JUDGMENT : His Honour Campbell J : Supreme Court of New South Wales. 6th June 2003

1 This is an application by the plaintiff to set aside a statutory demand which the defendant served on it on 30 January 2003.

2 The plaintiff ("*Chadah*") carries on a business in Albury of retail sale of goods of kinds which are of interest to farmers and gardeners. Chadah operates that business under the name of "*Greenfarm Sales and Service*". Chadah acquired that business in about September 1999 from the previous operator, a company then known as Greenfarm Sales & Service Pty Limited. Greenfarm Sales & Service Pty Limited changed its name to GGW Investments Pty Limited on 24 January 2000.

3 On 20 September 1999 Chadah and the defendant entered, in writing, a Dealership Agreement. The defendant imports and distributes various agricultural, power, garden and construction equipment, and attachments, accessories and service parts for such equipment. The Dealership Agreement set out terms on which Chadah could acquire such equipment from the defendant for retail sale. It distinguished between parts, and other goods called Wholegoods.

4 On 10 December 2002 the defendant, asserting that it was entitled to do so, removed from Chadah's premises all the Wholegoods which the defendant had supplied to Chadah, and which Chadah had not onsold to retail customers. On 6 January 2003 the defendant served on Chadah a Notice of Termination of Dealership Agreement. That Notice said:

"*1. Pursuant to an agreement made 20 September 1999, you were appointed a dealer for KTA Products ("the Dealership Agreement").*

2. Pursuant to clause 10.1, you agreed to pay KTA for all products "net cash".

3. On or about 20 November 2002, you caused to be delivered to KTA a cheque in favour of KTA for $61,533.51 the ("cheque").

4. The cheque was not met on presentation.

5. Pursuant to clause 11.2(g) of the Dealership Agreement, you agreed that KTA may terminate the Dealership Agreement immediately by written notice if there was any default or delay on your part in paying moneys due to KTA of $5,000.00 or greater.

6. By notice dated 19 December 2002, KTA advised you that unless the sum of $61,533.51 was paid on or before 12 noon on third day of January 2003, KTA intended to terminate the Dealership Agreement forthwith.

7. You have failed to remedy your breach of the Dealership Agreement by paying the sum of $61,533.51.

***KTA HEREBY GIVES NOTICE** that the Dealership Agreement is terminated with immediate effect.*

***TAKE FURTHER NOTICE** that KTA requires you to comply with your obligations upon termination as set out in clause 13 of the Dealership Agreement.*"

5 On 30 January 2003 the defendant served on Chadah a statutory demand for "*$310,212.50 being for goods sold and delivered*". It was accompanied by an affidavit, the body of which read:

"1. I am the Finance and Administration Manager of the Creditor.

2. I am authorised by the Creditor to make this Affidavit on its behalf.

3. I have inspected the business records of the Creditor in relation to the Debtor Company's account with the Creditor and confirm that the sum of $310,212.50 is owed by the Debtor Company to the Creditor being the balance owing pursuant to a demand dated 24 December 2002 for goods sold and delivered.

4. The total amount of $310,212.50 is due and payable to the Creditor by the Debtor Company.

5. I believe that there is no genuine dispute about the existence or amount of the debt."

6 On 19 February 2003, these present proceedings were started, by Chadah filing the Originating Process seeking the setting aside of the statutory demand, and filing an affidavit of Stephen Beaumont sworn 18 February 2003. That affidavit disputed that Chadah was indebted to the defendant "*in the sum of $310,212.50 for goods sold and delivered or at all*". It went on to give three grounds for that dispute. The first was that some of the invoices were ones addressed to Greenfarm Sales & Service *Pty Ltd*. The second was a contention that under the terms of the Dealership Agreement the time for payment of the vast majority of the invoices which made up the sum of $310,212.50 had not arrived. The affidavit identified seven particular invoices concerning which Mr Beaumont conceded that, on the construction of the Dealership Agreement he was putting forward, the time for payment had arrived by 30 January 2003. By the time of the hearing this contention had been developed, so that it was agreed that, if the construction of the Dealership Agreement for which Mr Beaumont was contending was correct, an amount of $53,622.30 had fallen due by 30 January 2003.

7 The third contention raised in Mr Beaumont's affidavit of 18 February 2003 concerned a particular invoice, number 1011336, which the defendant had issued on 20 December 2002, in the sum of $2,381.28. Mr Beaumont said that it was an adjustment of a discount which the plaintiff had previously received in respect of goods previously delivered, and that there was no entitlement on the part of the defendant to adjust that discount.

8 By a further affidavit filed 28 March 2003, Mr Beaumont advanced a further contention that the defendant's termination of the Dealership Agreement on 6 January 2003 was wrongful, because, even though he had stopped payment of the cheque for $61,533.51 referred to in that Notice of Termination, "*the time for payment of at least part of the amount of $61,533.51 had not yet arisen*". He also raised some allegations, in his affidavit of 28 March 2003, of misrepresentations made by the defendant, prior to Chadah entering the Dealership

Agreement, which were the foundation for a claim under the ***Trade Practices Act 1974*** (Cth). At the hearing, Chadah did not seek to rely upon any offsetting claim arising under the ***Trade Practices Act***. However, Chadah asserted that it was entitled to an offsetting claim for breach of contract in terminating the Dealership Agreement, and that the amount of Chadah's claim in that respect more than offset the amount of $53,622.30 which was admittedly due and owing on Mr Beaumont's construction of the Dealership Agreement.

The Statutory Provisions

9 The following provisions of the ***Corporations Act 2001*** (Cth) apply:

"*459F(1) If, as at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand at the end of that period.*

(2) The period for compliance with a statutory demand is:

(a) if the company applies in accordance with section 459G for an order setting aside the demand:

(i) if, on hearing the application under section 459G, or on an application by the company under this paragraph, the Court makes an order that extends the period for compliance with the demand---the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or

(ii) otherwise---the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of; or

(b) otherwise---21 days after the demand is served.

459G(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

(a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

459H(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:

(a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;

(b) that the company has an offsetting claim.

(2) The Court must calculate the substantiated amount of the demand in accordance with the formula:
Admitted total – Offsetting total
where:
admitted total *means:*
(a) the admitted amount of the debt; or
(b) the total of the respective admitted amounts of the debts;
as the case requires, to which the demand relates.
"offsetting total" *means:*
(a) if the Court is satisfied that the company has only one offsetting claim---the amount of that claim; or
(b) if the Court is satisfied that the company has 2 or more offsetting claims---the total of the amounts of those claims; or
(c) otherwise---a nil amount.

(3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.

(4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

(5) In this section:
"admitted amount", *in relation to a debt, means:*
(a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt---a nil amount; or
(b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt---so much of that amount as the Court is satisfied is not the subject of such a dispute; or
(c) otherwise---the amount of the debt.

"offsetting claim" *means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).*

"respondent" *means the person who served the demand on the company.*

(6) This section has effect subject to section 459J.

459J(1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
(a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
(b) there is some other reason why the demand should be set aside.
(2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect."

The "Wrong Company" Ground of Dispute

10 I am not persuaded that there is any genuine dispute about Chadah being the entity which owed amounts referred to in invoices addressed to Greenfarm Sales & Service Pty Ltd which were included in the amount claimed in the statutory demand. The amount of such invoices included in the amount claimed in the statutory demand was $43,695.52. The earliest of these invoices is one issued on 2 October 2002. There is no reason, on the evidence, to believe that the company formerly known as Greenfarm Sales & Service Pty Ltd has had anything to do with distributing, or in any other way acquiring, products of the defendant since the end of 1999. There is evidence from Mr O'Reilly, the Finance Administration Manager of the defendant, that all the Wholegoods and Approved Parts whose price makes up the amount claimed in the statutory demand were ordered by the plaintiff, were made available to the plaintiff at the defendant's warehouse in Melbourne, and collected by a carrier arranged by the plaintiff. Though Mr Beaumont swore an affidavit after Mr O'Reilly had given this evidence, in which he challenged various paragraphs of Mr O'Reilly's affidavit, the paragraph which gave this evidence was not challenged.

11 I conclude that there is no *bona fide* dispute on the "*wrong company*" ground.

The "Time for Payment had not Arrived" Ground

12 The Dealership Agreement dated 20 September 1999 is a document 34 pages long. Even if one excludes the index, and the form of a director's guarantee which made up an annexure to the Agreement, it is still 22 pages long.

13 Mr Beaumont's contention is that, while the Agreement makes provision for the defendant to supply Chadah products on bailment, no products were ever supplied on bailment. Schedule 3 of the Agreement is in the following terms:

"PAYMENT TERM FOR PRODUCTS
For any Products on bailment:-
Immediately upon:-
~~*(1) sale; or*~~
(2) the expiration of the Floor Plan Period;
whichever occurs ***earlier.***
For any Products on Consignment (which is bailment without any specified floor plan period)
~~*(1) Immediately upon sale*~~
(2) A once only distribution levy is payable by any one Dealer where consignment stock remains on the Dealer's floor for 60 days.
For Approved Parts – 25th day of month following purchase from KTA.
For all other Products –
Whichever is the ***earlier*** *of:-*
~~*(1) the date of re-sale; or*~~
(2) (a) if Construction and Agricultural Equipment (other than F & G Series Agricultural Equipment) – 180 days from delivery from KTA to the Dealer;
(b) if F & G Series Agricultural Equipment – 90 days from delivery from KTA to the Dealer, or;
(c) if Garden and Power Equipment, or any other items 90 days from delivery from KTA to the Dealer"

14 Mr Beaumont's contention is that, apart from the amount of $53,622.30, the time for payment of the equipment had not arrived. This was because the period of 90 days, or 180 days (as the case may be) from delivery allowed under the "*all other Products*" part of Schedule 3 had not elapsed by 30 January 2003.

15 Counsel for the defendant submitted that the question of whether goods had been supplied on bailment or not ought be determined as a matter of construction of the Dealership Agreement. He submitted that, properly construed, the Dealership Agreement had the necessary consequence that any goods which were supplied, were supplied on bailment terms. One of the reasons for this conclusion was because the Agreement contained a Retention of Title clause, which expressly required Chadah, until it had paid for any products, to hold those products as bailee for the defendant (Clause 6.4). That argument has, it seems to me, a problem (though not necessarily an insuperable problem) in that it leaves the portion of Schedule 3 commencing "*for all other products*" with no work to do.

16 The Dealership Agreement gives the third Schedule work to do by incorporating it in the definition of "*Payment Term*". Clause 10.1 and 10.2 provide: "*Payment for all Approved Parts or Products which are designated garden and power equipment shall be made by the Dealer to KTA net cash within the relevant Payment Term.*

On the execution by the Dealer of this Agreement, payment for Products which are designated construction and agricultural equipment, including implements, attachments and other ancillary equipment, shall be made by the Dealer to KTA in accordance with the terms of this Agreement, including the relevant Payment Term."

17 Clause 8.2 of the Dealership Agreement provides: "*Upon receipt of such an offer by a customer in respect of Approved Parts and Products which are designated garden equipment or power equipment the Dealer shall be entitled to sell in the ordinary course of its business any Approved Parts and Products which are held by the Dealer on bailment terms pursuant to this Agreement without first notifying KTA, and immediately prior to each such sale taking place, the Dealer shall be deemed to have purchased such Approved Parts and Products from KTA, and KTA shall be deemed to have sold such Approved Parts and Products to the Dealer. If a Product is sold to a customer pursuant to this clause 8.2 before the Dealer has paid for the Product under clause 10.1, the Dealer must pay KTA immediately, notwithstanding that the Payment Term has not expired.*"

18 The defendant asserted that Clause 8.2 entitled it to payment immediately upon sale by Chadah to a customer, at least so far as garden equipment or power equipment was concerned. All the amounts which made up the amount claimed in the statutory demand related to goods which Chadah had sold to customers.

19 The difficulty with this argument is that Clause 8.2 relates only to garden equipment or power equipment which are held "*on bailment terms*" – it seems to me that there is room for argument about whether any of the products whose sale price makes up the amount of the statutory demand was held on "*bailment terms*". In saying this, I express no view about what the outcome of that argument might be.

20 Clause 8.3 of the Agreement says: "*Upon receipt of an offer under clause 8.1 in respect of Products, other than Approved Parts and Products which are designated garden equipment or power equipment, the Dealer shall notify KTA if it wishes to purchase those Products from KTA and KTA may, in its absolute discretion sell the Products to the Dealer on the terms specified in the Trust Receipt or invoice.*"

21 The evidence does not go into whether this procedure was gone through, or not, in relation to the goods whose sale price makes up the amount of the statutory demand.

22 The defendant also relied upon the Termination provisions of the Dealership Agreement. Clause 11.2(g) confers on the defendant a right to termination the Agreement immediately by written notice to the Dealer if "*there is any default or delay on the part of the Dealer in payment moneys due to KTA of $5000 or greater*". The defendant asserts that it has invoked this clause, and that Clause 13.1(j) has thereby been triggered. Clause 13.1(j) provides that on termination of the Agreement "*and if clause 12 has been complied with*" "*the Dealer shall pay KTA immediately all moneys held by the Dealer on trust or in any other capacity for KTA and all other amounts owed by the Dealer to KTA*". This, the defendant says, is an acceleration provision which, even if Mr Beaumont's construction of the Payment Terms was right, would have the effect of advancing the time for payment of any moneys which were due but (apart from Clause 13.1(j)) not payable. There are, it seems to me, two problems with this argument of the defendant. The first is that the evidence does not make clear to me that there is no *bona fide* dispute about the validity of the termination. The second is that Clause 12 is a dispute resolution procedure, requiring referral of disputes to a mediator, and the evidence says nothing about whether that procedure has been complied with. I infer, from the speed with which the defendant moved, that it has probably not been complied with.

23 The size and complexity of the Dealership Agreement, and the complexity of the arguments which need to be considered to decide whether Chadah in fact owed the defendant more than $53,622.30 as at 30 January 2003, also contribute to the view that there is a genuine dispute.

24 In all these circumstances, there is, it seems to me, a genuine dispute between Chadah and the defendant about the existence of the debt claimed in the statutory demand, apart from the amount of $53,622.30.

25 Chadah submits that it has an offsetting claim in relation to that amount of $53,622.30, arising from the Notice of Termination of the Dealership Agreement having been given in breach of contract. The defendant submits it is not open to Chadah to rely on any such offsetting claim in relation to the amount of $53,622.30 (or indeed in relation to any part of the amount claimed in the statutory demand).

26 The statutory requirement in section 459G(3) that an application to set aside a statutory demand be accompanied by "*an affidavit supporting the application*" within 21 days after the demand is served has been construed to require the supporting affidavit to disclose facts sufficient to show the ground relied upon in seeking to have the statutory demand set aside: ***Graywinter Property Pty Ltd v Gas & Fuel Corporation Superannuation Fund*** (1996) 70 FCR 452; ***Meadowfield Pty Ltd v Gold Coast Holdings Pty Ltd*** [2001] WASC 360; ***Energy Equity Corporation Ltd v Sinedie Pty Ltd*** (2001) 166 FLR 179; ***Financial Solutions Australasia Pty Ltd v Predella Pty Ltd*** (2002) 167 FLR 106; ***Process Machinery Australia Pty Ltd v ACN 057 260 590 Pty Ltd*** [2002] NSWSC 45 at [22]; ***POS Media Online Ltd v B Family Pty Ltd*** [2003] NSWSC 147; ***Scope Data Systems v BDO Nelson Parkhill*** [2003] NSWSC 137 at [5].

27 Chadah says that Mr Beaumont's affidavit of 18 February 2003 adequately raises a claim of a setoff for wrongful termination of the Dealership Agreement because it annexed the Dealership Agreement, the construction of the Dealership Agreement was always in issue, and Clause 13.1(h) of the Dealership Agreement provided that on termination of the Agreement (and if Clause 12 had been complied with) any money owing to the defendant by Chadah can be setoff against any money owing by Chadah to the defendant.

28 I do not accept that Mr Beaumont's affidavit of 18 February 2003 made any such claim. While that affidavit did state that the Dealership Agreement had been terminated by the defendant by notice dated 6 January 2003 the notice was not annexed. A reader of that affidavit simply does not get the message that Mr Beaumont is claiming that the termination of the Dealership Agreement was in breach of contract, or that any particular loss has been

suffered in consequence of the termination of the Dealership Agreement, or that any such loss is relied upon as an offsetting amount.

29 In these circumstances, I am not persuaded that Chadah has made out that it has an offsetting claim in relation to the amount of $53,622.30, of a kind which section 459G permits to be taken into account.

Invoice 1011336

30 Mr Beaumont's affidavit of 18 February 2003 had this to say about this invoice. "*I refer to invoice number 1011336 dated 20 December 2002. I say that the charge of $2,381.28 referred to therein is an adjustment of a discount the Plaintiff has previously received in respect of goods previously delivered. This adjustment is not permitted pursuant to the terms of the Dealership Agreement.*"

31 Mr O'Reilly says in response: "*Invoice 1011336 was raised to correct a previous pricing error in credit note 1011077. This was a simple error made previously in our accounting department. I do not accept that the amount claimed in invoice 1011336 is not due and payable.*"

32 When all the evidence amounts to is this sort of generalised assertion and counter-assertion, I am not persuaded that Chadah has established the existence of any genuine dispute concerning whether or not the defendant is entitled to "*adjust the discount*" it had previously given. However, invoice number 1011336 is not one of the invoice numbers in relation to which Mr Beaumont accepts that the amount invoiced had become due and payable by the date of the statutory demand. In these circumstances, the proper conclusion on the evidence is that invoice 1011336 relates to a sale concerning which there is a genuine dispute as to whether the time for payment had arrived on 30 January 2003. When there is a genuine dispute about whether the time for payment had arisen, it does not matter that the other ground, of there being no entitlement to "*adjust the discount*" is not made out.

Defective Affidavit Verifying?

33 I have set out the terms of the affidavit verifying the statutory demand in paragraph 5 above, and the terms of section 459J ***Corporations Act 2001*** (Cth) in paragraph 9 above. Section 459E(3) ***Corporations Act 2001*** (Cth) provides: "*Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:*
(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
(b) complies with the rules."

34 Chadah submits that the affidavit verifying was inadequate because: "*... there was insufficient verification that the amount of $310,212.50 was due and payable on 30 January 2003 when the Statutory Demand was issued. At least $256,590.18 of the total amount claimed was not in fact due and payable as at 30 January 2003.*"

Chadah goes on to submit that, when the affidavit is inadequate, this provides, "*some other reason why the demand should be set aside*", within the meaning of section 459J(1)(b) ***Corporations Act.***

35 Chadah relies upon the decision of Barrett J in ***Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd*** [2002] NSWSC 219; (2002) 20 ACLC 726, where his Honour said at [23]: "*What is essential is that the documents put the company on notice in an unambiguous way of all the matters the legislation requires. The creditor's contention that the debt, as well as being a debt (that is, owing), is both due and payable is one such matter. That contention is indispensable to the full understanding the legislation requires a company receiving a statutory demand to obtain from that demand and its accompanying affidavit.*"

36 In my view, the affidavit verifying in the present case, meets the standard laid down by section 459E(3) as explained by Barrett J. The affidavit verifying specifically says the total amount of $310,212.50 is due and payable to the creditor by the Debtor Company.

37 That form of affidavit is to be contrasted with the form of affidavit with which Barrett J was dealing with in ***Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd***, which provided (at [8] of the judgment) "*I have duly verified by perusing the financial records of the Creditor, that the Debtor is indebted in the amount now demanded, and as described in the demand, and believe the details set out in the demand are true and correct.*"

38 The criticism which Barrett J expressed of that form of affidavit, at [8] was "*There is thus no statement or other indication that the debt or total is "due and payable".*"

That criticism cannot be made of the affidavit in the present case.

39 I invited counsel for Chadah to explain what would have counted as "*an affidavit that verifies that the debt ... is due and payable by the company*" within the meaning of section 459E(3). She submitted that an affidavit which complied with the statutory requirement would attach the invoices, to show what sums of money were really due, and would prove the date of delivery of the goods. That submission is contrary to the decision of Hayne J in ***Azed Developments Pty Ltd v Frederick & Co Ltd (In liq)*** (1994) 14 ACSR 54 at 56. There, his Honour held that "*verify*" in section 459E(3) Corporations Law meant make "*a formal affirmation*", rather than "*prove or demonstrate by good evidence or otherwise substantiate*" certain matters. That decision has been followed by Branson J in ***Hamilhall Pty Ltd (in liq) v AT Phillips Pty Ltd*** (1994) 15 ACSR 247 at 249, by Sackville J in ***Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia*** (1994) 15 ACSR 544 at 551 and by Master McLaughlin in ***Dventures Pty Ltd v Wily (in his capacity as Deed Administrator of Brac Retail Pty Ltd)*** [2001] NSWSC 641 at [79]-[81]. It is implicitly accepted by Barrett J in ***Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd*** [2002] NSWSC 219 at [25]. I also respectfully agree with it.

40 In my view the affidavit verifying the statutory demand is not vitiated by the feature of which Chadah complains.

Result

41 I raised with counsel in argument what the conclusion would be if I were to come to the view that I have in fact arrived at, that there was no genuine dispute as to the $53,622.30 and no offsetting claim able to be established against that amount, but that there was a genuine dispute concerning the balance of the amount referred to in the statutory demand. No submission was put that I ought decline to vary the amount of the statutory demand.

42 I am satisfied that there is a genuine dispute between Chadah and the defendant about the amount of the debt to which the demand served on 30 January 2003 relates. The substantiated amount of the demand, within the meaning of section 459H, is $53,622.32. The "*statutory minimum*" is defined in section 9 ***Corporations Act*** as being (in circumstances where no greater amount has been prescribed) $2,000. The substantiated amount thus is at least as great as the statutory minimum. Thus, pursuant to section 459H(4) I order:

(a) that the statutory demand dated 30 January 2003 a copy of which is annexure SGB1 to the affidavit of Stephen Grant Beaumont sworn 18 February 2003 in these proceedings be varied by deleting the sum of $310,212.50, and substituting for that amount the sum of $53,622.30

(b) I declare that demand to have had effect, as so varied, as from when the demand was served on Chadah Pty Ltd

43 If the parties are not able to agree on the costs consequences of these reasons for judgment, I will give them an opportunity of making submissions about costs when they have considered these reasons for judgment.

V Culkoff – Plaintiff instructed by Selby Levitt – Plaintiff
J Hmelnitsky – Defendant instructed by Hunt & Hunt – Defendant