretation Act*. The second passage appears to import a restriction into s 459E which the words of the section themselves do not have. The only restriction which appears from the terms of the section itself is that if a demand is served in respect of a single debt the debt must exceed the statutory minimum, and if debts are aggregated in a demand the aggregate amount must exceed the minimum.

[19] It is no doubt right, as her Honour points out, that the section confers a discretion on a creditor whether or not to serve a demand, but there is nothing in the wording of subsection (1) which obliges a creditor who is owed more than one debt by a particular debtor to include all of the debts in the one demand. One has to read a great deal into the paragraph to arrive at the conclusion that a creditor who is owed more than one debt must include all of them in the one demand.

[20] The reason for paragraph (b) is readily apparent: a creditor may be owed a number of small debts, all less than the statutory minimum but in the aggregate the amount may equal or exceed the minimum. The paragraph allows the aggregation.

[21] There is no compelling reason why the subsection should be read as though it contained that compulsion. The words actually used do not suggest it. A creditor, according to the subsection, may serve a demand relating to a single debt or a demand relating to more than one debt as long as together they exceed the statutory minimum. The wording is permissive. It gives a creditor the choice whether or not to serve a demand and, if it does, whether or not to serve a demand for a single debt or for multiple debts. A creditor who was owed more than one debt by the one debtor may exercise either of the choices given by paragraphs (a) and (b), so long, of course, as the statutory conditions as to amount are met. A creditor who is owed more than one debt may serve separate notices in respect of each of them, if each exceeds the minimum. Section 23 of the *Acts Interpretation Act* obliges one to read s 459E(1):

> 'A person may serve on a company [demands] relating to:
>
> (a) … single debt[s] that the company owes to the person …'

[22] The construction favoured by Warren J obliges a creditor owed more than one debt (exceeding in the aggregate the minimum) to deliver one demand only for all of the debts. A creditor may have a good reason for not wishing to include a debt in a statutory demand directed to the debtor. One debt may be disputed while others are not. If the disputed debt is excluded the debtor would have no basis for making an application under s 459G. If the undisputed debts were not paid the debtor would be wound up. To include a disputed debt would be to invite an application with attendant expense and delay. It is a serious thing to read into a statute words which are not there, or to impose on a right conferred by a statute restrictions that do no naturally appear in the wording of the section. In my opinion the imported restriction is unjustified.

[23] In *Leda Developments* Mullins J followed both *Sentinel* and *Hooker Cockram*. Her Honour was concerned with three applications to set aside demands issued by the respondent arising out of the performance of a call and put option deed between the parties who were respectively a developer and a builder. Following those cases her Honour thought that the dispatch of three statutory demands in relation to three separate amounts 'was clearly oppressive'. Her Honour accepted that the cases established that:

> '… what was offensive was the issue of two statutory demands in respect of debts between the same parties where the legislation clearly requires one single demand for two or more debts that a company owes a creditor.'

Her Honour did not give any additional reasons for the decision.

[24] Apart from the textual analysis, which appears to me to involve reading into the words of s 459E(1) a proviso that is not there, the only reason advanced for construing the subsection so as to require a creditor to include all debts owed by the same debtor in the one demand is the inconvenience and expense of having to bring separate applications to challenge each demand. This concern assumes, of course, that the debtor has a genuine dispute or offsetting claim to answer each demand. More importantly any inconvenience is unnecessary. The debtor can in the one application brought pursuant to s 459G seek orders that all or some of the demands be set aside.

[25] I accept that I should follow these decisions, notwithstanding that none is binding on me and none is a decision of an appellate court, unless I am satisfied that they are plainly wrong. This result follows, I think, from *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485. With respect to those who have thought otherwise I think the decisions are wrong. Accordingly I reject this challenge to the demands. The respondent was entitled to issue separate demands.

[26] This is not to say that in an appropriate case it may not be oppressive for a creditor to issue a large number of demands, one each for a large number of separate debts owed it by the same debtor. In such a case, however, the demands may be set aside pursuant to the power conferred on the court by s 459J(1)(b), not because the issue of the demands contravened some implied restriction in s 459E(1). Whether there has been oppression, or an abuse of process, will depend upon the number of demands issued and the other circumstances. It cannot, I think, be said that the issue of two notices is oppressive, especially when the applicant could have in the one application sought to have both set aside.

[27] It is necessary to deal with each of the applications in turn.

The demand on Cooloola – 24 June 2004, Application SC No 6180 of 2004

[28] On 15 July 2004 the applicant filed and served its application. The copy of the application actually served was defective in a number of respects. The application number did not appear on the document. The space for the insertion of the date on which the application would be heard by the court was left blank. The seal of the court had not been affixed to the document which did not bear the Registrar's signature. By letter dated 21 July 2004 the respondent's solicitors notified the applicant's solicitors of these defects. On 23 July 2004 the respondent's solicitors were provided with a complete copy of the application.

[29] The demand was served on 25 June 2004. Section 459G(2) provides that an application to set aside a demand may only be made within 21 days after the demand is served. The application first served on the respondent was within 21 days of service, but the second was not. The first service was of an incomplete copy of the application. A number of cases have established that an application deficient in the same particulars as was the applicant's is not a copy for the purposes of s 459G(3)(b), which provides that an application is made within 21 days only if a copy of the application and of the supporting affidavit are served on the creditor.

[30] The Full Court of the Supreme Court of Western Australia in *Robowash Pty Ltd v Robowash Finance Pty Ltd* [2000] WASCA 409 emphasised the need for strict compliance with the provisions of s 459G(3) in a case in which the debtor's supporting affidavit served on the creditor omitted four pages of the annexures to the affidavit. The Court dismissed the application for non-compliance with the subsection. Master Sanderson thought, in *Universal Trade Exchange Pty Ltd v Westpac Banking Corporation* [2002] WASC 36 that *Robowash* had established that the word 'copy' in s 459G(3)(b) 'means an exact copy'. More to the immediate point is the decision of Santow J in *Benonyx Pty Ltd v Fetrona Pty Ltd* [1999] NSWSC 1181, in which the applicant served a copy of the application which omitted the return date. His Honour thought that the document served was not a copy of the application (at para 6):

> 'For how can the party who is served have received proper notice of the proceedings for which attendance is required within the twenty-one days when that party is not told of the important fact of the return date … until after the twenty-one days.'

[31] *Chelring Pty Ltd v Coombes* [2000] WASC 60 was a case with facts identical to the present. A copy of the application:

> '… did not have the action number on the … document and, perhaps most significantly, did not have the date and time on which the application would be heard. The service copy of the document did not bear a mark denoting the seal of the Supreme Court.' (at para 2)

Master Sanderson followed *Benonyx*. He said (at para 9):

> 'It may then be the case that if the copy served does not contain the seal of the … Court or … does not contain the action number, such omissions may be excused. But a copy of the application must, I think, … require the important information to be included on the served document. In particular, that must mean that the return date of the application and the date upon which the application was filed should be included. Without these two … pieces of information a respondent is put at a disadvantage. In the one case, it needs to know the date of filing to ensure that the procedure for setting aside a statutory demand has been followed. In the other the respondent needs to know when it should appear in court to answer the application.'

[32] The facts in *LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd* [2004] QSC 134 are also relevantly identical. A copy of an application to set aside a statutory demand, which omitted the court's seal, the return date and the action number, was served on the respondent. Holmes J followed *Benonyx*, *Chelring*, *Universal Trade Exchange* and *Robowash* to conclude that 'the documents served failed to reflect the original application in a matter of substance: it did not contain the return date for the application.' (see para 9). Her Honour pointed out, as had other judges, that the requirement that the copy served reflect the original may cause hardship. Indeed in some of the cases the deficiency was not the fault of the applicant, although in this case it was. The cases have also pointed out that the requirements of s 459G are inflexible, depriving the court of a discretion to overlook any defects in service.

[33] UCPR 26(7) emphasises the need for an application, 'and any copies of the application for service', to specify the date set by the court for hearing the application. In this case the respondent was not disadvantaged by the defective copy of the application. All four applications were served together and only one was deficient. The other three applications contained notice of the return date, which was the same. The respondent's solicitors correctly guessed that the return date for application SC No 6180 of 2004 was also the same. This, however, is not the test. Moreover the guess might have been wrong.

[34] As with other line of authorities I should follow these cases unless convinced that they are wrong. I do not think they are. The opinion they express is a justifiable exposition of s 459G. The copy of the application which the section requires to be served must show that an application has been filed and when the respondent is required to attend and answer it. It will not perform these functions if it is not sealed and does not show the action number allocated by the court. The inclusion of the return date is obviously necessary.

[35] The authorities establish that the copy of the application served on the respondent must be such as to show that it is a replication of the application which has been filed in the court. To do that it must show the action number given it by the court and it must show the return date for the hearing of the application. It must, also, I think, show the seal of the court to indicate that there are curial proceedings on foot. The document in question did not exhibit those attributes. It was not therefore a copy of the application. The result is that the terms of s 459G(3) were not complied with and the application must be dismissed with costs.

Demand on Cooloola – 14 July 2004, Application SC No 6742 of 2004

[36] The applicant does not dispute the existence or amount of the debt claimed by the respondent but contends that it has an offsetting claim which is equal to or greater than the amount of the debt. Section 459H defines such a claim to be a genuine claim that the company has against the respondent by way of counter-claim, set off or cross-demand even if not arising out of the same transaction or circumstances as the debt to which the demand relates. The applicant claims that it has causes of action against the respondent for trespass and/or inducing breach of contract; and/or injurious falsehood; and/or misleading and deceptive conduct, and conversion, the damages for which, together with exemplary damages, are likely to exceed the respondent's debt.

[37] The claims arise out of the respondent's actions between 18 and 21 July 2004. The applicant conducted its business from leased premises, which included a cold room. Alait shared the premises which were leased from a Mr & Mrs Byrnes. On the afternoon of 18 June 2004 the respondent engaged private security guards to seize possession of the applicant's cold room and deny it and its employees access to its business premises and its stock-in-trade stored in the cold room. The guards engaged by the respondent were instructed not to allow any person onto the premises other than its employees. The respondent remained in control of the premises and cold room until the evening of 21 June 2004 when Byrne J ordered it to leave.

[38] The applicant's general manager deposed that during the days when the respondent had control of its premises:

- The respondent's employees told the applicant's staff and customers that the applicant 'had gone broke and would not be returning'.

- The respondent offered incentives to all the applicant's employees to quit their employment and accept an engagement with the respondent. Most of them did.

- The respondent redirected telephone calls and facsimile messages from the applicant's number to its own office. Orders for the delivery of milk products are received by facsimile or telephone. The respondent thereby diverted orders directed to the applicant to itself. It filled those orders for the duration of its occupation and delivered product to the applicant's customers.

- When the applicant retook possession following the order of Byrne J Mr Ellison removed the diversion from the telephone line so that the applicant would receive calls made to its number. Some time later the respondent again redirected telephone calls so that it received orders meant for the applicant and filled them. It was not until 25 June that Mr Ellison realised what had happened and contacted Telstra with appropriate directions.

- The respondent converted some of the applicant's trading stock held in the cold room to its own use.

[39] According to Mr Ellison's affidavit the result of the respondent's action was that the applicant was unable to deliver goods to its customers and its 'entire customer base has now quit [the applicant] and is serviced by the respondent.'

[40] The applicant has thus lost its entire business which, Mr Ellison concedes, is difficult to value. However, he believes that a business of comparable size and product distribution recently sold for more than $1,000,000. The applicant intends to claim exemplary damages.

[41] There is no doubt that the applicant has an offsetting claim against the respondent and that it is genuine. Whether all of the adumbrated causes of action are eventually made out remains to be seen, but there is no doubt that the applicant has a good arguable case for damages for the disruption to its business and the conversion of its stock-in-trade. Given the circumstances and the respondent's use of force to dislodge the applicant from its own business premises there is likely to be a substantial award of exemplary damages.

[42] The respondent was inclined to dispute the existence of the claim and contended that it was not genuine. It submitted that there was no admissible evidence that the respondent had, while in possession of the cauldron, removed part of the applicant's stock or that it had informed the applicant's customers that the applicant had gone out of business. Without ruling on the objections there remains evidence that the respondent engaged the applicant's workforce and that the respondent is now delivering milk to businesses that had been the applicant's customers, and that these

changes occurred immediately after the respondent's apparently unlawful seizure of the premises.

[43] The respondent also contends that the applicant had no business to lose: its only enterprise was the distribution of the respondent's products, and on 16 June 2004 the respondent had resolved not to supply any further product to the applicant because of its outstanding indebtedness to the respondent, and because it had not honoured promises to reduce the indebtedness according to an agreed schedule of payments.

[44] This may, or may not be, an answer to the applicant's action for damages. It is not so convincing as to demonstrate that the applicant has no genuine offsetting claim. Palmer J thought in *Macleay Nominees Pty Ltd v Bell Property East Pty Ltd* [2001] NSWSC 743 that a genuine offsetting claim meant:

> '… 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.'

[45] The applicant's claim cannot be regarded as fanciful. The respondent's submissions asked the court to find, in an inquiry of the kind required by s 459H, that the applicant had no business which could have been damaged or destroyed by the respondent's forceful trespass. I am not prepared to make that finding. Even if the applicant could not obtain milk product from the respondent its distribution network and connections were an asset and it could have, no doubt with difficulty, have obtained milk product from another supplier.

[46] Thomas J, in *Re Morris Catering (Australia) Pty Ltd* 11 ACSR 601 explained the function of the court on an application under s 459G in terms that remain helpful. His Honour said (605):

> 'It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.
>
> The essential task is relatively simple – to identify the genuine level of … an offsetting claim (not the likely result of it).'

[47] In *Chadwick Industries (South Coast) Pty Ltd v Condensing Vapourisers Pty Ltd* 13 ACSR 37 Lockhart J said (39):

> 'However, what appears clearly enough from all the judgments is that a standard of satisfaction which a court requires is not a particularly high one. … Certainly the court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a "genuine dispute" in this context suggests to me that the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance. On the other hand the court

> must be careful, because if all an applicant has to do is to assert both a claim and some basis for it, without more, it would mean in almost every case the court would set aside statutory demands where application is made to that effect. Plainly that is not what the legislature intended by introducing this new regime.'

[48] In *JJMMR Pty Ltd v LG International Group* [2003] QCA 519 McPherson JA said (at para 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 for 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.'

[49] There is no doubt that the offsetting claim which the applicant describes in its affidavits passes the test propounded by these authorities. Indeed the respondent's complaints that the applicant has not provided more cogent evidence in support of the existence of its claim appears a little hypocritical, coming, as it does, from a party who appears to have acted arrogantly and with contemptuous disregard for the applicant's rights and property.

[50] The respondent raises more substantial arguments about the quantum of the offsetting claim. The criticisms are that the estimate of the applicant's worth as a going concern based upon the sale of a comparable business is of no assistance because that business is said to have been comparable to Alait's business, not Cooloola's. This is what Mr Ellison deposed to, so there is some basis for the criticism. The respondent also points to evidence that Mr Ellison has on previous occasions estimated the value of the goodwill of Cooloola's business at about $100,000. The applicant complains that the respondent's conduct caused the loss of his business at Hervey Bay, part of the total, so that the loss should be less than $100,000. There is also evidence that Mr Ellison had informed an officer of the respondent that Cooloola's had had difficulty selling its distribution business for $200,000.

[51] There is, however, evidence from Mr Ellison that at the time of the respondent's trespass it was supplying between two and three million litres of milk annually. There is, according to Mr Ellison, an industry average of 15 cents per litre as the value of the goodwill of a business like the applicant's. Adopting this measure the goodwill of Cooloola's business was between $300,000 and $450,000. Mr Ellison expresses the value as a figure per annum which is clearly wrong. The value is a capital sum, not a recurring loss of income. This error attracts considerable scorn in the respondent's submissions but it is not important. Mr Ellison's evidence provides a basis for estimating what the applicant claims as the value of the business lost.

[52] In his affidavit of 4 August 2004 Mr Ellison deposed that he knew of 'a similar distribution centre' to the one operated by Cooloola at Hervey Bay. It was sold by its owner, Mr Lacey, on the Gold Coast. According to Mr Ellison 'the same products were sold through that distribution centre' and he believed 'that similar volumes of milk were also supplied.' The price paid for Mr Lacey's business was approximately $1,000,000. In his subsequent affidavit of 18 August 2004 Mr Ellison deposed that he had been informed by an officer of the respondent 'that a business of comparable size and product line to that of Alait in the Hervey Bay district, and owned by John Lacey on the Gold Coast was sold recently for over $1,000,000'. The overwhelming likelihood is that it was the same business, the one owned by Mr Lacey from the Gold Coast, which is referred to in both affidavits. The earlier affidavit describes it as a distribution business. Cooloola conducted a distribution business. I think the reference to Alait in the second affidavit is probably an error. Mr Ellison has sworn a number of affidavits on behalf of both applicants. A confusion of names would not be surprising.

[53] If one accepts, as I am inclined to do, that the reference to Alait in Mr Ellison's second affidavit is an error, then there is evidence that a business similar to the applicant's was sold for about $1,000,000.

[54] There is therefore evidence that the applicant Cooloola has lost its business valued at somewhere between $300,000 and $1,000,000. It must be accepted that the proof offered of the higher sum is imprecise and lacking in detail. It is an estimate based upon an imperfect foundation of fact but I am satisfied that the *quantum* of the claim has not been invented. It has not been conjured up merely to defeat the effect of the respondent's demand. The applicant has adduced some evidence to show the basis upon which the loss arises and how the loss is calculated. Palmer J in *Macleay Nominees* thought this was sufficient, and I agree.

[55] The applicant has indicated that it will make a claim for exemplary damages against the respondent. On the evidence presently available there would seem to be good prospects of a substantial award of such damages. If the matter were tried by a jury the award could be very large indeed. Everything, of course, depends upon what facts emerge at a trial, but there is, at the least, a genuine claim for a genuinely large amount of damages and exemplary damages. It is impossible to quantify in advance but there is a real prospect that the award of damages including exemplary damages would equal or exceed the debt due to the respondent.

[56] Accordingly, the applicant is entitled to an order that the statutory demand of 14 July 2004 directed to Cooloola Dairys be set aside.

Demands against Alait – Applications SC No 6182 of 2004 and SC No 6741 of 2004

[57] Alait seeks an order setting aside the two statutory demands on the grounds that it has a number of offsetting claims which in total equal or exceed the debt it owes the respondent. The total amount claimed in the two demands is $1,701,188.31. The offsetting claims which are advanced are common to both applications. It is convenient to deal with them together.

[58] The first claim to consider arises out of what has been called Farmgate Agreements made between Alait and a number of dairy farmers and, subsequently between those farmers and the respondent. Mr Ellison explains that before commencing to do

business with the respondent Alait had an agreement with a number of farmers by which they agreed to supply it with raw milk. Consequent upon the making of the agreement between Alait and the respondent those farmers signed a Farmgate Milk Supply Agreement with the respondent. Alait, of course, was not a party to those agreements which were drafted by the respondent's solicitors 'when the arrangement changed to the respondent directly purchasing the farmers' milk, rather than Alait purchasing the milk.' According to Mr Ellison it was essential to Alait that if its agreement with the respondent should come to an end the applicant's relationship with the milk suppliers would be reinstated. A daily reliable supply of milk to Alait was essential to its business. For these reasons the applicant agreed with Mr Perrott, the respondent's milk supply manager, that a clause should be inserted in the agreement to address this concern. The clause was to read:

> 'As the Milk Supplier was supplying milk to Alait … before the existence of this contract and should the milk packaging arrangements between [the respondent] and Alait … cease to exist then at Alait's request [the respondent] must assign its Milk Supply Agreement to Alait … for the duration of the contract.'

[59] The contract between Alait and the respondent did come to an end on or about 18 June 2004. On that day Alait's solicitors requested the respondent to 'assign all relevant milk supply agreements back to our client.' By a facsimile transmission of the same date the respondent's solicitors advised the applicant's solicitors that it had 'no option but to refuse the assignment of the respective Farmgate Agreements to your clients.'

[60] Mr Ellison approached the milk suppliers who were parties to the Farmgate Agreements with the respondent and asked them to resume their supplies to Alait. They each 'expressed concern that they might become involved in litigation with the respondent' if they did so and refused the applicant's overtures.

[61] Alait purchases about 30,000,000 litres of milk per annum. By reason of its inability to obtain supplies from the farmers it formerly dealt with, it has been obliged to purchase milk from Parmalat at an additional cost of 12 cents per litre. Mr Ellison estimates that the loss occasioned to Alait by reason of the respondent's failure to assign the agreements is about $1,560,000 per year.

[62] The respondent has a number of answers. Its national milk supply manager, Mr Pafumi, deposes that the respondent did not in fact execute any Farmgate Agreements with farmers in the terms of the draft agreement which Mr Ellison identifies in his affidavit and which he says he negotiated with Mr Perrott. Mr Pafumi swears that the respondent executed a number of Farmgate Agreements with 12 farmers whose contracts fell into two different categories. The first category to which nine farmers became parties provided that:

> '10.3 As the Milk Supplier was supplying milk to Alait … before the existence of this contract and should the milk packaging arrangements between [the respondent] and Alait … cease to exist, then at Alait and the Milk Suppliers request, [the respondent] must assign this Milk Supply Agreement to Alait for the duration of the contract.'

Mr Pafumi says, perhaps a little smugly, that none of the farmers has requested that the contract be assigned to Alait, so that the respondent has no obligation to assign the agreements.

[63] The second category of agreement provided:

> '10.3 Should the milk packaging arrangements between [the respondent] and Alait … cease to exist [the respondent] will assign this Milk Supply Agreement to Alait for the duration of the contract.'

Alait has requested the assignment of these contract and the respondent has refused to do so. Mr Pafumi says of this that two of the three suppliers who signed an agreement in that form 'wish to continue to supply raw milk to [the respondent] …'. Mr Pafumi does not explain why the respondent has not honoured its contract.

[64] The respondent's second answer is that each of the Farmgate Agreements expired at the end of June 2004. The contracts in the second category were automatically extended for three months to allow the parties to agree a further term. The respondent is negotiating with the farmers who signed a contract in the first category for a new term.

[65] The respondent's points are that Alait has a claim with respect only to the three suppliers who signed the second category of agreement and that any loss is limited to the increased costs of purchasing milk for the three months during which the contracts were automatically extended.

[66] The respondent's answers are not compelling. Mr Ellison's evidence is that the applicant and respondent agreed upon terms on which they would do business. One of those terms was that the respondent would include in its Farmgate Agreements with Alait's former suppliers a clause in the terms set out in the draft given to Mr Ellison, and which is found in the second category of agreements. A different form of clause appears in the majority of the contracts. The inclusion of this form of obligation to assign the agreements to Alait arguably gave rise to the breach of a collateral agreement between the parties, damages for which would consist of the very losses of which the applicant complains. Nor is it self-evident that the applicant's losses are limited to the increased costs of milk for three months. If the contracts between the respondent and the farmers are extended for a further term of years the period for which the applicant would incur losses would be extended.

[67] The Court's function is not to form an opinion on the likely outcome of proceedings brought by the applicant in respect to the Farmgate Agreements. It is not possible to do so. The task of the Court is to determine whether there is a genuine offsetting claim and the value of it. There is a claim. The respondent appears clearly to be in breach of two or three agreements, though it assesses the maximum damage suffered by the applicant from those breaches at about $9,000. However it is not possible to form any estimate of the likely quantum of the claim, should it succeed. The amount claimed by the applicant is very substantial but is not supported by evidence from Parmalat or any documentary record. Mr Ellison is prone to exaggerate and is given to make unreliable estimates. He has identified a basis for calculating the loss, namely 12 cents per litre on the amount of milk purchased annually. The applicant is, of course, obliged to mitigate its losses. It is only if it

takes a year to find alternative suppliers at a competitive price, and the Farmgate Agreements are extended for a term at least that long, that the applicant has a claim for about $1,500,000. There is no basis in the evidence that would allow the Court to determine the value of the offsetting claim. The amount contended for is large. The applicant should have provided some evidence to corroborate Mr Ellison's assertion that the loss is 12 cents per litre. There must be invoices, even if there is no written contract with Parmalat. Some attempt could have been made to show how far into the future the loss is likely to run, before milk at a more competitive price could be bought. There is also the problem that, in relation to a later claim, Mr Ellison deposes that Alait's business has been 'effectively destroyed' (see para 87 of these reasons). This statement cannot stand with the basis of the present claim. The genuine amount of the claim is really impossible to ascertain. I am not prepared to put a figure on it given the unsatisfactory nature of the proof offered. The result is that the applicant has a genuine claim, but has failed to prove its worth.

[68] The second claim arises out of what is said to have been a breach by the respondent of a Consultancy Agreement between Alait and the respondent. It was constituted by a letter dated 31 October 2001 between Mr Perrott and Mr Ellison. By the terms of the agreement Alait (by Mr Ellison) was to act as the respondent's consultant in relation to procuring supplies of milk for all of the respondent's Queensland milk requirements. Alait was to be paid an annual consulting fee of $40,000 together with GST and an administration fee. The agreement was to be for a term of 12 months from 1 January 2002. Either party could terminate it without notice. Otherwise termination was to take place 'six months past the current term … unless otherwise agreed.'

[69] Mr Ellison claims that Alait was paid pursuant to the agreement up to and until 1 September 2002 since when no payments have been made 'in accordance with the agreement'. According to Mr Ellison working arrangements between him and the respondent became unsatisfactory after September 2002 when the respondent declined to provide Mr Ellison with information he needed if he were to perform his role in procuring milk supplies for the respondent. In November 2003 he met with two of the respondent's officers at Caboolture. The meeting was tense. Mr Ellison 'was presented with a letter, backdated to 28 May 2003, which [he] was told [he] was required to sign … It was made plain … that resolution of this issue as required by the respondent was material to the continued supply of milk product [to Alait]. [He] cannot now recall the words used nor [does he] assert that any direct threat was made. However [he] was well aware … that [the respondent] required [him] to sign the letter …'.

[70] The letter set out a different regime by which Alait was to arrange raw milk supply for the respondent. By clause 1 Alait was to 'cease effective 1 June 2003 to act as [the respondent's] consultant in relation to milk procurement as detailed in [the respondent's] correspondence … of 31 October 2001.' By clause 7 the respondent agreed to pay Alait 'for its services in relation to milk supply consulting up to 1 June 2003. The outstanding amount agreed is $60,000.' Mr Ellison accepts that the respondent paid a consultancy fee of $66,000 (including GST) in 2003. Mr Ellison estimates that for the period 1 September 2002 to June 2004 he had procured about 300,000,000 litres of milk for the respondent so that, pursuant to the agreement, Alait is owed about $600,000.

[71] Mr Koch, a general manager of the respondent, has deposed that in about April 2003 he decided to terminate the Consultancy Agreement with Alait. He arranged a meeting with Mr Ellison to discuss the termination of the agreement and the terms upon which the respondent might continue to do business with Mr Ellison's company. There was a meeting at the respondent's office in Melbourne on 12 May 2003. Mr Ellison claimed to be owed moneys under the Consultancy Agreement. After a discussion Mr Koch offered to pay Alait $60,000 to settle all claims which Alait made for fees payable under the Consultancy Agreement for the period ending 1 June 2003 but intimated that the respondent would terminate the agreement. According to Mr Koch Mr Ellison accepted the offered sum. Subsequently the letter dated 28 May 2003 was prepared by Mr Koch, signed by him and sent to Mr Ellison. It was returned signed by Mr Ellison bearing the date 15 August 2003. Mr Ellison does not dispute that he signed the letter of 28 May 2003, nor that he attended the meeting with Mr Koch on 12 May. He agrees Alait has received $60,000 which is the sum referred to in the May letter. He also agrees that the sum was paid pursuant to 'a further agreement', which can only have been the May agreement which was reduced to writing and signed by Mr Ellison.

[72] By the terms of that agreement, the Consultancy Agreement, pursuant to which Alait claims $600,000, was brought to an end and all moneys due under it have been paid.

[73] The assertion by Mr Ellison that the letter was signed under some circumstance of pressure cannot give rise to any basis for avoiding the agreement of May 2003. For a start the pressure was said to have been exerted at a meeting in Caboolture in November 2003. The agreement was made in May in Melbourne. Mr Ellison says nothing about this meeting. It is apparent he signed the agreement bringing the consultancy to an end in August 2003 before the events complained of in November. In any event the circumstances of pressure are so vague and ill defined as not to give rise to any arguable basis for setting the May agreement aside.

[74] I am not satisfied that there is a genuine claim with respect to the Consultancy Agreement.

[75] The next claim made by the applicant is that it had an agreement with the respondent pursuant to which Alait could buy milk from the respondent 'at the price the farmers sell it to [the respondent] plus average freight costs.' Mr Ellison refers to a draft letter addressed to him by the respondent under cover of an email which invited Mr Ellison to say whether or not the draft correctly set out the terms of the negotiations between the parties. Mr Ellison does not exhibit an executed copy of the agreement nor does he depose to having made an agreement in the terms of the draft letter. Nonetheless, accepting the draft at face value, it provided:

> 'In the past Alait have provided milk to [the respondent] for packing under a contract pack agreement. The milk has remained the property of Alait. From 31 December 2001 Alait will acquire raw milk from [the respondent] for packing into its products under a revised contract pack agreement.
>
> I would like to clarify the pricing arrangements for the sale of raw milk by [the respondent] to Alait. … [The respondent] will sell raw

> milk to Alait for packing … at [the respondent's] average raw milk cost. [The respondent] will not seek to make a margin on the sale of raw milk …'.

[76] Mr Ellison deposes that during the currency of the agreement he discovered that Alait has in fact been charged the 'cost of goods in store price' for raw milk, which includes a profit margin for the respondent, 'and all other costs such as testing, transport and other costs incurred by (the respondent)'. Mr Ellison says he confronted the respondent about this breach of the agreement and was promised that every half year a rebate would be granted to the applicant, the amount of which would equal the difference between what was due under the agreement and the 'cost of goods in store' price, which the respondent had in fact charged for the milk. Mr Ellison alleges that, despite requests, the respondent has never disclosed the actual purchase price of raw milk that it has paid the suppliers and that Alait has been paying the higher price since October 2002. Mr Ellison further claims that an officer of the respondent told him in May 2003 that the amount of the rebate was $33,000. Mr Ellison, however, estimates 'the amount owing to Alait was in fact higher than $33,000'. He was unable to confirm this amount but nevertheless estimates that the amount is in fact $200,000.

[77] Mr Kevill, a sales manager employed by the respondent, explained in an affidavit that pursuant to an agreement between the applicant and respondent the latter supplied, processed and packaged milk for Alait for it to sell to its retail customers. The respondent has charged Alait two components for performing the contract. One component is the cost of raw milk and the second is a charge to cover the production and processing costs of converting raw milk into the products which Alait sold. This component of the price is commonly called 'cost of goods sold'. Mr Kevill deposes that the first component of the price, the cost of raw milk, has been charged to Alait at the same price which the respondent paid to the farmers who supplied it. It has not made a profit on that part of the price.

[78] This is a complete answer to the applicant's claim. The amount, over and above the raw milk price, which the applicant has been charged is the second component of the price. The agreement which the applicant relies upon has been honoured by the respondent. It is not necessary to make this finding. The point is whether there is evidence of a genuine offsetting claim. The applicant relies upon the fact that it has been charged more than the raw milk price – but the applicant has no evidence that the additional charge is not, as Mr Kevill says, referrable solely to the cost of processing, packing and branding the milk for the applicant. Mr Ellison does not contend that these services should have been provided by the respondent free of charge.

[79] There is also the point that there is simply no basis shown in the evidence for the assertions as to the amount of the alleged overcharge. A letter to which Mr Ellison refers, sent by him to the respondent on 6 April 2004, asserts that the outstanding amount due by way of rebate was $69,700. The applicant does not provide any evidence in support of the figures it has advanced.

[80] This claim is without sufficient substance to be a genuine offsetting claim.

[81] The next claim advanced by the applicant to offset its debt to the respondent arises out of what was said to be an arrangement made for the delivery of the respondent's

milk products into Mackay and surrounding districts. The applicant's case is that it was requested by the respondent to deliver that product to Spotless Catering Services, a substantial customer of the respondent's in Mackay. Mr Beattie, the respondent's distribution manager for Queensland, agrees that he spoke to Mr Ellison about the applicant delivering milk into Mackay and they discussed the price at which that would be done. Mr Ellison's contention is that the applicant engaged a subcontractor to deliver the milk who turned out to be unreliable and unsatisfactory. Mr Ellison wished to terminate the subcontract, but 'National Foods insisted that we not do so as they were concerned that an interruption to the supply of milk to [Spotless Catering Services] may result in loss of market share.' The subcontractor refused to pay the applicant for milk supplied to it. Mr Ellison describes the arrangements in these terms:

> 'The respondent would supply product to the contractor and forward Alait an invoice for the product so supplied. Alait would, in turn, invoice the subcontractor. However, it did not pay Alait's invoices. The respondent insisted upon Alait paying its invoices.'

[82] Mr Ellison contends that Alait would have immediately ceased using the contractor upon the first refusal of payment but the respondent insisted upon the retention of the arrangements between Alait and the subcontractor because of its fear of losing its distribution network which Mr Ellison was informed 'was worth some $23,000,000 to the respondent.' Mr Ellison attaches to his affidavit two invoices addressed to the subcontractor. They total $120,184.48. Surprisingly Mr Ellison 'estimates' that Alait has lost approximately $110,000 'as a result of being required to persist in this arrangement … contrary to Alait's interests.' The invoices are apparently attached to the affidavit on the basis that they verify the claim that the goods were supplied to the subcontractor who did not pay for them. It is curious that Mr Ellison would not take the trouble to perform the simple addition to show the precise amount the applicant had lost, but would instead rely upon the estimate of an approximation which is less than the amount shown in the invoices. The amount of $110,000 apparently comes from a judgment obtained by the applicant against the subcontractor in the Magistrates Court at Mackay for this amount but the only reference to this appears in notes made by Mr Beattie of a meeting with Mr Ellison to discuss the applicant's outstanding debt to the respondent on 4 February 2004. Mr Ellison does not explain the derivation of the amount or show the value of goods not paid for.

[83] Mr Beattie's account of the arrangements is different. He deposes that he agreed with Mr Ellison on a price for milk products to be delivered to the Mackay area by the applicant. Mr Ellison advised Mr Beattie that:

> 'Alait would use a person named Carmel Lando to distribute [the respondent's] products in Mackay. In April 2003 [Mr Beattie] had a meeting with [Mr Ellison] and informed him that this arrangement was only acceptable … on the basis that Carmel Lando was a delivery agent only and not a distributor of [the respondent's] products. [Mr Ellison] agreed …'.

Subsequently Mr Ellison told Mr Beattie that he was selling the respondent's products to Carmel Lando for on-sale. This arrangement contravened the agreement made between the parties for the delivery of the respondent's milk to Mackay.

[84] The affidavits raise a clear dispute of fact which cannot be resolved without a trial. The background facts appear not to be in dispute. What is in contention is whether it was the respondent who insisted upon the sale of milk products by Alait to the subcontractor so that Alait ran the risk associated with non-payment, or whether the agreement between the parties was for the applicant to engage a carrier in which case it would never have been owed money by the carrier.

[85] It must be said that the respondent's contentions appear more likely. The contractual arrangement Mr Beattie describes is straightforward and would have been simple to administer. The manner in which the applicant went about getting the respondent's milk to Mackay appears unnecessarily complicated. It is also of concern that Mr Ellison should not have clearly identified the quantum of the claim. The applicant's records would reveal the debt owed by Lando and what, if any, amounts had been paid on delivered invoices. If the amount claimed is the amount of the judgment debt in the Magistrates Court he could have said so.

[86] Notwithstanding these reservations there is enough in the material to show a claim which is not artificial and cannot be seen to have been invented for the purpose only of defeating the demand. There is a real question of fact to be determined which could result in the respondent having to pay the applicant $110,000.

[87] The next offsetting claim is said to be worth between $3,000,000 and $7,000,000 but for such a large amount the applicant's material is alarmingly deficient in particulars. This claim can be dealt with shortly because I am not satisfied, even if the material shows a genuine claim, that there is any basis for evaluating its worth. Stripped to its bare essentials the claim is that the respondent peremptorily terminated the contracts in place with Alait for the supply of milk products which Alait would on-sell to its customers. Prior to 16 June 2004 the respondent had been supplying milk COD only. The initial arrangements for payment, seven days after invoice, had come to an end because of the applicant's persistent failure to pay substantial amounts due to the respondent and its failure to honour promises to reduce the debt by agreed instalments. On 16 June the applicant was paying in advance or on delivery of the milk it had bought from the respondent but, nevertheless, on that day Mr Beattie, on behalf of the respondent, intimated that it would make no more deliveries. Mr Ellison refers to clause 9.4 of the processed milk supply agreement made between the parties which provided that either could terminate the agreement by giving the other three months' notice in writing. No such notice has been given. Clause 29.1 of the licence distribution agreement between the parties provided for notice to be given of breach and termination 30 days after failure to remedy the breach. The respondent did give notice pursuant to this contract, but only on 14 July 2004, a month after it had ceased supplying milk. According to Mr Ellison:

> 'the effect of the respondent's sudden withdrawal of all supply meant that Alait … had no ability to negotiate any reasonable terms with any other supplier. … The nature of the industry is such that the inability to supply a customer, even for a day, can mean the loss of that customer. … Following the withdrawal of supply by the respondent, the respondent then delivered stock to our customers in … Brisbane … The failure to give proper notice of the termination … has effectively destroyed Alait's business.'

[88] Accepting that these are facts which give rise to a genuine claim it is one which cannot, on the material, be valued. In his affidavit of 15 July 2004 Mr Ellison deposed that as a result of the respondent's actions on 16 June the applicant was forced to mitigate its loss by entering into an agreement with Parmalat. Nothing is said about the terms of the agreement. If it was in writing the document has not been exhibited. If it is oral nothing has been said about its terms. Mr Ellison says only that he estimates that the result of making the agreement with Parmalat 'on terms that were less than what Alait could reasonably have negotiated' had it been given three months' notice is a loss 'in the region of $3,000,000 to $7,000,000.' This amount is said to be calculated from what Mr Ellison believes Alait 'could have negotiated to sell the business to Parmalat or another company, and what Alait ultimately received from Parmalat.'

[89] Mr Ellison is apparently advancing a claim that the applicant's business was sold on a forced basis, for less than it was worth because it was denied the opportunity of the three months' notice to obtain a sale on the basis of a going concern. If this is right then to prove its loss the applicant should prove what it received for the sale of its business to Parmalat and what it would have been worth as a going concern. Neither figure is given. It is not even clear that Alait's business was sold to Parmalat. The phrase 'what Alait ultimately received from Parmalat' is ambiguous. Whatever the basis for payment Mr Ellison must know the amount but did not disclose it.

[90] In Mr Ellison's second affidavit of 18 August 2004 he deposes (para 68) that the failure to give proper notice of termination 'effectively destroyed Alait's business.' This is a wholly different basis for claiming the loss. Attached to that affidavit is an analysis prepared by 'an independent commercial consultant specialising in the milk, dairy and beverage industry' of the applicant's 'probable prospective earnings based on various assumptions.' The analysis is not, and does not purport to be, a valuation. There is no evidence led in support of the assumptions which are not, in any event, described intelligibly in the analysis. It is not possible to put any weight on the consultant's projections.

[91] There is an inconsistency between this asserted basis of loss and the basis advanced in support of the losses pursuant to the respondent's failure to assign the Farmgate agreements. Those, it would be recalled, were said to have produced an ongoing annual loss because the applicant was obliged to buy milk from Parmalat at a higher price than the respondent had agreed to. The applicant does not make clear the factual basis on which it claims to have suffered a loss by reason of the respondent's breach of contract. It provides no basis for valuing the claim.

[92] The next offsetting claim concerns an amount of $100,000 which the applicant claims has been debited to its account by the respondent on two occasions. 'In or about 2003' Alait made a payment to the respondent by cheque in the sum of $100,000. It either countermanded payment or the cheque was dishonoured. The amount was debited to Alait's account, presumably because it had been given credit when the cheque was received. Mr Ellison complains that Alait's account was debited a second time for the same amount. The relevant entries in the statements of account are illegible and therefore provide no support for the claim. Equally damaging to the applicant's case is that the statements of account which have been produced in support of this claim show on their face that they record the running

account between the applicant and Cooloola, not Alait. Even if there had been the error alleged, it is not one which gives rise to a claim by Alait.

[93] In his second affidavit (para 98) Mr Ellison changes his explanation. There are now said to be two cheques which were dishonoured, one for $16,517.97 and the other for $83,492.03, which were debited to the account on two occasions, on 7 June 2003 and on 18 June 2003. Mr Ellison himself, though, makes it clear that the first cheque was drawn by Cooloola so Alait can have no claim in respect of it. The second cheque, for the larger amount, was drawn by Alait and debited to its account when the cheque was dishonoured.

[94] The statements of account do not make out the claim even for the lesser amount. It is true that the statements do show that the amount of the dishonoured cheque, $83,492.03 was debited to Alait's account on 7 June 2004 and on 16 June 2004. However, the debits appear separately on statements of account printed on two separate dates from the computerised record in respect of slightly different periods. The statement printed on 14 June 2004 for the period 1 May to 13 June shows the debit occurring on 7 June. The statement printed on 28 June for the period 4 May to 27 June shows the debit was made on 16 June 2004. Significantly, this statement which covers the period of 7 June shows the same debit only once. It appears on 16 June. It does not appear on 7 June, or any other date covered by the statement. Why the date should be a moveable feast is not explained. What appears established by the statements of account is that the amount of the dishonoured cheque was debited only once to the account, whether it was on 7 or 16 June.

[95] There is no genuine claim for this amount.

[96] The last claim advanced is for the conversion of Alait's stock of milk held by the respondent at its cold room and distribution centre at Crestmead. The claim is that when, on 16 June 2004, the respondent terminated its supply agreements with Alait the respondent informed Mr Ellison that 'Alait's milk stock at … Crestmead … could be collected by Alait and distributed to its clients.' However, it is claimed, when the respondent's employees arrived at Crestmead the respondent refused to hand over its milk products and it was 'not until three days later that [the respondent] eventually released the milk.' Because of the delay the milk was sold at a reduced price. Mr Ellison estimates the loss at $50,000.

[97] The respondent has prepared a detailed refutation of this claim. According to Mr Collins, the respondent's logistics manager, the respondent held 37 pallets of Alait's milk products in its Crestmead store as at 17 June 2004. At about 2.40 pm on that day Mr Collins received a telephone call from an employee of Alait who asked Mr Collins to prepare for dispatch orders which Alait would send that day. Mr Collins replied by email six minutes later confirming that the respondent would prepare the orders which could be collected by Alait. At about 3.00 pm the next day, 18 June, two trucks and three men arrived to collect the order. They were not known to Mr Collins who telephoned Mr Levis, the officer at Alait with whom he dealt, for written confirmation that the three men were authorised to collect Alait's milk. That was duly given and 18 pallets of milk were loaded into the two trucks. No more was loaded because the trucks did not have the capacity. Therefore, the remaining 19 pallets loaded with the applicant's milk had to remain in the cold store. At 5.30 pm on 18 June Mr Collins spoke again with Mr Levis and told him that the remaining pallets of milk could be collected the following day between

4.00 and 5.00 pm. Mr Collins made a note of the conversation. No-one from Alait arrived on 19 June. Two men came instead at about 12.30 pm on 21 June to collect the milk which they duly took away.

[98] Mr Collins deposes that the retail value of the milk collected by Alait on 18 and 21 June was $40,459.50. All the milk collected on those days was fit for sale. Its 'use by' date was 27 June.

[99] Mr Ellison's response to Mr Collins' affidavit is that he arranged for his 'normal transport company' to collect the milk from Crestmead. 'Approximately 14 trucks arrived during the night of 17 June but all were informed by [the respondent] that they would not load any milk onto the trucks. [The carrier] informed [Mr Ellison] that [the respondent] had instructed them not to transport any [Alait] products …'. Mr Ellison says he was obliged to arrange alternative transport for the milk.

[100] This account approaches the nonsensical. There is no discernible reason why the respondent would not deliver milk to the applicant's normal carrier but would deliver it to others with whom it had had no dealings. It is significant that the applicant does not provide evidence from the carrier, whom it named, to corroborate the account that he was turned away. Nor does the applicant provide an affidavit from Mr Levis with whom Mr Collins swears he had relevant conversations. It is also noteworthy that Mr Ellison does not take issue with Mr Collins' evidence that the milk, when collected, was fit for sale until 27 June at the earliest.

[101] It follows that I am not satisfied that there is a genuine claim for detention of the applicant's milk stock.

[102] The result of my analysis of these claims is that the applicant has shown a genuine offsetting claims for $110,000 only. Two demands have been served on Alait both for amounts in excess of the claim. I think the appropriate course is to notionally allocate the offsetting claim, which I have found to be genuine to the amount claimed first. Subtracting that amount from the amount of the demand, $1,412,065.80 leaves a balance of $1,102,065.80. The demand should be reduced to that amount, and I order accordingly. I declare that, as reduced, the demand has had effect as from its date of service. The applicant should pay the costs of the application, SC No 6182 of 2004. There is no available offsetting claim in respect of the demand dated 15 July 2004 for $289,122.51. The application to set aside this demand, SC No 6741 of 2004, should be dismissed with costs.